NYSBA 2018 | VOL. 31 | NO. 2

International Law Practicum

A publication of the International Section of the New York State Bar Association

www.nysba.org/ILP

Enforcement of Foreign Judgments and Arbitral Awards in Switzerland: Cracking One of the World's Safe Boxes

By André Brunschweiler, Sandrine Giroud, and Deborah Hondius

I. Introduction

André Brunschweiler

Sandrine Giroud

Deborah Hondius

Being among the world's leading financial centres, and often a place of refuge to transfer assets, Switzerland is considered a highly attractive place for the enforcement of foreign judgments and arbitral awards but it remains generally very favorable to debtors.

This article aims to present the general legal framework applicable to the enforcement of foreign judgments and arbitral awards in Switzerland, and it also addresses selected key issues often encountered in practice, such as asset tracing, creditors hidden behind third parties and immunity issues, as well as protective briefs, which are a useful tool to consider in an asset protection strategy.

II. What Rules Apply

The organization of the legal and judicial system of Switzerland reflects its political and federalist structure of 26 cantons.

When it comes to enforcement proceedings, Swiss law distinguishes between non-monetary (e.g., specific performance) and monetary claims (i.e., payment of an amount of money). Whilst enforcement of non-monetary claims is governed by the Swiss Code of Civil Procedure (SCCP), in particular articles 335 *et seq*., enforcement of monetary claims is governed by the Swiss Debt Collection and Bankruptcy Act (DCBA).

III. Enforcement Measures Available

Prior to starting actual enforcement actions, and to secure later enforcement, provisional measures are of practical importance. Such measures can be applied for at any time, during judicial proceedings, on the merits, or even before proceedings have been initiated.

Swiss courts can, in principle, order any provisional measure suitable to prevent imminent harm in support of a non-monetary claim (article 262 SCCP).

In practice, the most common situation occurs when a plaintiff wishes to secure a monetary claim by attaching the debtor's assets, such as (typically) bank accounts held in Switzerland. It is interesting to note, in this respect, that the Swiss Federal Supreme Court ruled that claims against a debtor residing abroad are located (and may be subject to an attachment order) at the seat of the Swiss third-party debtor (e.g., a Swiss bank), even if said claims arise from his or her relationship with a foreign branch of the Swiss third-party debtor.[1]

To obtain a civil attachment, the creditor must demonstrate *prima facie* that (1) he or she has a claim against the debtor, (2) there exists grounds for an attachment as per the DCBA, and (3) there are assets in Switzerland belonging to the debtor. An (enforceable) foreign judgment or arbitral award constitutes a ground for enforcement, as per article 271 (1)(6) DCBA.[2]

Applications for attachments are decided on an *ex parte* basis, and the debtor will only be informed about the attachment request if the attachment was granted. The creditor may thus benefit from a certain surprise effect. As it will be further developed below, an attachment is often also the first stage in recognising, and enforcing, an enforceable judgment.

André Brunschweiler is partner at LALIVE, Zurich, Switzerland. He focuses on domestic and international litigation, including debt recovery, corporate related disputes and enforcement of foreign judgments and awards.

Sandrine Giroud is partner at LALIVE, Geneva, Switzerland. She focuses on domestic and international litigation, with an emphasis on asset recovery, fraud and private client litigation.

Deborah Hondius is an associate at LALIVE, Geneva, Switzerland. Her main areas of practice are domestic and international litigation.

IV. Enforcement of Foreign Judgments

Recognition and enforcement of a foreign judgment in Switzerland is subject to the provisions of the multi or bilateral treaties in force between Switzerland and the state in which the judgment was issued. The most important instrument in force in Switzerland in this respect is the 2007 revised Lugano Convention on Jurisdiction, Recognition and Enforcement of Judgments in Civil and Commercial Matters (the "Lugano Convention").[3] A court seized with a request for enforcement of a judgment rendered in one of the Convention member states must declare it immediately enforceable, upon mere satisfaction of formal conditions. Should an appeal be lodged against the declaration of enforceability, the recognition of the foreign judgment may be refused in case of (1) violation of Switzerland's public policy (punitive damages are, for example, contrary to Swiss public policy),[4] (2) absence of a proper notice to the defendant in case of a default judgment, or (3) *res judicata* (article 34 of the Lugano Convention).

