

Enforcement of Foreign Judgments

Interim and Precautionary Measures [Switzerland]

2020



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I. APPLYING FOR INTERIM AND PRECAUTIONARY MEASURES

1. **Is it possible to apply for an interim measure in order to ensure the effective enforcement of a court decision?**

Answer: Yes.

2. **Is it mandatory to pay court fees for this type of application?**

Answer: Yes. The Cantons may but do not have to request payment of court fees in advance. Nevertheless, they 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 (Arts. 339 seq., 252 seq., 98 and 104 seqq. CCP).

3. **What is the ordinary/average length of time for this kind of procedure?**

Answer: This depends on the complexity of the matter, the number of court instances involved (one to three) and the particular court. A time period of three months to two years is realistic.

II. TYPES OF INTERIM AND PRECAUTIONARY MEASURES.

1. **For which types of interim measures are the parties allowed to apply? (e.g. injunction, freezing orders, caveat, restraining order, etc.)**

Answer: This depends on the judgment whose enforcement is sought in Switzerland.

If a foreign enforceable judgment for the payment of a sum of money is to be enforced in Switzerland, an attachment order may be obtained to “verarrestieren” (freeze) Swiss assets belonging to the debtor (Art. 271 seqq. DCBA).

Any type of interim and precautionary measures that seem necessary to facilitate the enforcement of the foreign (non-monetary) judgment “may” be ordered by the competent judge upon an application by the claimant, if need be ex parte (Art. 261 seqq. CCP).

III. PROCEDURE

1. **Competent court**
 - a) **Which court has jurisdiction to grant these interim and precautionary measures?**

Answer: The “Vollstreckungsgericht” / “Tribunal de l’exécution” / “Giudice dell’esecuzione” (Enforcement Court) has subject matter jurisdiction (Art. 340 CCP). Territorial jurisdiction lies (at the election of the claimant) either with the court at the place of

domicile or seat of the defendant or at the place where the measures are to be taken (Art. 339 (1) (a-b) CCP).

2. When can the application for interim and precautionary measures be submitted?

Is it possible to apply for it at the time the underlying lawsuit is filed? If YES: Are there any special requirements when so doing?

Answer: Yes (the underlying lawsuit meaning the Request to enforce the foreign judgment in Switzerland, not the bringing of the lawsuit on its merits abroad).

No: Since the Lugano Convention entitles the judgment creditor as of right to interim and precautionary measures in the enforcement State (Art. 47 (2) Lugano Convention), the Swiss legislator has extended that right to other judgment creditors as well to avoid negative discrimination of Swiss and Non-European judgment creditors (Art. 271 (1) (6) DCBA).

Note that foreign interim and precautionary measures may also be recognised in Switzerland under Art. 47 (2) Lugano Convention and lead to a freezing of assets in Switzerland. E.g. English “Freezing Injunction”, Italian “Sequestro Conservativo” or Greek freezing orders (against the defendant or against third parties) have seen recognition in Switzerland and led to Swiss attachment orders.

3. Is it possible to apply for interim precautionary measures before filing the underlying lawsuit? If YES: Are there any special requirements when so doing? (e.g. deadline to submit the lawsuit)

Answer: Yes (filing the underlying lawsuit again understood in this context as filing of the request to enforce the foreign judgment in Switzerland, not the filing of the lawsuit on its merits abroad). An attachment order (“Arrest”) always has to be followed up within 10 days (Art. 279 (1) DCBA), first, by filing a Request to Issue a “Betreibungsbegehren” / “Réquisition de poursuite” / “Domanda d’esecuzione” (Summons for Payment) (Art. 67 DCBA), then, upon objection of the defendant (Art. 69 seqq. DCBA), by filing a Request to quash the opposition of the defendant or, in the absence of an opposition by defendant, to continue enforcement proceedings (Art. 79 seqq. DCBA).

4. Is it possible to apply for interim precautionary measures after filing the main claim? If YES: Are there any special requirements when so doing?

Answer: Yes (filing of the main claim again understood in this context as the filing of the Request to enforce the foreign judgment in Switzerland, not the bringing of the lawsuit on its merits abroad), but it is usually not in the interest of the claimant to give the defendant advance notice of enforcement measures.

5. Criteria used by the court for granting these measures

What requirements must be fulfilled in order to apply for an interim measure? (e.g. *periculum in mora*, *fumus boni iuris*, security, etc.)

Answer: The foreign judgment has to be enforceable in the originating country. Furthermore, recognition and enforcement in Switzerland have to seem possible (which depends mainly on the issue whether the foreign judgment defendant was given reasonable notice to defend the lawsuit abroad and, to a lesser extent, on public policy considerations).

6. Procedure

a. Which are the main steps of the procedure after filing the interim measure application? (e.g. holding a hearing, presenting evidence, etc.)

Answer: Under the Lugano Convention, recognition and enforcement proceedings in another contracting State in the first instance are always *ex parte*; at this stage of the proceedings the party against whom enforcement is sought (defendant) is not entitled to make any submissions on the application (Art. 41 Lugano Convention). Once a requested court fee is paid by the claimant, the judge will decide without further hearings. Subsequently, the declaration of enforceability and the decision are served on the debtor. If a judgment from a Lugano Convention State is recognised and declared enforceable in Switzerland by the first instance court, the defendant may and, in order to prevent enforcement, file an appeal (Art. 43 Lugano Convention).

If a judgment from a non-Lugano Convention State has to be enforced in Switzerland, the proceedings will be adversarial in the first instance court (Art. 29 (2) PILA). A short deadline to submit written observations will be set on behalf of the judgment debtor. It can be plead that facts have occurred since notification of the judgment that preclude its enforcement, i.e. payment, extension of the term of payment by the judgment creditor or that the claim has become statute barred or been forfeited (Art. 341 (3) CCP).

