(2) of the APC. Unfortunately, this guideline was offered by the Panel's Ruling, rather than the resolution of the Presidium of the Supreme Arbitrazh Court. Hence, the interpretation contained therein can only be considered persuasive, but not binding on the lower courts. Hopefully, the Panel's approach will be followed by the lower courts facing the similar question.

Notes

1 Ruling of the Supreme Arbitrazh Court of the Russian Federation No VAS-14851/11 dated 13 January 2012 can be accessed in Russian at **http://kad.arbitr.ru/PdfDocument/c6b204e5-4680-4b80-93c2-78c95b4eece4/A40-116933-2009_20120113_Opredelenie.pdf**.

2 See, for example, Article 5(5) of the Council Regulation (EC) No 44/2001 (the 'Brussels I Regulation'); Principle 3.1 of the ILA Fourth and Final Report: Jurisdiction over Corporations (2002) (the 'ILA Principle 3.1'). For Russia, see Article 247(1)(2) of the APC.

3 *Magnus/Mankowski*, Brussels I Regulation (2007) Article 5 note 298.

4 The ILA Principle 3.1 provides for the jurisdiction of the courts of the state where a corporation has a branch, agency or other establishment with respect to the disputes arising out of operations of the corporation in this state. Hence, this principle focuses on the operations of the corporation, rather than its establishment (as in Article 5(5) of the Brussels I Regulation).

5 A Mamaev, 'Comparative analysis of the provisions of the Russian Civil Procedural Code and APC governing the alternative international jurisdiction in civil cases' in: *Arbitrazh and civil procedure*' No 11 2007.

Enforcement of Worldwide Freezing Orders in Switzerland

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Worldwide Freezing Orders (WFO), or so-called 'Mareva injunctions', have been described as one of the 'nuclear weapons' of commercial litigation and arbitration. Often granted at the pre-trial stage in *ex parte* hearings, a WFO prevents a defendant, by way of a preliminary injunction, from disposing of assets pending the resolution of the underlying substantive proceedings. While granted only in common law jurisdictions, such orders can be made to have worldwide effect. Their enforcement in other jurisdictions can, however, be problematic. For instance, freezing orders targeting a person do not exist in Switzerland. Indeed, a Swiss attachment order will always target a specific asset or bank account. A recently published Swiss Federal Supreme Court decision provides guidance as to the enforceability of English WFOs in Switzerland.[1] Of particular interest in the case was the question of whether a party can apply for a mere declaration of enforceability without actually seeking to enforce the WFO against specific assets.

WFO enforcement in Switzerland

In Switzerland, the enforcement of a WFO is possible under certain conditions. Different legal regimes are applicable depending on whether the WFO has been issued by a Court of an EU Member State or by a non-EU court. While the enforcement of an EU WFO is governed by the Lugano regime, the enforcement of a non-EU WFO is governed by the Swiss Private International Law Act (PILA).

WFO enforcement under the Lugano regime

According to the established practice of the Swiss courts, a WFO pertaining to a civil or commercial matter issued by a court of an EU Member State is characterised as a provisional measure which may, in principle, be declared enforceable pursuant to Articles 38 et seq of the 2007 Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ('LC 2007').[2] The LC 2007 is the successor treaty to the 1988 Lugano Convention on jurisdiction and the enforcement of judgments in civil and commercial matters ('LC 1988'), which contained identical provisions on the enforcement of provisional measures at Articles 25 et seq. Due to the similarity of the provisions, the jurisprudence of the Swiss courts on the application of Articles 25 et seq of the LC 1988 can also be said to apply to Articles 38 et seq of the LC 2007.

An *ex parte* interim order could be enforced under the LC 1988 provided that the defendant

was granted the right to be heard in the underlying proceedings, within a reasonable time, prior to the application for recognition and enforcement in Switzerland.[3] In a previous decision, the Swiss Federal Supreme Court considered that a five business day period to apply for variation or discharge of the *ex parte* WFO was too short.[4] One might conclude that the WFO could have been recognised in Switzerland if the time for varying or discharging the order had been longer, for instance, one month. One might also assume that an *ex parte* WFO which has been confirmed after an *inter partes* hearing would, in principle, be enforceable in Switzerland.

In the recent case mentioned above, the Swiss Federal Supreme Court had to decide on an appeal against a decision of the Zurich Court of Appeal. Initially, the claimants (30 corporations) had requested the First Instance Court to (i) declare a WFO of the London High Court of Justice enforceable, and (ii) to order protective measures against the defendant and a bank in Switzerland, Bank D, at which the defendant held an account. Invoking Article 39(2) of the LC 1988, the claimants sought in particular to limit the defendant's rights to dispose of the funds held in his account with Bank D. The two requests were subsequently subdivided into separate proceedings. The following discusses the first request (ie, the request to obtain a declaration of enforceability). Although the case was decided under the LC 1988 (the WFO having been issued by the High Court before the entry into force of the LC 2007), its reasoning is also applicable to the LC 2007.

The First Instance Court held that a WFO can, in principle, be declared enforceable upon request and after submission of the required documents, provided that the decision is enforceable in the state of origin, the decision has been notified to the defendant, and there are no grounds for refusal according to Articles 27 and 28 of the LC 1988. However, the First Instance Court rejected the claimants' application considering that they had not been able to show an actual interest in obtaining a mere *declaration of enforceability* (as opposed to the actual enforcement) of the WFO in Switzerland, and they appealed to the Zurich Court of Appeal. The Zurich Court of Appeal rejected the appeal for the same reasons and confirmed the decision of the First Instance Court.

