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The Scope of Due Service of Process: Swiss Law Considerations on the Enforcement of Foreign Default Judgments

By Cristian Casanova and Andreas Schregenberger

I. Introduction

Cristian Casanova

Obtaining a final and binding judgment ordering the adversary party to pay a substantial sum to the claimant may raise the hope to have arrived at the end of a dispute. However, more often than not, the losing party fails to comply with the judgment, leading to necessary enforcement actions. These enforcement actions come with the growing realization that the proceedings on the merits of the case were only the first step to overcome what has proven to be a protracted and arduous resistance from the defendant to fulfill judgement obligations.

One of the recurrent topics in enforcing foreign judgments in Switzerland is whether there has been proper service of at least the initial document starting the proceedings to be enforced, which otherwise can lead to a valid defense against enforcement. After an overview of the basic mechanisms of recognition and enforcement under Swiss law, this article discusses practical issues arising in this context based on two recent decisions from the Swiss Federal Tribunal concerning the enforcement of a default judgement rendered from a court in the United Arab Emirates (UAE).

Service of court documents in civil and commercial matters between Switzerland and the United States is governed by The Hague Convention of 15 November 1965, on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (hereinafter The Hague Service Convention). Experience shows that the formalities requested for service by Switzerland are not always fully appreciated by United States (U.S.) authorities and attorneys. This article provides an overview of the requirements Swiss courts set for proper service under this convention, in view of a specific enforcement proceeding concerning a U.S. judgment.

II. Legal Framework of Recognition and Enforcement of Foreign Judgments

To the extent that there is no pertaining international treaty,[1] recognition and enforcement of foreign judgments in civil and commercial matters in Switzerland is governed by the Swiss Private International Law Act (PILA).[2] PILA rules apply to the recognition and enforcement of

Andreas Schregenberger

U.S. judgments in Switzerland, and this article therefore focuses on these rules. In contrast, the recognition and enforcement of foreign arbitral awards in Switzerland is governed by the New York Convention.[3]

Under PILA,[4] a foreign judgment shall be recognized and enforced if (1) the judicial or administrative authorities of the state in which the decision was rendered had jurisdiction; (2) if no ordinary appeal can be lodged against the decision or the decision is final; and (3) if there are no grounds for refusal.

The grounds for refusal are listed in PILA, Article 27. The recognition is denied if the foreign judgment is manifestly incompatible with Swiss public policy, or if a party establishes (1) lack of proper notice to the defendant, unless the defending party proceeded on the merits without reservation; (2) that the decision was rendered in violation of fundamental principles to the Swiss conception of procedural law, including that fact that said party did not have an opportunity to present its defense; or (3) that either a pending or already decided dispute in Switzerland between the same parties and with respect to the same matter exists, or a respective recognizable decision in a third state.

In addition, Article 29 of PILA lists documentation which must be presented to the court in recognition and enforcement proceedings. Although these requirements only concern formal points in an enforcement proceeding, receiving the proper documentation may prove a substantial burden in practice; in particular, in the case of a default judgment.[5]

This article focuses on one particular aspect of the recognition and enforcement of foreign judgments—i.e., *the due service of the document initiating the process,* as requested in PILA, Article 27(2)(a).

Christian Casanova is a partner in the Dispute Resolution Group of Prager Dreifuss in Zurich. Andreas A. Schregenberger is an associate in this group and focuses on international arbitration and litigation cases.

