

# NEUTRAL TERRITORY

## LALIVE'S MARC HENZELIN AND SANDRINE GIROUD EXAMINE THE KEY FACTS ON THE ENFORCEMENT OF FOREIGN JUDGMENTS IN SWITZERLAND

Ranked among the top five financial centres in the world and top of the Global Innovation Index 2014, with postcard landscapes and a tradition of discretion and stability, Switzerland remains a top destination for companies and wealthy individuals alike to bring their business and wealth. It is therefore unsurprising that enforcement of foreign judgments against assets held in Switzerland is an issue that comes up regularly in the day-to-day practice of international litigators.

To increase chances of the successful enforcement of a foreign judgment in Switzerland, here are a few points to keep in mind.

### LEGAL REGIME

Switzerland can be generally considered as an enforcement-friendly place. However, while the enforcement process is subject to summary procedure it

far-reaching jurisdictions such as the US and procedural defects such as defective service of the proceedings to the defendant or violation of the right to be heard.

There is, however, no reciprocity requirement between the jurisdiction where the foreign judgment was rendered and Switzerland. Moreover, Swiss law does not provide for any limitation period for the enforcement of foreign judgments. Accordingly, a foreign judgment can be enforced in Switzerland as long as it is enforceable in the country where it was rendered.

### JURISDICTION OF THE FOREIGN COURT

The jurisdiction of the foreign court issuing the judgment is only recognised if the defendant was domiciled or had its seat in such jurisdiction or if the PILA foresees an 'indirect' jurisdiction in its favour. This is, for instance, the case if the foreign jurisdiction is the place of performance in case of a contractual claim or it is the place of the tortious act or resulting injury in a tort case. Alternatively, in case of a monetary claim, the 'indirect' jurisdiction is established if the parties have entered into a valid choice of court agreement in favour of the foreign court or if the defendant proceeded on the merits without objecting to jurisdiction. Should a counter-claim be filed, the jurisdiction of the foreign court is established if it had jurisdiction over the main claim and the two claims are closely related.

### EUROPEAN FORUM SHOPPING?

Switzerland entered into several bi- or multilateral treaties to facilitate enforcement of judgments. In this respect, the most important instrument in force in Switzerland is the 2007 Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the Lugano Convention) which also applies to the European Union (EU), Iceland, and Norway. It provides that a Swiss court presented with a request for enforcement of a court judgment rendered in one of the member states to the Convention, must declare such a judgment immediately enforceable if certain formal conditions are met. Swiss courts may, in any event, not review the merits of the case.

When faced with different alternative jurisdictions to file a claim, it may therefore be advisable to consider choosing a jurisdiction belonging to a favourable enforcement regime, such as a country belonging to the Lugano Convention, which may ensure a facilitated enforcement process in Switzerland.

### ENFORCEMENT OF INTERIM MEASURES

The enforcement of interim measures under the PILA is a matter of debate. The prevailing view seems to be that Swiss courts cannot enforce interim measures ordered by foreign courts, as the PILA requires that a decision be final. The Swiss Federal Supreme Court has acknowledged that this view has been adopted but it has not yet decided on the issue, leaving the question open. In any event, even those authors considering that foreign interim measures could be enforced under the PILA still find that this would exclude *ex parte* interim measures.

By contrast to the PILA, the Lugano Convention foresees the enforcement of interim measures, even *ex parte*, provided the decision was served to the defendant and they were granted the right to be heard in the underlying proceedings within a reasonable time and prior to the application for recognition and enforcement in Switzerland. In practice there may, however, be issues of the equivalence of foreign interim measures into corresponding Swiss procedural law. This is particularly the case with the well-known English freezing orders and their typical *ad personam* effect, which some Swiss courts find



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may take several months, and sometimes years in case of an appeal up to the Swiss supreme court, until a final decision on enforcement has been issued.