In the absence of any treaty, recognition and enforcement proceedings must follow the provisions set out in the Private International Law Act (PILA). Under the PILA, a foreign judgment shall be recognized in Switzerland (1) if the judicial or administrative authorities of the state in which the judgment was rendered had jurisdiction; (2) if no ordinary appeal can be lodged against the judgment or the judgment is final; and (3) if there are no grounds for refusal as exhaustively listed in the PILA, such as violation of Switzerland's public policy, defective service, violation of the right to be heard or *res judicata* (articles 25 and 27 PILA).

All types of judgment may, in principle, be enforced in Switzerland, with the exception of *ex parte* judgments.[5] Foreign interim measures may, on their side, be enforced in Switzerland under the Lugano Convention, provided that the defendant's right to be heard was respected.[6] Under the PILA, as a foreign judgment must be final in order to be enforced in Switzerland, the enforcement of foreign interim measures remains controversial to date.[7]

The enforcement of foreign judgements follows the Swiss domestic enforcement proceedings applicable to non-monetary and monetary claims. In the attachment proceedings, the Swiss judge will decide on the recognition of the foreign judgment on a *prima facie* basis; no prior, separate recognition and declaration of enforceability are needed for foreign court judgments (even for judgments falling outside the scope of the Lugano Convention[8]) or arbitral awards. Rather, the judge will decide on the recognition within the attachment proceedings (as a preliminary matter for non-Lugano Convention judgments or as a separate issue for Lugano Convention judgments).[9]

Swiss courts may not review the merits of the case on which the foreign judgment was rendered.

V. Enforcement of Foreign Arbitral Awards

Statistics show that approximately 50 percent of awards are complied with voluntarily, and only 10 percent of all international arbitration result in enforcement proceedings.[10]

The recognition and enforcement of foreign arbitral awards in Switzerland is governed by the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC) as per article 194 PILA, regardless of whether the place of arbitration was in a state party or not.

The requirements according to the NYC will typically be directly examined by the Swiss Courts in the course of the enforcement proceedings as a preliminary question. Alternatively, it is also possible to conduct separate proceedings confined to the mere recognition of the award. In practice, having the award declared enforceable (as a preliminary question) within the framework of debt collection proceedings or, if specific assets of the debtor are known within attachment proceedings, is the rule. The main reasons are that the creditor benefits from a surprise effect and there is no risk of (negative) *res judicata* in case not all conditions for recognition and enforcement are met.

Under the NYC, the party applying for recognition and enforcement of the award is required to comply with a limited number of formal requirements set out in detail in Article IV NYC. In particular, the applicant must establish the authenticity and contents of the award as well as the existence of an arbitration agreement on which the award is based.

For this purpose, (1) the duly authenticated original award or a duly certified copy thereof, and (2) the original arbitration agreement or a duly certified copy thereof must be submitted.

If the award or arbitration agreement is not issued in an official language of the canton where enforcement actions are sought in Switzerland (German, French or Italian), an official certified translation must be submitted. The Swiss Federal Supreme Court confirmed that in the case of English awards, a translation of the relevant sections (i.e., namely the operative part of the award) is sufficient and a full translation is not needed.[11] Swiss courts apply a very recognition- and enforcement-friendly approach under the NYC. In order to successfully object to any recognition or enforcement action in Switzerland, a debtor would need to raise and provide evidence for the existence of grounds for refusal of the recognition and enforcement of the arbitral award pursuant to Article V NYC.

The list of grounds for refusal as provided for by Article V(1) NYC is exhaustive, and (in a nutshell) provides for the following: (1) invalidity of the arbitration agree-

ment, (2) violation of due process, (3) the arbitral award is dealing with a difference not contemplated by or not falling within the scope of the arbitration agreement, (4) the arbitral tribunal was not properly constituted or the arbitral procedure was not held in accordance with the arbitration agreement, and (5) the arbitral award is not yet binding, set aside or suspended.