Pursuant to PILA, Article 27(2)(a), a foreign judgment shall not be recognized if a party establishes that "it did not receive proper notice under either the law of its domicile or that of its habitual residence, unless such party proceeded on the merits without reservation."[6]

The requirements of PILA, Article 27, are deeply rooted in Swiss public policy (*ordre public*). The goal of the provision is to ensure the consideration of fundamental procedural principles when it comes to the recognition and enforcement of foreign judgments in Switzerland. The requirement of a due summoning in the foreign court proceedings leading to the judgment, as set out in PILA, Article 27(2)(a), refers to the summoning to the first hearing of the court rendering the judgment,[7] or to the court document initiating the proceedings (CDIP), respectively.[8] The CDIP is a document which provides the defendant for the first time, the opportunity to take notice of the proceedings initiated against them.[9] The first summoning aims to make the defendant formally aware of the proceedings and to afford the defendant with the opportunity to organize a defense. This opportunity is comprised of an appearance before the court, the submission of an answer to the complaint, and the appointment of a legal representative or of an agent for service of process. The summoning is "due" if it complies with the requirements of the law at the domicile or, if there is no domicile, the law at the place of habitual residence of the defendant at the time the proceedings are commenced.[10] Relevant for the recognition is the law of the state where the CDIP is effectively being delivered to the defendant; such law determines the content, the form, and the point in time of the summoning.[11]

The requirement of due summoning is a norm of protection in favor of a defendant domiciled (or having its habitual residence) in Switzerland,[12] who is being sued and convicted abroad without being aware of it and without having the opportunity to defend itself in such foreign proceedings.[13] Such protection of a Swiss defendant under PILA, Article 27(2)(a), presumes that the need for protection is genuine. Against this backdrop, a defendant may be barred from invoking this provision (i.e., ground for refusal of recognition) if they "turn a deaf ear" or insists on formalities—albeit the defendant had actual knowledge about the proceedings and the timely possibility to defend.[14] Notwithstanding this principle, controversial cases have discussed how a defendant should be treated where the defendant was made aware of the foreign proceedings accidently, or in another fashion as would be formally required, and on such basis would have sufficient time to organize a defense.[15] Court practices tend to request the formal service without taking into account any prior actual knowledge of the proceedings on the merits by the party resisting the enforcement.

It should be noted that the considerations for valid service in an enforcement procedure may differ from the requirements in the proceedings on the merits. While the court deciding on the merits may well accept that the service has been made in accordance with its rules, and will therefore validly render its judgment, a foreign court confronted with the request of recognition of the same judgment may come to the conclusion that no proper service took place under its own applicable rules—thus denying the recognition and enforcement of the judgment. If, in a dispute with a foreign party, an enforcement of a judgment abroad is to be expected, it is therefore recommended to not only focus on the domestic rules, but also to keep in mind the potentially relevant jurisdictions abroad.

III. Two Decisions on the Recognition and Enforcement of Foreign Default Judgments

The implementation of the principles described above is often fraught with uncertainties, as it forces the courts to assess procedural steps and documents stemming from an unfamiliar jurisdiction to determine whether and when the CDIP has been served.

In two decisions[16] concerning the same matter, the Swiss Federal Tribunal considered whether a default judgment rendered in the UAE could be recognized and enforced in Switzerland ("Default Judgement"). The Default Judgment ordered a company incorporated in Switzerland ("Swiss Company") to pay a certain sum to the claimant, a company domiciled in the UAE ("UAE Company"). The Default Judgment had been issued by the first instance court of the Dubai International Financial Centre ("DIFC Court").

The DIFC Court had first tried to serve the Swiss Company with documents by means of international judicial assistance. However, the Swiss Company was able to (validly) reject the acceptance of these documents, given that they were not accompanied by a German translation.[17] In a further attempt, the Swiss Company was served with a translated request for judicial assistance,[18] requesting confirmation of the receipt within 14 days, but setting no deadline for filing a response to the claim. The Swiss Company did not react, and the DIFC Court issued the Default Judgment roughly 16 months later.

The UAE Company had subsequently initiated enforcement proceedings against the Swiss Company on basis of the payment order contained in the Default Judgment. While the first instance court in Switzerland granted the request, the second instance court reversed.

A. First Decision—Rejection of Enforcement

The issue presented to the Swiss courts was whether the DIFC Court was to be considered a state court or whether it was to be qualified as an arbitral tribunal. In the first case, PILA would apply to the enforcement proceedings; in the second case, the New York Convention. On the other hand, the Swiss courts needed to determine whether the requirements for recognition and enforcement under the applicable rules were effectively met.

