



Dispute Resolution Guide **2015**

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IFLR
INTERNATIONAL FINANCIAL LAW REVIEW

Enforcing foreign judgments and awards

Urs Feller and **Marcel Frey** of **Prager Dreifuss** describe what to expect when foreign parties start knocking at the doors of Swiss enforcement authorities with a judgment in hand

Securing a court victory is a significant step in obtaining what one is owed. Parties frequently realise though that winning in court is by no means the end of the road, but rather the beginning of another journey called enforcement. Enforcing a decision in another country can be fraught with additional practical difficulties, technical challenges and may entail time-consuming proceedings.

Switzerland, with its central location in Europe, its traditional role as a safe haven for assets and attractive business environment for multinational corporations, is frequently the showground for cross-border enforcement proceedings. Swiss courts have a wealth of practical experience, and legislation and jurisprudence is sound and stable. The court practice of locating assets of a foreign debtor held with a Swiss bank at the branch in Switzerland further increases the attractiveness of Switzerland as a place of enforcement.

Enforcing a decision in another country can be fraught with additional practical difficulties

The growing interlinkage between Switzerland and its neighbouring countries, and throughout the world through multinational trade, has given rise to multinational agreements facilitating simpler recognition and enforcement of foreign judgments and awards.

Foreign decisions

In this article, foreign decisions will include both state court judgments and awards by privately convened arbitral tribunals. Although both types of decisions are, in principle, enforced similarly and by the same authorities in Switzerland, whether a decision originates from a state judicial institution or from an arbitrator determines the legal basis on which enforcement may be requested. Further, the geographic region from which a decision emanates has an influence on the applicable set of rules governing its enforcement.

Switzerland, though not a member of the European Union, is a signatory party to the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, concluded between the European Community, Denmark, Iceland and Norway and Switzerland in Lugano in 2007 (Lugano Convention). Its aim is to facilitate the recognition of judgments between these states without lengthy court proceedings. Enforcing an English or German court judgment in Switzerland is thus – as a rule – simpler and quicker than enforcing an overseas counterpart.

State court decisions from non-Lugano Convention states are enforced according to the provisions contained in the Swiss Federal Act on International Private Law (PILA) which contains somewhat stricter recognition hurdles than the Lugano Convention.

International arbitral awards are enforced under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, ratified in New York in 1965 (New York Convention). According to the PILA, all international arbitration awards are recognised and enforced under the New York Convention, regardless of whether the state at the seat of arbitration is a signatory member of the New York Convention or not.

Enforcement of monetary and non-monetary decisions

In Switzerland, the method of enforcement will depend on whether the foreign decision grants its beneficiary a financial reward or some other type of relief. Under Swiss law, monetary decisions are enforced under the rules of the Federal Debt Enforcement and Bankruptcy Act (DEBA) whilst non-pecuniary decisions (decisions changing the status of a matter, ordering a rectification in a register, or requiring a party to perform or refrain from certain actions) are enforced according to the similar, though separate, provisions of the Federal Civil Procedure Code (CPC).

Debt enforcement in Switzerland

Debt enforcement proceedings under the DEBA are reasonably simple to get started. A creditor, domestic or foreign, may, at any time and without any evidence, request the debt enforcement office to issue a payment summons against a Swiss-based debtor or at the place where assets have been attached.

Once the payment summons has been served, the debtor can either pay or raise an objection which they must affix to the payment summons. The debt enforcement office then notifies the creditor of the objection. The creditor must then commence setting aside proceedings in court to have the objection removed, enabling him to apply for the continuation of the proceedings. If the debtor's objection is set aside, the creditor can request the seizure and liquidation of assets, or the declaration of bankruptcy in the case of legal entities.

Once declared enforceable, non-monetary foreign judgments are enforced with the instruments provided for in the CPC. Specific performance may be enforced by cantonal law enforcement officers tasked with the enforcement of the award by the enforcement court. The enforcement court may also fine defendants with daily penalties for delayed performance and may also issue orders replacing actions or statements required by the defendant (ordering the notification to a public register).

