

Lorem ips

Enforcement of Foreign Judgments

Fundamental Principles [Switzerland]

2020



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INTRODUCTION: RECOGNITION TO BE DISTINGUISHED FROM ENFORCEMENT

The questions that follow seem to use the terms “Anerkennung”/ “reconnaissance” / “riconoscimento” (recognition) and “Vollstreckung” / “exécution” / “esecuzione” (enforcement) interchangeably as being one and the same. Under Swiss law, they have to be distinguished: Art. 335 (3) of the “Schweizerische Zivilprozessordnung” (“ZPO”) / “Code de procedure civile” (“CPC”) / “Codice di diritto processuale civile svizzero” (“CPC”) (Swiss Federal Code of Civil Procedure of 19 December 2008, as amended; “CCP”), distinguishes recognition, “Vollstreckbarerklärung” / “declaration de force exécutoire” / “dichiarazione di esecutività” (exequatur) and enforcement of non-domestic judgments. While there is no enforcement of a foreign court decision which is not, or has not previously been, explicitly or implicitly recognised and declared enforceable (exequatur) in Switzerland, foreign court decisions may well be recognised and declared enforceable in Switzerland without (simultaneously) being enforced.

I. RECOGNITION AND ENFORCEMENT OF A FOREIGN COURT DECISION (CIVIL AND COMMERCIAL MATTERS)

A. Ability to Apply for Recognition and Enforcement of a Court Judgment

- 1. Is it possible to apply for enforcement of a foreign court judgment in your country?**

Answer: Yes

B. Applicable Law: General Rules

- 1. Which laws are generally applicable to the enforcement of a foreign court judgment in your country?**

Answer:

Art. 335 (3) CCP provides that recognition, exequatur and enforcement of non-domestic judgments are subject to the provisions of that chapter (Arts. 335 to 346 CCP) unless an international treaty or the “Bundesgesetz über das Internationale Privatrecht” (“IPRG”) / “Loi fédérale sur le droit international privé” (“LDIP”) / “Legge federale sul diritto internazionale private” (“LDIP”) (Swiss Federal Private International Law Act of 18 December 1987, as amended; “PILA”), provides otherwise.

Art. 335 (2) CCP provides that judgments for the payment of a sum of money or the furnishing of security are enforced pursuant to the “Bundesgesetz über Schuldbetreibung und Konkurs” (“SchKG”) / “Loi fédérale sur la poursuite pour dettes et la faillite” (“LP”) / “Legge federale sulla esecuzione e sul fallimento” (“LEF”) (Swiss Federal Debt Collection and Bankruptcy Act of 11 April 1889, as amended; “DCBA”).

According to Art. 1 (1) PILA, the PILA inter alia sets the conditions for recognition and enforcement of foreign decisions. According to Art. 1 (2) PILA, international treaties take precedence.

Switzerland is a party to a significant number of pertinent international treaties. The most significant is the “Lugano-Übereinkommen” (“LugÜ”) / “Convention de Lugano” (“CL”) / “Convenzione di Lugano” (“CLug”) (Lugano Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, of 30 October 2007; “Lugano Convention”), replacing the prior version of 16 September 1988.

C. Special Rules: European Union

1. Are there any special rules regarding the enforcement of a foreign court judgment in your country?

Answer: The Lugano Convention governs the conditions for the recognition and enforcement of judgments given by a court or tribunal of a Member State of the EU, Denmark, Iceland or Norway.

2. Does the European Union have a special procedure to enforce court judgments coming from its member states?

Answer: N/A: Switzerland is not a Member State of the EU.

D. Average Duration of Enforcement Procedure

1. What is the average length of time for this kind of procedure?

Answer: This depends on the complexity of the matters, the number of court instances involved and the particular courts involved. Enforcement of a foreign judgment for the payment of a sum of money may take as little as two months (one instance, no appeal taken, court not overloaded) or as long as two years or even longer (two appeals taken, complex case, high workload).

II. DENIAL OF RECOGNITION AND ENFORCEMENT OF A FOREIGN COURT JUDGMENT: REASONS

1. Can a court in your country deny recognition and enforcement of a foreign court judgment? If YES: what kind of reasons may justify denial?

Answer: Yes.

The pertinent rules differ for judgments of courts of a Member State to the Lugano Convention and other foreign judgments.