While the first instance judge had recognized and enforced the DIFC Court judgment, the second instance

court held that the Swiss Company had not been properly notified of the DIFC Court proceedings and thus, recognition and enforcement of the Default Judgment had to be refused.[19] Interestingly, the second instance court did not decide the status of the DIFC Court as a state court or an arbitral tribunal. The court concluded that the requirements of a due summoning under PILA, Article 27(2)(a), would not be met. In other words, it did not address whether the requirements of a proper notice under the New York Convention would be fulfilled.

Upon challenge, the Swiss Federal Tribunal reversed the second instance's judgment. The highest court in Switzerland considered that, if it was to decide that the Default Judgment constitutes a state court judgment and, on that basis conclude that the PILA would not prevent its recognition and enforcement, it would nevertheless be possible for the Default Judgment to be refused recognition and enforcement under the New York Convention, if applicable. Thus, the Swiss Federal Tribunal held that the qualification of the DIFC Court, as either a state court or an arbitral tribunal, was of utmost importance for the material outcome of the case. Accordingly, the case was remitted to the second instance court to determine the qualification of the DIFC Court and decide on the enforcement.

B. Second Decision—Granting of Enforcement

The second instance court subsequently issued a new decision, which held that the DIFC Court was a state court, and not part of the DIFC-LCIA Arbitration Centre. Nevertheless, it again came to the conclusion that the Default Judgment could not be recognized and therefore could not be enforced, pursuant to the requirement of due service of process under PILA, Article 27(2)(a). The UAE Company again challenged the second instance court's decision before the Swiss Federal Tribunal.

The Swiss Federal Tribunal considered that the second instance court misinterpreted the purpose of PILA, Article 27(2)(a). Commonly, the term "summon" would mean the summoning to a court hearing. The purpose of the provision is that a defendant party is by means of a due summoning made aware of proceedings abroad and to put a party in a position to organize its defense. For this, it was not necessary to set a time limit for the defendant party to file an answer to the claim or that the parties were notified of the first date of the oral hearing. This is against the background that the Swiss Company had, based on the indications in the request for service, specific knowledge about the initiation of court proceedings for a claim for payment before the DFIC Court in Dubai. The Swiss Company knew that such claim for payment was a claim for accrued fees out of a contract on financial services; it was also notified about the place of the hearing. In view of this actual knowledge, it was difficult to understand how the Swiss Company could not have been in a position to arrange for the necessary steps to prepare its defense in the proceedings.

If the Swiss Company decided not to follow the express request by the DIFC Court and did not acknowledge receipt of the delivered documents, then it had also to bear the risk that it would not receive any further correspondence from the DIFC Court. With the judicial request to confirm receipt of the claim documents, the CDIP had evidentially and formally been delivered to the Swiss Company. In light of this document, the Swiss Company must have been aware of the fact that a claim was brought against it before the DIFC Court and that it would need to prepare for its defense. Hence, the guaranty of a due summoning, the compliance of which is decisive for the recognition and enforcement under PILA, Article 27(2)(a), was sufficiently respected. Accordingly, the challenge was granted, the decision by the DIFC Court was recognized and declared to be enforceable.

The case exemplifies the difficulties courts encounter in assessing the foreign judicial documents served on a party. The second instance court denied a sufficient service, as it would have expected the CDIP to include a summoning in the sense of an invitation to a hearing or a deadline to submit a response. It was up to the Federal Tribunal to confirm that the barrier for proper service is lower, which it did, thereby enabling the enforcement.

IV. Service by International Judicial Assistance in Civil MattersBetween Switzerland and the United States

A. Means of Service Under The Hague Service Convention

The service of documents between Switzerland and the US is governed by The Hague Service Convention.[20]

The basic mechanism for service of process prescribed in The Hague Service Convention, Article 2, is that "[e]ach Contracting State shall designate a Central Authority which will undertake to receive requests for service coming from other Contracting States and to proceed in conformity with the [subsequent] provisions."