The burden of proof for these grounds for refusal lie with the debtor. This means that, e.g., no certificate or other forms confirming the enforceability of an award must be submitted by the award-creditor, but the award-debtor will have to reverse the presumption that an award is binding and enforceable. On the other side, the award-debtor will, as a rule, not be precluded from raising these objections, if he or she failed to initiate actions to challenge or annul the award in the jurisdiction where the award was rendered.[12] However, the principle of acting in good faith and abuse of right still requires a party to raise any formal objections or challenge in the arbitration proceeding itself; otherwise, according to the Swiss Federal Supreme Court, these formal objections or challenges have been forfeited.[13]

In addition, Article V(2) NYC also sets forth the following two grounds, which, contrary to the above-mentioned grounds any state court may (and indeed should) consider even on its own motion: (1) lack of arbitrability of the dispute, and (2) violation of public policy. Swiss courts would, however, still expect the debtor to raise these grounds and provide some evidence in support thereof. The two grounds must be considered from a Swiss law perspective (*lex fori executionis*).

As mentioned, Swiss courts apply a recognition- and enforcement-friendly approach and the threshold to successfully object to the enforcement of an award is very high. Also, a violation of public policy is only successful in very limited circumstances.

It is also important to note that the NYC allows parties to commence enforcement proceedings outside the seat of the arbitration, even if annulment proceedings have been commenced. Depending on the circumstances, Swiss courts may enforce awards despite annulment proceedings being initiated. That said, Swiss courts do not recognize awards that have been set aside (in contrast to other jurisdictions, such as France and the United Kingdom).

VI. Selected Issues

This section aims at presenting a few practical aspects and requirements to keep in mind when seeking the enforcement of foreign judgments and arbitral awards in Switzerland, in particular with regard to the obstacles commonly encountered and the objections which may be raised.

A. Identifying and Securing Assets

As mentioned, the most effective way of enforcing foreign judgments or arbitral awards is by applying for an attachment of the debtor's assets. This requires, amongst other things, the demonstration of the existence of specific assets and where they are located. This may prove difficult in practice, in particular regarding banking assets, given the (still) existing Swiss banking secrecy.

Under Swiss law, so-called "searching attachments" or "fishing expeditions" (i.e., requests for attachment not sufficiently identifying the assets to be attached, but rather aiming at finding out whether the debtor has any assets in Switzerland) are not allowed.

Public sources for searching for assets are in general limited, but exist, including the following: (1) the commercial register (information on companies, e.g., share capital, legal seat, address, corporate purpose, for some company types also the shareholders), (2) the Swiss Official Gazette of Commerce (gathering of information published in every cantonal commercial register, bankruptcies, composition agreements, debt enforcement, calls to creditors, lost titles, precious metal control, etc.), (3) the land register (record of every plot in Switzerland, except for those in the public domain[14]), (4) the debt enforcement and bankruptcy register (record of debt collecting proceedings against a debtor[15]), and (5) the Swiss aircraft and/or car registries. There also exists an unofficial register recording wills and other testamentary dispositions (it is, however, not exhaustive as it only contains information provided freely). Certain cantons make it possible as well to access certain limited information contained in a person's tax declaration. Lastly, judgments rendered by civil courts are in principle made accessible to the public (article 54 SCCP). Some judgments are directly published by civil courts in redacted form. Judgments which are not published may otherwise be obtained upon request.[16]

"Under Swiss law, so-called 'searching attachments' or 'fishing expeditions' (i.e., requests for attachment not sufficiently identifying the assets to be attached, but rather aiming at finding out whether the debtor has any assets in Switzerland) are not allowed.

Due to Swiss bank secrecy laws, there is not a register of bank accounts in Switzerland.

In practice it is important to know that a bank must only provide information as to the effectiveness of the attachment (i.e., whether the bank account still exists and if so, whether funds were blocked and for which amount) once the deadline to appeal against the attachment order has expired. In cases where the debtor is located abroad and service of documents is to be made through judicial legal assistance proceedings or through consular or diplomatic channels, such essential information might only be available at a very later stage.

Furthermore, an attachment of a bank account is a "snapshot," meaning that only the exact amounts on the bank account at the moment of attachment are (and remain) attached or blocked but, as a rule, not any funds which will be credited on the bank account subsequent to the attachment. These future credits or funds can, as a rule, only be attached with a renewed attachment request.