Proof of payment and extension of the term of payment can be established only by documentary evidence (Art. 341 (3) CCP).

- b. Is it possible for the court to order an interim measure without hearing the other party? (*in audita parte debitoris*). If YES, under what circumstances can the parties apply for it?**

Answer: Yes, it is always possible and sometimes mandatory (“Arrestgesuch”; Request for an attachment order; Art. 271 seqq. DCBA) for the court to order such measures ex parte (Art. 265 CCP). In order to qualify for an attachment order, it is sufficient that the foreign judgment is for the payment of a sum of money and prima facie qualifies for recognition and enforcement in Switzerland (Art. 271 (1) (6) DCBA). The judge has to satisfy himself ex officio whether or not this is the case.

- c. What are the main steps of the procedure in this case?**

Answer: The judgment creditor has to submit a Request for enforcement and submit the required documents. If the judgment creditor wants to obtain an “Arrestbewilligung” (attachment order) (Art. 272 DCBA), the enforceable judgment has to be produced (Art. 271 (1) (6) and Art. 272 (1) (2) DCBA) and it has to be shown that it is likely that the debtor has some assets within the jurisdiction (Art. 272 (3) DCBA) which may serve to satisfy, at least in part, the judgment to be enforced.

If another interim measure is sought, the claimant has to show that without interim measures being ordered ex parte, there is risk of enforcement being thwarted or seriously obstructed (Art. 340 CCP).

7. Opposition of the defendant

- a. Is it possible for the defendant to oppose interim and precautionary measures?**

Answer: Yes, but in the case of an attachment order, he has to initiate a new procedure in the same court (“Arresteinsprache”, “Opposition à l’Ordonnance de séquestre”, “opposizione al decreto di sequestro”; Art. 278 DCBA).

- b. Is it possible for the defendant to ask the court for the substitution of the interim measure for a guarantee?**

Answer: Yes. The Enforcement Court may use its discretion whether or not to accept such a substitution (Art. 340 CCP). In the case of an attachment order, such a request has to be filed with the “Betreibungsamt” / “Office de poursuite” / “Ufficio d’esecuzione” (Debt Collection Office) which has to execute the

order of the court, and not with the court. The Debt Collection Office has to release the attached assets against adequate security (Art. 277 DCBA).

8. Appeal

- a. Are appeals allowed from the court decision ordering the measures or rejecting the defendant's opposition to them?**

Answer: Yes. The defendant may raise a (limited) appeal called "Subsidiary Appeal" or "Objection" (Art. 319 seqq. CCP and Art. 278 (3) DCBA), and, under even more limited circumstances, a further appeal to the Swiss Federal Court.

- b. Is it possible to enforce the interim measure once an appeal is filed?**

Answer: Yes, unless the Court of Appeal (or the Swiss Federal Court) specifically suspends enforcement. The Court of Appeal itself may order precautionary or interim measures. It may also order the judgment creditor to post security, e.g. if the judgment to be enforced is enforceable, but not yet final (cf. Art. 325 (2) CCP).

IV. EFFECTS AND VALIDITY OF INTERIM AND PRECAUTIONARY MEASURES.

- 1. Is it possible to enforce the interim measure when the other party obstructs it?**

Answer: Yes. The Enforcement Court may threaten criminal sanctions to the obstructing party (pursuant to Art. 292 of the Swiss Penal Code), fine the obstructing party (of up to CHF 1'000 per day of non-performance), forcibly evict the obstructing defendant from the premises or order a third party to execute the duties of the obstructing defendant at its cost (Art. 343 CCP).

- 2. Is it possible to modify a previous interim measure?**

Answer: Yes.

- 3. When is it possible to raise an interim measure?**

Answer: If the risk of thwarting enforcement persists despite interim measures having been already ordered.

4. Are there any rules concerning the costs (e.g. lawyers' fees, etc.) related to the application?

Answer: Yes. The cantons enact tariffs, usually ad valorem for both court costs and attorneys' fees. In Switzerland, costs usually follow the event (Art. 106 (1) CCP; Arts. 66 seqq. FSCA).

V. ARBITRATION

1. Is it possible to apply for an interim measure in order to ensure the effective enforcement of an Arbitration Award in your country? If YES: what is the enforcement procedure?

Answer: Yes. An enforceable arbitration award qualifies for an attachment order (Art. 271 (1) (6) DCBA) or other interim/precautionary measures in the same way as an enforceable court judgment (Art. 387 CCP).

If the award (or judgment) debtor is a foreign state, the creditor has to show in addition that the foreign state did not act *iure imperii* and that the commercial dispute had a sufficient connection with Switzerland to warrant Switzerland to assume jurisdiction over the foreign state.

2. Are the arbitrators entitled to order an interim measure?

Answer: Arbitrators sitting in Switzerland are entitled to order provisional or conservatory measures if the parties have not opted out (Art. 374 (1) CCP; Art. 183 (1) PILA). If the defendant does not comply voluntarily, the arbitrators (or the party; Art. 374 (2) CCP) may request the assistance of the competent court ("Juge d'appui") (Art. 374 (2) CCP; Art. 183 (2) PILA).

VI. FOREIGN PROCEDURE & ARBITRATION

1. Is it possible to apply for an interim measure before your country's courts in order to ensure the effective enforcement of a foreign Court Decision or Arbitration Award? If YES: how is this procedure executed?

Answer: Yes. Proceedings are as described above. The Swiss Act on Private International Law (PILA) generally provides for the jurisdiction of the Swiss court as the place where interim measures are to be enforced in support of foreign litigation and arbitration.

Switzerland

Submitted by
Markus Aeschbacher
Bratschi Ltd
markus.aeschbacher@bratschi.ch