In addition to this "ordinary" service through the Central Authorities designated by each member state, The Hague Service Convention provides for five subsidiary ways of service:[21]

1. Direct service of judicial documents through diplomatic or consular agents upon persons abroad, without application of any compulsion.[22] Switzerland has submitted an opposition to this means of service, thereby excluding it unless the document is served upon a national of the state in which the documents originate.

2. Service through consular channels to the authorities designated for this purpose by another Contracting State.[23]

3. Direct service to persons abroad by postal channels.[24] Switzerland has submitted an opposition to this means of service, excluding its application.

Thereagainst, service by postal channels from Switzerland to other countries remains possible, as long as that state has not made a reservation of its own and waived the requirement of reciprocity.[25] This applies for example to the United States.

4. Direct Service by judicial officers, officials or other competent persons of the state of origin directly through the judicial officers, officials or other competent persons of the state of destination,[26] thus leaving out the Central Authority. Also, this means is excluded for service to Switzerland due to a respective opposition—but may be available for service from Switzerland.

5. Direct Service by a person interested in a judicial proceeding through the judicial officers, officials or other competent persons of the state of destination,[27] e.g., attorneys or parties. Again, this means of service is excluded for service to Switzerland due to a respective opposition.

Service is evidenced by the use of the Model Form and the respective certification of service on such form.[28] In case a recipient accepts the served documents *voluntarily*, a translation of the documents may not be necessary.[29]

Due to the various oppositions formed by Switzerland, in essence only the ordinary means of service through the Central Authorities is available for valid service to a defendant with domicile or habitual residence in Switzerland. In particular with regard to service by postal channels, the Swiss Federal Court has clearly held that such service is void for recognition purposes.[30] It can be expected that the Swiss Federal Court would come to a similar conclusion with regard to the service by other means, for which an opposition is in place.[31]

B. Further Requirements for Recognition and Enforcement of Default Judgments

The Swiss Federal Tribunal had, in a recent decision,[32] the opportunity to consider the recognition and enforcement of a judgment rendered in the US in circumstances where service of the CDIP was contested.

The dispute involved a debtor ("Debtor"), at that time resident of the United States, and a Swiss company ("Swiss Company"). Following a complaint for compensatory damages in the U.S. by the Swiss Company, the Debtor filed for insolvency at the respective bankruptcy court ("Bankruptcy Court"). The Bankruptcy Court subsequently ordered the Swiss Company to withdraw attachments the Debtor's assets abroad.

The Debtor claimed in the later Swiss enforcement proceedings that the Swiss Company had not complied with this order, and that the Debtor had filed a motion for sanctions with the Bankruptcy Court. While the Debtor claimed that this motion for sanctions had been served to the Swiss Company in accordance with The Hague Service Convention, this claim was not supported by any exhibits.

Five months after filing the motion for sanctions, the Debtor filed with the Bankruptcy Court a further motion to set an *ex parte* proof hearing on damages. This motion was sent to the Swiss Company by the Debtor's attorney through first class mail, including a notice informing the Swiss Company that it was to reply to the motion within 11 days after receipt of the notice.

The Swiss Company reacted neither to the first motion for sanctions, nor to the later notification of the motion to set hearing and subsequent orders of the Bankruptcy Court. It was subsequently ordered by the Bankruptcy Court to pay damages to the Debtor, as well as daily penalty payments to the state. This judgment was validly served on the Swiss Company.

In the Swiss enforcement proceedings, the issues contested between the parties were (1) the proper service of the motion to set hearing and whether this motion was to be qualified as the CDIP; (2) whether a deadline of 11 days was sufficient to prepare a defense; and (3) the question whether the judgment to be enforced violated Swiss public policy, in particular with regard to the punitive element potentially included in the damages.