In doing so, the Zurich Court of Appeal imposed an additional condition for the declaration of enforceability of a WFO, namely that the applicant had to show 'a legitimate interest' in obtaining a declaration of enforceability of the WFO in Switzerland. Indeed, under Swiss procedural law, a party seeking declaratory relief must in principle demonstrate that it has an actual interest in obtaining such declaratory relief. If the party could be compensated by monetary compensation, the Swiss courts would generally consider that no such actual interest exists. According to the Zurich Court of Appeal, the claimants had no legitimate interest in obtaining a declaratory order unless they applied for the actual enforcement of the WFO in Switzerland. The Zurich Court of Appeal also considered that although the WFO was not legally binding on third parties on Swiss territory, banks in Switzerland would usually comply voluntarily with a foreign WFO, at least for a certain period of time (assuming that the bank had been informally notified of the WFO). According to the Zurich Court of Appeal, this also showed that the claimants had no legitimate interest in seeking a declaration that the WFO was enforceable. It thus concluded that a declaration of enforceability would (*de facto*) not be of any use to the claimant.

The claimants successfully appealed to the Swiss Federal Supreme Court, which held that the LC 1988 does not require that a party seeking a declaration of enforceability of WFO must simultaneously request the enforcement of the order. It further held that the Swiss banks' voluntary compliance with a foreign freezing order is irrelevant to the claimants' right to have the order declared enforceable. The Swiss Federal Supreme Court therefore considered that a party benefitting from an English WFO has a legitimate interest in obtaining a declaration of enforceability from a Swiss court.

WFO enforcement under the PILA

Under Swiss conflicts of law rules (Article 25 of the PILA), a foreign decision must be enforced in Switzerland if:

- the judicial or administrative authorities of the state in which the decision was rendered had jurisdiction; no ordinary appeal can be lodged against the decision or the decision is final;
- and there are no grounds for refusal as specifically listed in the PILA (eg, violation of Swiss public order or violation of *res judicata*).

The enforcement of interim measures pursuant to these rules 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 in the majority of the doctrine but it has not decided on the issue, leaving the question open. In any event, even the authors who consider that a foreign interim measure could be enforced under Article 25 of the PILA are of the opinion that the provision would only apply to *inter partes* interim measures. A non-EU WFO is therefore likely to be unenforceable in Switzerland.

Conclusion

WFOs have become a feared tool, especially for holders of Swiss bank accounts. The recent decision of the Swiss Federal Supreme Court brings guidance to cross-border litigators as to how WFOs can be translated into the Swiss legal order and enforced. The question remains, however, open in relation to a WFO issued by a court of a non-EU Member State.

Notes

1 Decision of the Swiss Federal Supreme Court 4A_366/2011 31 October 2011.
2 It is a parallel agreement to Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation). While the 2007 Lugano Convention entered into force for the EU, Denmark and Norway on 1 January 2010, it has only applied to Switzerland since 1 January 2011 and to Iceland since 1 May 2011.
3 *Bernard Denilauler v SNC Couchet Frères* (C-125/79) [1980] ECR 1553, with effect also in Switzerland pursuant to Protocol 2 of the LC 1988 and LC 2007.
4 Decision of the Swiss Federal Supreme Court 4P.331/2005 of 1 March 2006.

Discovery is sneaking into Swiss litigation

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Discovery is sneaking into Swiss litigation

On 1 January 2011 the new Swiss Federal Code of Civil Procedure (the 'Civil Procedure Code') came into force, signalling a landmark progress for litigation in Switzerland. The Civil Procedure Code replaced the former structure of 26 different procedural regulations on the cantonal (state) level and it harmonised the rules applicable to civil proceedings throughout Switzerland.

New instrument of pre-trial discovery

Along with the enactment of the Civil Procedure Code, new procedural tools were introduced into the Swiss litigation system that previously had been unknown to many litigators practicing in Switzerland. One of these tools enables a form of pre-trial 'discovery', allowing the claimant to obtain evidence prior to litigation if they are able to show on a *prima facie* basis a legitimate interest in obtaining such evidence (Article 158(1)(b) of the Civil Procedure Code). Such legitimate interest may be based on the need to explore the evidentiary basis of the claim and properly assess the merits of a potential lawsuit prior to lodging the claim. For litigators from common law countries this may sound like yesterday's news but, in Switzerland prior to 2011, the pre-trial gathering of evidence had been possible only in cases in which there was an imminent risk of evidence becoming unavailable prior to the (late) evidence-taking stage of the proceedings. In such a situation, for instance if a witness was seriously ill and in danger of dying before his/her testimony would normally be taken, the claimant was entitled to request the securing of evidence at a pre-trial stage. This previously very limited form of obtaining evidence at the pre-trial stage has now been expanded.

The evidence proceedings in a Swiss litigation normally take place after the pleading stage, that is, after the parties have each submitted statements on the merits of the case. This means that in principle the claimant has to file their lawsuit on the basis of the information at their disposal when filing the suit, without having access to the evidence in possession or control of the other party. In view of this basic set-up, the new instrument of pre-trial discovery would appear to represent a revolutionary development and a most helpful tool in the

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