Lugano Convention: Pursuant to Art. 34 Lugano Convention, a judgment given by a court or tribunal of a Member State to the Lugano Convention shall not be recognised in Switzerland (i) if such recognition is manifestly contrary to public policy (order public) in Switzerland; (ii) where it was given in default of appearance, if the defendant was not served with the document which instituted the proceedings or with an equivalent document in sufficient time and in such a way as to enable him to arrange for his defence; (iii) if it is irreconcilable with a judgment given in a dispute between the same parties in Switzerland; (iv) if it is irreconcilable with an earlier judgment given in another State bound by the Lugano Convention or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in the State addressed.

Note that Switzerland made a reservation with respect to Art. 34 (2) Lugano Convention: It will not recognise a default judgment against a defendant that did not have sufficient time to prepare his defence but could have appealed (but did not) against such default judgment in the originating State.

Moreover, pursuant to Art. 35 Lugano Convention, a judgment shall not be recognised if it conflicts with Sections 3 (jurisdiction in matters relating to insurance), 4 (jurisdiction over consumer contracts) or 6 (exclusive jurisdiction) of Title II of the Lugano Convention or in a case provided for in Art. 68 Lugano Convention. A judgment may furthermore be refused recognition in any case provided for in Art. 64(3) or 67(4) Lugano Convention.

PILA: Pursuant to Art. 27 (1) PILA, a foreign decision from a non-Lugano Convention State shall not be recognised in Switzerland if such recognition would be manifestly incompatible with Swiss public policy. A foreign decision shall likewise not be recognised if a party establishes (i) that he was not duly summoned, (ii) the decision was rendered in violation of fundamental principles of Swiss procedural law or (iii) that a law suit between the same parties and concerning the same matter had already been brought or decided in Switzerland (Art. 27 (2) (a-c) PILA). Moreover, a foreign decision shall not be recognised in Switzerland if the judicial or administrative authorities of the State in which the decision was rendered did not have jurisdiction (Art. 26 PILA).

B. Costs and Expenses

1. What kind of costs and expenses can a claimant expect in this enforcement procedure?

Answer: The costs comprise (i) the court costs (e.g. decision fee, translation costs) and (ii) the costs awarded to the parties (e.g. costs for professional representation, reimbursement of necessary expenses). The courts may require the plaintiff to pay court costs in advance (Art. 98 CCP). The actual tariffs of court costs and attorney's fees differ from

Canton to Canton. Both tariffs are usually tied to the amount at stake (ad valorem) and each amount may be (very) significant.

III. FORMAL REQUIREMENTS

A. Time Limit

1. **Is there a time limit to apply for enforcement of a foreign court judgment?**

Answer: Under Swiss Law there is no time limit to apply for enforcement of a foreign court judgment. However, like all claims, claims recorded in a (Swiss or foreign) judgment may become time barred.

According to Art. 148 (1) PILA, the statute of limitations and the extinction of a claim are governed by the law applicable to the claim. According to Art. 137 (2) of the "Obligationenrecht" ("OR") / "Droit des obligations" / "Diritto delle obbligazioni" (Swiss Federal Code of Obligations of 30 March 1911, as amended; "CO"), claims (governed by Swiss law) recorded in a judgment become time barred after ten years.

B. Final and Definitive Court Judgment: Provisional Enforcement

1. **Is it mandatory for the judgment to be a final and definitive court judgment? If NO: Are there any special requirements to provisionally enforce a court judgment which is not final and definitive?**

Answer: Again, the answers under Swiss law are different depending on whether or not the Lugano Convention or PILA applies.

Lugano Convention: A judgment given by a court or tribunal of a Member State to the Lugano Convention and enforceable in that State shall be enforced in Switzerland when, on the application of any interested party, it has been declared enforceable in Switzerland (Art. 38 (1) Lugano Convention).

PILA: A foreign decision from a non-Lugano Convention State shall be recognised in Switzerland if no ordinary judicial remedy can any longer be brought against the decision or if the decision is final (Art. 25 (b) PILA; Art. 29 (1) (b) PILA).

C. Necessary Requirements

1. What necessary requirements must the foreign court judgment fulfil to be recognised and enforced?

Answer: Once more, the answer depends on whether the Lugano Convention or PILA applies.

Lugano Convention: A judgment given by a court or tribunal of a Member State of the Lugano Convention and enforceable in that State shall be enforced in Switzerland when, on the application of any interested party, it has been declared enforceable there (Art. 38 (1) Lugano Convention).

PILA: Pursuant to Art. 25 PILA, a foreign decision from a non-Lugano Convention State shall be recognised in Switzerland (i) if the judicial or administrative authorities of the State in which the decision was rendered had jurisdiction (Art. 26 PILA), (ii) if no ordinary judicial remedy can any longer be brought against the decision or if the decision is final and (iii) if there are no grounds for non-recognition under Art. 27 PILA.