The Swiss Federal Tribunal confirmed its jurisprudence that under PILA, Article 27(2)(a), a party has to be served the CDIP in the formally correct way, irrespective of the service of later documents in the foreign proceedings. It also confirmed that service by postal service is not accepted in Swiss recognition proceedings.[33] The Swiss Federal Tribunal additionally held that proper service requires the CDIP to be served in a manner leaving sufficient time for the defendant to prepare a defense.[34] The Swiss Federal Tribunal went further, elaborating on the burden of proof for due service of process. In general, the party resisting the enforcement of a judgment has to prove that no proper service was made. However, this burden is to be shifted in the case of a party seeking recognition and enforcement of a default judgment.[35]

In applying these principles, the Swiss Federal Tribunal only had to decide on the first issue. The Swiss Federal Tribunal relied on the judgment to be enforced to determine that the basis of the judgment was the first motion for sanctions, and neither the later notice of the motion to set a hearing, sent by the Debtor's attorney, nor additional communications by the Bankruptcy Court summoning the Swiss Company to a hearing, were served by way of international judicial assistance.

The Swiss Federal Tribunal continued in its assessment of whether the motion for sanctions was duly delivered under PILA, Article 27(2)(a). It pointed out that, in the case of a default judgment, it is the party seeking to enforce the judgment who has to prove proper service of the CDIP. Consequently, the Debtor would have, according to its burden of proof, to submit to the Swiss courts

the CDIP, i.e., the motion for sanctions, and the formal confirmation of service on the Model Form. As the Debtor had omitted to submit these exhibits, such proof had failed. The Swiss Federal Tribunal finally held that such lack of proof of formal service cannot be cured under the PILA by actual knowledge of the party resisting the enforcement, i.e., if such knowledge was gained informally. The request for recognition and enforcement of the U.S. judgment was thus denied.

V. Conclusion

The enforcement proceedings described above illustrate some of the issues that can arise in the context of enforcing foreign default judgments. Enforcement proceedings are based on a set of seemingly simple rules, for which a partial standardization is envisaged by international treaties. However, when it comes to applying these rules to a case, a substantial uncertainty arises when the Swiss courts must fit the effects of foreign judicial (or even extrajudicial) acts or documents into the requirements presented by the Swiss law.

The question of which document can be considered as the document initiating the proceedings is often contested. As the discussion in the case concerning the enforcement of the U.S. judgment shows, additional factors may become relevant. Although that case was decided on a rather formal point, the argument that a deadline of 11 days would have been insufficient to provide proper service may well have had some merit, if it had been considered by the court.

Last but not least, it can be concluded that the chances for successful enforcement of foreign (default) judgments rise substantially if the requirements of potential enforcement proceedings are taken into account not only after the proceedings on the merits have been finished, but from the beginning of the main proceedings.