B. Creditors Hiding Behind Third Parties

Switzerland remains to date one of the biggest offshore private wealth centers of the world, as third parties can still hold assets with Swiss banks in compliance with NYC procedures when applicable. Said assets are not being compulsory registered and most related information (shareholding, etc.) remains confidential.

Swiss law knows the concept of *alter ego*, respectively piercing the corporate veil, but the threshold to successfully apply these concepts is very high. The applicant must demonstrate that the formal owner of the assets is only the *alter ego* or the mere instrumentality of its beneficial owner (economic identity), and that such structure of formal ownership is not legitimately used but merely "used" in bad faith, i.e., as a means of circumventing legal or contractual obligations.[17]

From a strategic point of view, it may thus be interesting for the creditor to explore the option of first lifting the corporate veil based on the *alter ego* concept in a foreign jurisdiction, which might be more open to these concepts (such as the United States), and to have the foreign judgment then recognized or at least referred to when applying for enforcement in Switzerland.

C. Immunity from Enforcement

Swiss courts apply the concept of sovereign immunity restrictively.[18] Accordingly, a distinction is drawn between cases in which the foreign state acts in the exercise of its sovereign capacity (*de iure imperii*), where immunity from enforcement is applicable, and cases in which the foreign state acts in a private capacity (*de iure gestionis*), where it is not. The principal criterion to distinguish between acts *de iure imperii* and acts *de iure gestionis* is the nature of the transaction. In addition (a specific procedural requirement set by Swiss law), the transaction out of which the claim against the foreign state arises must have a sufficient connection to Switzerland (in German: "*Binnenbeziehung*" in French "*rattachement suffisant*").[19] Said connection is established when the claim originated or had to be performed in Switzerland, or when the debtor performed certain acts in Switzerland. Conversely, the mere location of assets in Switzerland or the existence of a claim based on an award rendered by an arbitral tribunal seated in Switzerland does not create such a connection.

Finally, the assets targeted by the enforcement measures must not be earmarked for tasks that are part of the foreign state's duty as a public authority, which are excluded from enforcement proceedings pursuant to article 92(1) DCBA. The concept of tasks belonging to a public authority is interpreted widely by the Swiss Federal Supreme Court.[20] It always includes the assets of diplomatic missions and generally includes cultural goods. However, the Swiss Federal Supreme Court has considered that a dispute relating to a lease agreement entered into by the state was not covered by the immunity from enforcement.[21] Furthermore, money, whether in the form of cash or held on bank accounts, is exempt from seizure only if clearly earmarked for concrete public purposes, which implies a separation from other assets. However, bank accounts and other assets belonging to an embassy are presumed to be for public purpose and are thus immune from enforcement.[22] The same applies to funds specifically allocated to the purchase of arms,[23] the rolling stock of a state railway company,[24] the shares of an international corporation created by an international agreement but performing public functions,[25] and a cultural center or buildings for foreign citizens run by a foreign consulate in Switzerland.[26] Swiss case law has also recognized overflight rights as de *iure imperii* assets and thus immune from enforcement.[27]

D. Protecting Against Enforcement: Protective Briefs

Swiss law provides the debtor with an instrument to defend himself against a (possible) attachment request (or other *ex parte* measure) by filing a so called "protective brief." The protective brief allows a party to submit his or her position in advance to the court.

This brief will only be communicated to the opposing party if and when the *ex parte* injunction is effectively requested and shall remain in effect for six months from the date of its filing. After six months, the brief must be renewed or extended in order to have a continued effect.

This measure is available in all areas where the issuing of an *ex parte* injunction is to be feared, including attachment proceedings. Protective briefs are, however, not permitted in enforcement proceedings under the Lugano Convention, as a court seized with a request for enforcement of a judgment rendered in one of the Convention

member states must declare such a judgement immediately enforceable, upon mere satisfaction of formal conditions. Therefore, the opposing party is not to be heard and may only object to the declaration of enforceability at a later stage.