D. Other Formal Requirements: Court Fees

1. Is it mandatory to pay court fees for this kind of application?

Answer: No. The courts may (and usually do) but as a matter of federal law, do not have to request payment of court fees (in advance or after having rendered a decision). Courts usually do assess court fees ad valorem, to be advanced and finally paid by the claimant who may recover these fees from the losing defendant.

Note that Art. 52 Lugano Convention prohibits the assessment of ad valorem court fees (but not attorney's fees) for a (mere) declaration of enforcement.

E. Are there any other formal requirements in your country to enforce a court judgment?

Answer: No.

IV. PROCEDURE

A. Competent Court

1. Which court or courts are competent to decide an enforcement application?

Answer:

Jurisdiction *ratione loci* shall be determined by reference to the place of domicile of the party against whom enforcement is sought, or to the place of enforcement (Art. 39 (2) Lugano Convention; Art. 339 (1) (a-b) CCP).

Jurisdiction *ratione materiae* lies with the court set out in Annex II to the Lugano Convention (Art. 39 (1) Lugano Convention), which is

- (a) in respect of judgments ordering the payment of a sum of money, the “juge de la mainlevée” / “Rechtsöffnungsrichter” / “giudice competente a pronunciare sul rigetto dell’opposizione”, within the framework of the procedure governed by Art. 80 and 81 DCBA;
- (b) in respect of judgments ordering a performance other than the payment of a sum of money, the “juge cantonal d’exequatur” compétent / zuständiger “kantonaler Vollstreckungsrichter” / “giudice cantonale” competente a pronunciare l’exequatur (Arts. 335 seq. CCP).

B. Informational Requirements for the Application to Enforce a Foreign Court Judgment

1. What information must be contained in the enforcement application of a foreign court judgment?

Answer: Again, the answer depends on whether the Lugano Convention or PILA applies.

The Vollstreckungsgesuch (enforcement application) must comprise the information provided for in Art. 252 seqq. CCP (see also Art. 29 (1) PILA and Art. 40 and Art. 53 Lugano Convention).

C. What documents must be included with/attached to the application to enforce a foreign court judgment?

Answer: Once more, the answer depends on whether the Lugano Convention or PILA applies.

Lugano Convention: Pursuant to Art. 40 and 53 Lugano Convention, the application for enforcement of a judgment given by a court or tribunal of a Member State to the Lugano Convention must be accompanied by (i) a copy of the judgment which satisfies the conditions necessary to establish its authenticity and (ii) – without prejudice to Art. 55 Lugano Convention – the certificate referred to in Art. 54 Lugano Convention (cf. Annex V of the Lugano Convention). Furthermore, upon request of the court, a certified translation of these documents has to be produced.

PILA: The application for enforcement of a judgment given by a court or tribunal of a non-Lugano Convention State must be accompanied by (i) a complete and authenticated original of the decision, (ii) a certificate that an ordinary judicial remedy can no longer be brought against the decision or that the decision is final, and (iii) in the case of a default judgment, the application must be accompanied by an official document establishing that the defaulting party was duly summoned and that he had a reasonable opportunity to enter a defence (Art. 29 PILA).

D. Phases of the Procedure

1. What are the phases of the procedure to enforce a foreign court judgment?

Answer: Once more, the answers differ depending on whether the Lugano Convention or PILA applies.

Lugano Convention:

- (1) Application for declaration of enforceability (Art. 39 Lugano Convention; Art. 252 CCP);
- (2) Court decision declaring the foreign court judgment enforceable or not (at this stage of the proceedings the party against whom enforcement is sought is not entitled to make any submission on the application; Art. 41 Lugano Convention);

To be followed (if so requested) (3) by (provisional) enforcement measures (requested together with the declaration of enforceability or separately later on).

PILA:

- (1) Application for recognition or declaration of enforceability and enforcement (Art. 29 (1) PILA; Art. 252 CCP);
- (2) Opposition of the party against whom enforcement is sought; the defendant may present documentary (Art. 254 (1) CCP) evidence (Art. 29 (2) PILA);
- (3) Court decision declaring the foreign court judgment enforceable or not, to be followed by enforcement measures (requested together with the declaration of enforceability or separately later on).

E. Opposition of the Defendant

1. Can a defendant oppose this enforcement application?

Answer: The defendant may always oppose enforcement. Under the Lugano Convention, in contrast to PILA (Art. 29 (2) PILA), he may not oppose a declaration of enforceability in the first instance (Art. 41 Lugano Convention).