Endnotes

1. In practice, the most important international treaty on the recognition and enforcement of foreign judgments in Switzerland is the so-called Lugano Convention of October 30, 2007; signatory states are the Swiss Confederation, the European Community, the Kingdom of Denmark, the Kingdom of Norway and the Republic of Iceland.
2. [Federal Act on Private International Law] Dec. 18, 1987, SR 291 (hereinafter PILA).
3. [Convention on the Recognition and Enforcement of Arbitral Awards] 1958 (hereinafter, "New York Convention"); cf. PILA art. 194.
4. PILA art. 25.
5. See below, p. [<to be filled in according to the print set>].
6. It should be noted that even a party participating in the foreign procedure can still rely on the defense of improper service, as far as it has made a respective reservation; *cf.* Tribunal fédéral [STF] [Federal Supreme Court] Feb. 19, 2016, 4A_364/2015 (Switz.).
7. *Cf.* Tribunal fédéral [STF] [Federal Supreme Court] Oct. 31, 1996, 122 III 439, § 4a; Tribunal fédéral [STF] [Federal Supreme Court] Mar. 30, 2017, 5A_889/2016, § 5.1.
8. *Cf.* Tribunal fédéral [STF] [Federal Supreme Court] Apr. 14, 2008, 5A_633/2007, § 3.3; Tribunal fédéral [STF] [Federal Supreme Court] Mar. 30, 2017, 5A_889/2016, § 5.1.
9. *Cf.* Leandro Perucchi, Anerkennung und Vollstreckung von US class action-Urteilen und—Vergleichen in der Schweiz 83 (2008); Thomas bischof, Die Zustellung im internationalen Rechtsverkehr in Zivil- oder Handelssachen 367 (1997).
10. *Cf.* PILA art. 27(2)(a).
11. *Cf.* Tribunal fédéral [STF] [Federal Supreme Court] Mar. 30, 2017, 143 III 225, § 5.1; *see also,* Paul Volken, Zürcher Kommentar ¶ 77–79, 82 (2d ed. 2004); Dorothee Schramm & Axel Buhr, Handkommentar zum Schweizer Privatrecht, ¶ 23, 25 (3d ed. 2016); Robert K. Däppen & Ramon Mabillard, Basler Kommentar, Internationales Privatrecht, ¶ 9 (3d ed. 2013); different opinion Teddy Svatopluk Stojan, Die Anerkennung und Vollstreckung ausländischer Zivilurteile in Handelssachen 123 (1986).
12. It should be noted that in case of the defendant having its residence outside of Switzerland at the time of service of the CDIP, the applicable law to determine the proper service is the law at the place of residence, i.e., not the Swiss law.
13. *Cf.* Tribunal fédéral [STF] [Federal Supreme Court] Mar. 30, 2017, 5A_889/2016, § 5.2.
14. *Cf.* Volken, *supra* note 11, at ¶ 75; Schramm & Buhr, *supra* note 11, at ¶ 29; Blätter für Zürcherische Rechtsprechung [ZR] [Supreme Court of the Canton of Zurich] Sept. 10, 2010, 109/2010, 300.
15. *Cf.* Tribunal fédéral [STF] [Federal Supreme Court] Mar. 30, 2017, 5A_889/2016, § 5.2.
16. *Cf.* Tribunal fédéral [STF] [Federal Supreme Court] Sept. 2, 2016, 5A_672/2015; Tribunal fédéral [STF] [Federal Supreme Court] Mar. 30, 2017, 5A_889/2016, 143 III 225.
17. Service was governed in that case by The Hague Convention of 1 March 1954 on Civil Procedure.
18. Including a Claim Form, the Particulars of Claim, Exhibits, Change of Legal Representation and Correspondence.
19. *Cf.* PILA art. 27(2)(a).
20. See already above, p. [<to be filled in according to the print set>].
21. *Cf.* Gerhard Walter & Tanja Domej, Internationales Zivilprozessrecht der Schweiz 390 (5th ed. 2012).
22. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters art. 8, Nov. 15, 1965, (hereinafter "Hague Service Convention").
23. Hague Service Convention art. 9.
24. Hague Service Convention art. 10(a).
25. *Cf.* Walter & Domej, *supra* note 21, at 391.
26. Hague Service Convention art. 10(b).
27. Hague Service Convention art. 10(c).
28. Hague Service Convention art. 3, art. 6.
29. Hague Service Convention art. 5(2); *cf.* Walter & Domej, *supra* note 21, at 393.
30. *See also,* Tribunal fédéral [STF] [Federal Supreme Court] Apr. 6, 2009, 135 III 623, § 3.
31. In this context, it should also be noted that a direct service in violation of The Hague Service Convention may potentially be considered as "activities on behalf of a foreign state on Swiss territory without lawful authority" according to article 271 of the Swiss Criminal Code, which constitutes a blocking statute.
32. Tribunal fédéral [STF] [Federal Supreme Court] Feb. 19, 2016, 142 III 180.
33. *Id.* at § 3.3.1, 3.3.2.
34. *Id.* at § 3.3.3.
35. *Id.* at § 3.3.4 (referencing PILA art. 29(1)(c)).