VII. Conclusion

Despite being generally a debtor-friendly jurisdiction due to Swiss banking secrecy, lack of discovery and centralised registers on specific property, Switzerland remains an important jurisdiction for enforcement actions. Notwithstanding the exequatur and enforcement friendly approach of Swiss courts, turning a foreign judgment or arbitral award into a key to a Swiss safe box is not always straightforward in practice. In particular, the identification of assets, the dealing with creditors hiding behind third parties, and immunity issues require careful planning, anticipation and coordination of the enforcement actions with local counsel.

Endnotes

1. Bundesgericht [BGer] [Federal Supreme Court] Sep. 3, 2014, 5A_723/2013 Entscheidungen Des Schweizerischen Bundesgerichts [BGE], making reference to and confirming its ruling in its decision of [BGer] Aug. 20, 2002, 128 [BGE] III 473.
2. [BGer] Dec. 21, 2012, 139 [BGE] III 135.
3. The signatories are the Swiss Confederation, the European Community, the Kingdom of Denmark, the Kingdom of Norway, and the Republic of Iceland.
4. [BGer] Oct. 10, 1996, 122 [BGE] III 463.
5. [BGer] Jul. 30, 2003, 129 [BGE] III 626, E. 5; Bernard Dutoit, *Droit international privé suisse, Commentaire de la loi fédérale du 18 décembre 1987*, Basel 2005, art. 25 N 9.
6. [BGer] Jul. 30, 2003, 129 [BGE] III 626, E. 5.
7. Andreas Bucher, Commentaire romand, *Loi sur le droit international privé, Convention de Lugano,* 2011, art. 25 N 24 to 31.
8. Decision of the Cantonal Tribunal of Vaud of 12 Apr 2012 (N° 115).
9. [BGer] Dec. 21, 2012, 139 [BGE] III 135, E. 4.5.2; Decision of the First Instance of Zurich of 15 Feb 2015 (EQ150028).
10. Queen Mary & PwC, International Arbitration: Corporate Attitudes and Practices 2008 (2008).
11. [BGer] Jul. 2, 2012, 138 [BGE] III 520.
12. [BGer] Jul. 3, 1985, 111 [BGE] II 175; [BGer] Oct. 4, 2010, 4A_124/2010.
13. [BGer] Jul. 3, 1985, 111 [BGE] II 175; [BGer] Oct. 4, 2010, 4A_124/2010; [BGer] Nov. 21, 2003, 130 [BGE] III 66.
14. The land register may however in principle only be consulted provided that there is a legitimate interest in accessing it (e.g., purposes of contractual negotiations for the purchase of a property etc.).
15. The debt enforcement and bankruptcy register may be consulted upon request by anyone showing a *prima facie* legitimate interest as well.
16. A copy of a civil judgment which has not been published will, however, only be provided upon showing of a legitimate interest and can, depending on the court's practice, also be made anonymous.
17. [BGer] Jun. 7, 2016, 5A_205/2016, E. 7.2 and 8.
18. *See generally*, Sandrine Giroud and Veijo Heiskanen, Sovereign Immunity 2018, Getting the Deal Through (contributing eds. Tai-Heng Cheng and Odysseas G Repousis), available at https://gettingthedealthrough.com/area/113/jurisdiction/29/sovereign-immunity-switzerland/.
19. [BGer] Sep. 7, 2018, 5A_942/2017; [BGer] Jun. 19, 1980, 106 [BGE] Ia 142; [BGer] Sep. 1, 2009, 135 [BGE] III 608.
20. [BGer] Aug. 15, 2007, 134 [BGE] III 122; [BGer] Nov. 23, 2011, 5A_681/2011.
21. [BGer] Oct. 7, 2010, 136 [BGE] III 575.
22. [BGer] Apr. 30, 1986, 112 [BGE] Ia 148.
23. [BGer] Feb. 10, 1960, 86 [BGE] I 23.
24. [BGer] Apr. 30, 1986, 112 [BGE] Ia 148.
25. Decision of the Swiss Federal Supreme Court of 22 June 1966 *in* Annuaire suisse de droit international, 1975, p. 219.
26. [BGer] Apr. 30, 1986, 112 [BGE] Ia 148.
27. [BGer] Aug. 15, 2007, 134 [BGE] III 122.