In the absence of bi- or multilateral treaties, the recognition and enforcement of a foreign judgment is regulated by the Swiss Private International Law Act (PILA) which requires that:

- (i) the jurisdiction of the foreign authorities rendering the judgment is established (so-called 'indirect jurisdiction');
- (ii) no ordinary appeal can be filed against the judgment or it is final; and
- (iii) there is no ground for refusal. Such grounds exist when (a) there is a violation of Swiss public policy; (b) the defendant proves that they were not duly summoned according to the law of their domicile or according to the law of its ordinary residence, except where they made an appearance in the proceedings without reservation; (c) the decision was rendered in violation of fundamental principles of Swiss procedural law, in particular if the right to be heard was denied; (d) proceedings involving the same parties and the same subject matter were first brought in Switzerland (*lis pendens* objection), or adjudicated in Switzerland, or adjudicated in a third state and a decision has been made, which satisfies the conditions for recognition in Switzerland (*res judicata* objection).

In practice the most common obstacles to enforcement are the lack of jurisdiction of the foreign court, in particular in relation to countries with

difficult to reconcile with the *in rem* nature of the Swiss attachment. In this sense, it is sometimes more advisable to apply afresh for interim measures directly in Switzerland.

## INTERIM MEASURES IN SUPPORT OF ENFORCEMENT PROCEEDINGS

Interim measures may be requested to secure the assets against which enforcement is sought or to maintain the status quo over a specific situation. The PILA provides specifically for the jurisdiction of Swiss courts to issue interim measures in an international context where such courts have jurisdiction on the merits or are located at the place where the measure should be enforced. The types of measures available are regulated by Swiss domestic law which distinguishes between non-monetary and monetary claims, each being the subject of different legal regimes (the Swiss Code of Civil Procedure for the former and the Debt Collection and Bankruptcy Act for the latter).

Swiss courts can order any interim measures suitable to prevent imminent harm in support of a non-monetary claim. In particular, such interim relief can take the form of an injunction; an order to remedy an unlawful situation; an order to a registry or third party; a performance in kind; or the remittance of a sum of money (if provided by law). In practice, interim measures that are often requested are the registration of property rights in a public register. Interim measures can also be requested to prevent a party from disposing of assets such as company shares or moveable property.

In the context of a monetary claim, assets could be frozen by way of attachment proceedings. Such attachment is granted *ex parte* and must thereafter be validated. The applicant must *prima facie*:

- (i) show a claim against the debtor;
- (ii) identify assets of the debtor that can be attached (a condition difficult to satisfy given Swiss banking secrecy); and
- (iii) show that one of the specific grounds for attachment, as set out by law, exists (eg, if the debtor does not live in Switzerland and the claim has sufficient connection with Switzerland or is based on a

recognition of debt; or if the creditor holds an enforceable title against the debtor).

The attachment is a powerful tool frequently used in the context of enforcement proceedings given that an enforceable judgment is one of the required grounds for attachment.

## CONCLUSION

Turning a foreign judgment into Swiss gold requires careful planning and anticipation of the legal obstacles that may arise before the enforcement stage. Issues of 'indirect' jurisdictions or due process at the claim stage should be particularly considered as well as the specific obstacles and



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**SANDRINE GIROUD, LALIVE**

uncertainties existing regarding the enforcement of foreign interim measures. As always in cross-border matters, prior co-ordination with local counsel will allow removing unnecessary obstacles at the enforcement stage.

## About the authors

Marc Henzelin is a partner of the firm, and has vast experience in transnational and domestic litigation, in particular in international and economic criminal law, commercial and banking litigation, asset recovery, mutual legal assistance in criminal matters and extradition, and public international law. He regularly leads private investigations, focusing on asset search, recovery and compliance issues.

Sandrine Giroud is counsel at the firm and specialises in domestic and international litigation. She primarily advises and represents clients in complex multi-jurisdictional proceedings, including recognition and enforcement of foreign judgments, asset-freezing injunctions, international legal assistance (civil, criminal, administrative), immunity issues, art law-related matters, cross-border family matters and trust disputes.

## About LALIVE

LALIVE is an international and independent law firm based in Switzerland, with offices in Geneva, Zurich and Doha (LALIVE IN QATAR LLC). The firm provides a wide range of legal services and is renowned for its expertise and experience in international legal matters, in particular, international dispute resolution. It advises a variety of clients, both from the public and private sectors, on a global basis. LALIVE has significant experience representing clients in proceedings before all Swiss courts, as well as before foreign jurisdictions co-operating with local counsel. It also regularly assists clients in pre-trial asset tracing and attachments orders, enforcement of foreign judgments and arbitral awards, and international judicial assistance proceedings in civil, criminal and administrative matters.