2. Are there a limited number of reasons for the defendant to oppose the enforcement of the court judgment? If YES: what are those reasons?

Answer: Yes.

- (1) Against an application for the enforcement of a foreign judgment for the payment of a sum of money, the defendant may raise defences based on facts which have occurred since the foreign judgment was rendered, that bar its enforcement (payment, moratorium, expiry of the statute of limitation period; Art. 81 (1) DCBA or Art. 341 (3) CCP).
- (2) Alternatively, or cumulatively, the defendant may invoke grounds for non-recognition / refusal of enforcement set out in the Lugano Convention, PILA or another pertinent international treaty on the enforcement of foreign judgments (Art. 81 (3) DCBA; Art. 335 (3) CCP).

F. Appeal and its Consequences in this Procedure

1. Is it possible to appeal a court decision to recognise and enforce a foreign court decision?

Answer: Yes. The enforcement decision may be appealed to the higher Cantonal court. The “Beschwerde” / “Recours” / “Reclamo” or “Arresteinsprache” / “Opposition à l’Ordonnance de séquestre” / “opposizione al decreto di sequestro” (Art. 319 seqq. CCP in particular Art. 319 (a) CCP) (called “Subsidiary Appeal” or “Objection”) is limited. The appellant may only invoke the incorrect application of the law and / or the manifestly incorrect establishment of the facts (Art. 320 CCP). The procedure does not end up in a “révision au fond” (review of the merits) of the foreign judgment to be enforced (Art. 45 (2) Lugano Convention).

The judgment given on appeal is subject to a further appeal in civil matters to the “Schweizerisches Bundesgericht” / “Tribunal Fédéral” / “Tribunale Federale” (Swiss Federal Supreme Court) (Art. 72 seqq. of the “Bundesgesetz über das Bundesgericht; Bundesgerichtsgesetz”, “BGG”; Swiss Federal Supreme Court Act of 17 June 2001, as amended;

“FSCA”). The grounds for such an appeal are even more limited to the incorrect application of Swiss federal law and the manifestly incorrect establishment of facts (Art. 95 seqq. FSCA).

2. Can this appeal suspend the enforcement?

Answer: Yes. Both appeals can result in a suspension of the enforcement. Objections against a declaration of enforceability of a judgment given by a court or tribunal of a Member State to the Lugano Convention do as a matter of law suspend the enforcement (Art. 46 Lugano Convention; Art. 327a (2) CCP) but not the enactment of provisional measures securing final enforcement in Switzerland (Art. 47 (1) Lugano Convention; Art. 327a (2) CCP). Other objections as a matter of law do not suspend the enforcement (Art. 325 (1) CCP). The Court of Appeal (Art. 325 (2) CCP) or the Swiss Federal Court (Art. 103 (2) FSCA) may, upon request by the appellant or ex officio, suspend the enforcement of the decision under appeal.

G. Recovery of Judicial Costs and Expenses

1. Are there any rules concerning recovery of the judicial costs incurred as a result of the enforcement application?

Answer: There are no special rules regarding costs related to the enforcement of foreign court judgments, so the general rules are applicable (Art. 104 seqq. CCP). In Switzerland, costs generally follow the event (Art. 106 (1) CCP; Arts. 66 seqq. FSCA).

V. RECOVERY OF THE DEBT

A. Means of Enforcement

1. What types of assets are subject to enforcement of the court’s judgment?

Answer: The question seems to imply the enforcement of a judgment for the payment of a sum of money. Under Swiss law, all assets that can be sold may be subject to enforcement. The assets will be taken away from the debtor and eventually be auctioned off by the Debt Collection or the Bankruptcy Office. Exceptions apply in enforcement proceedings against natural persons (see e.g. Art. 92 DCBA for indispensable items, e.g. clothes, food, assistance and amounts received from charitable institutions in the event of illness, need, invalidity or bereavement and Art. 93 DCBA: limited seizability of income).

Other judgments may be enforced by court order, which can contain threats of criminal sanctions, fines of up to CHF 1'000 for each day of non-performance etc., or give leave to the plaintiff to obtain substitute

performance (at the expense of defendant), the conversion of the judgment into a claim for money, damages etc. (Arts. 343 to 345 CCP).

VI. OTHER ISSUES OF INTEREST IN YOUR JURISDICTION

A. Any other issues of interest in your jurisdiction

Answer: None.

Switzerland

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