Types of enforceable decisions

Foreign decisions, both by state courts and by international arbitration tribunals, may take different forms and contain various remedies. Some may require certain actions to be performed or payments to be made, while others may only be declaratory in nature. Decisions may have been rendered by default or in ex parte proceedings. Others may contain provisional measures safeguarding a present situation. In principle, all these types of measures are enforceable in Switzerland. Note however the following.

In the case of a default judgment rendered by a court in a member state of the Lugano-Convention, such decision will only be recognised in Switzer-

land, where the defendant has been properly served notice at the beginning of the proceedings abroad.

Similarly, in the case of non Lugano-Convention state judgments, default judgments will only be declared enforceable where a defendant was duly summoned in the prescribed form and early enough to have had an opportunity to have made his case heard. Therefore, an *ex parte* judgment rendered outside the Lugano-Convention realm is, despite some scholarly debate, not enforceable in Switzerland.

Note further, that mere declaratory decisions cannot be enforced in Switzerland (for lack of action), but may be formally recognised.

Arbitral awards that have been rendered by default must demonstrate that the defending party had adequate opportunity to take part in the proceedings.

Note, that foreign bankruptcy orders are only enforceable in Switzerland if the country of origin reciprocates in its own territory in instances where a Swiss bankruptcy decision is presented for enforcement.

Exequatur or direct enforcement with incidental recognition

Where an applicant has secured a judgment or an award abroad, which they intend to enforce in Switzerland, they have two options. First, they can commence recognition proceedings and obtain a separate judgment declaring their foreign judgment enforceable in Switzerland. With this judgment, they can then commence debt enforcement proceedings against the creditor and present the enforceable decision in the setting aside proceedings.

The other option is for the applicant to commence debt enforcement proceedings directly against the debtor, and only request recognition of their decision during the ensuing setting aside proceedings in court as an incidental question. The court then adjudges the question of enforceability as a preliminary question.

Switzerland is frequently the showground for cross-border enforcement proceedings

In addition, the fact that a creditor has a decision in hand allows them to request the attachment of assets of a debtor before commencing actual debt enforcement actions, which ensue after the attachment has been secured.

Recognition of a foreign judgment

On applying for recognition of a foreign judgment, the jurisdiction of the court that rendered the original decision may not be reviewed by the Swiss enforcement court where a judgment was originally issued by a Lugano Convention state. An exception applies for certain compulsory areas of law (concerning insurance litigation and consumer contracts). Further, in cases of exclusive jurisdiction according to the Lugano Convention (concerning real estate, corporate actions or registry disputes), a decision rendered outside that venue is not acceptable.

Non-Lugano Convention judgments, which must comply with the provisions of the PILA, must satisfy the condition that they were rendered at the correct place of jurisdiction under the rules of the PILA (at the place of residency of the defendant or other prescribed fora).

Proper notice of the judgment is a precondition for recognition both under the Lugano Convention as well as under the PILA.

As noted earlier, Lugano Convention decisions may be preliminary in nature and still enforceable, while other state judgments must be final for their effect to be recognised in Switzerland. Also, the foreign judgment may not stand in conflict with a prior decision. In Lugano-Convention recognition proceedings, this challenge can only be brought at the appeals stage due to the one party nature of the application proceedings for such judgments.

The objection that a claim has become unenforceable due to the lapsing of the applicable limitation period has to be brought before the foreign court deciding the merits of the case.

If the limitation period has expired in the time period after the rendering of the judgment but before the court has rendered a verdict, an objection regarding the limitation period can be raised.

Switzerland will not recognise a foreign decision that is not compatible with its understanding of public policy. This is the case both under the Lugano Convention as well as under the PILA. Public policy exceptions come into play in certain family law matters and – *inter alia* – in cases concerning judgments awarding punitive damages, but also in cases of judgments with an excessive restriction of a party's personality.

Enforcement procedure for foreign judgments

Court fees are reasonable for DEBA proceedings. They depend on the claim amount in question and may reach a couple of thousand Swiss francs.

In non-monetary proceedings, the court fees are also calculated on the estimate of the value of the claim. They may reach several thousand Swiss francs, depending on the cantonal tariff applicable.

In Switzerland, the court located at the venue of residence or registered office of the defending party or at the place where the measures are to be enforced has jurisdiction to decide the application for enforceability.

An applicant with a Lugano Convention state judgment can apply for enforcement in *ex parte* proceedings. The defending party only receives an opportunity to defend its position in the ensuing appeals proceedings. Recognition proceedings for judgments from other states are adversarial in nature.

Both applicant and defendant may challenge a first instance decision regarding enforceability.

In order to prove the enforceability of the foreign decision, an applicant under the Lugano Convention must submit an authenticated copy of the judgment and an enforceability certificate as per the standard form in annex v of the Lugano Convention.

Under the PILA, the applicant must produce a certified copy of the decision in addition to a confirmation that no ordinary judicial remedy is available against it, or a statement confirming that the decision has in the meantime become final. Where a default judgment is concerned, the applicant must further evidence that the defendant was duly summoned.

Where the foreign judgment is in a language other than one of the official Swiss languages (German, French or Italian), the court may request a translation into one of the official Swiss languages at the place of the enforcement proceedings. Frequently though, English decisions need not be translated, since most Swiss courts are proficient enough in English to be able to understand the extent of the foreign judgment.

Requirements for international arbitration awards

The applicant must demonstrate that the award was duly served on the defendant.

The applicant must prove that the award is final by demonstrating that

no appeal was lodged, or the appeal does not have suspensive effect or that the suspensive effect has been lifted by the appeal court.

The argument that a claim has lapsed must be brought during the arbitration proceedings. Once adjudged by an arbitral tribunal, a claim lapses only after 10 years under Swiss law.

During the enforcement proceedings, the defendant may challenge the enforceability if the claim has been paid, deferred or has become time-barred since the award has been rendered.

Further, the New York Convention contains a set of refusal grounds hindering enforcement. These deal with procedural aspects such as the inability of the parties to legally conclude an arbitration agreement or the violation of due process. The defendant may also claim that the subject matter of the dispute adjudicated by the arbitral tribunal was not covered by the scope of the arbitration agreement or that the composition of the arbitration tribunal was wrong. Where an arbitration award was later set aside or suspended by a competent authority, the defendant may also raise this defence.

In addition, the Swiss court charged with the enforcement application must, of its own accord, consider two other refusal grounds. First, it must decide whether the award concerns a matter that is excluded from settlement by arbitration under its own laws. Further, it must decide whether enforcement of the award would violate Swiss public policy.

Enforcement procedure for international awards

As for foreign state court judgments, the court fees are calculated according to the federal or the various cantonal tariffs, depending on the nature of the award.

The court at the place where the award will be enforced is competent to hear the enforcement application. Further, the courts at the place of residency or at the registered office of the defendant residing in Switzerland have alternative jurisdiction.

International awards are recognised and enforced in adversarial proceedings following an application by the applicant. The application is dealt with in summary proceedings by a single judge court in the district court. The defendant is granted an opportunity to make a submission on the question of enforceability.

The enforcement decision by the single judge can be brought before the cantonal high court for review. As a last resort, the second instance judgment may be appealed to the Federal Tribunal.

An applicant seeking enforcement of an international award must submit with his application an original of the award or a certified copy together with proof of service of the award to the defendant. The application must also be accompanied by the original agreement containing the arbitration clause or a certified copy of the agreement instead. A confirmation of enforcement by the arbitral tribunal must also accompany the application.

An international award not held in English or in one of the national languages of Switzerland (German, French or Italian) must be translated into one such language. The Swiss enforcement court may dispense with the requirement of translation for an international award drafted in English if it feels it has sufficient grasp of the necessary content.

Careful preparation a must

Securing a court victory is often only a part of the battle won. Enforcing a decision against a recalcitrant defendant may lead to a time-consuming and sometimes frustrating process. Doing so in a different jurisdiction invariably complicates the process. A good knowledge of debtor assets and careful preparation can smooth out many of these challenges and enhance the chances of success of finally receiving what one is due.



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