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Enforcement of U.S. Judgments in Switzerland

By

Michael Donev, *Esq.*

One question often comes to mind to many Americans who have chosen Switzerland for the asset management and custody of their wealth. How safe actually are their Swiss assets? If a plaintiff obtains a favorable judgment in the United States and accesses money from the defendant's domestic accounts, would it be the same with respect to the Swiss bank account? The answer is straightforward. In order to reach the defendant's/debtor's assets in Switzerland, the plaintiff or creditor needs to have the American judgment recognized and enforced in Switzerland. This article examines the general legal implications and issues surrounding the enforcement of American judgments in a Swiss court.

Introduction and Background

There are many reasons why U.S. investors trust Swiss independent managers with their asset management needs and the Swiss private banks for their custodial services. The Alpine country offers benefits that make it very attractive as a destination for safekeeping and deposits not only for Americans, but also for individuals around the world. As a major financial center with more than 250 banks with an aggregate balance sheet total of more than 3 trillion Swiss francs, a considerable part of which belongs to non-domestic clients, Switzerland is a hub for global wealth management business.[1]

With its multi-generational traditions of banking and wealth management, one of the oldest and strongest currencies in the world, stable political environment, and an uncompromising legal system, Swiss banking has and continues to be the top choice for custodial services.

Depending on the reasons for seeking asset protection in the first place, whether it's business liability, frivolous lawsuits, creditors, or spouse or business partner protection, one may choose one of three structures – domestic, international, or a mixture of both. The domestic options include life insurance policies and annuities or instruments such as domestic asset protection trusts ("DAPT"), LLCs, family limited partnerships ("FLP"), just to name a few. With respect to the international option, offshore trusts in jurisdictions such as the Cook Islands, Nevis, and the Cayman Islands may be requisite in order to protect one's assets from vultures and frivolous lawsuits. Finally, a hybrid between those options may be best for some who want to add an extra layer of asset protection – the more complex the structure, the more hurdles there are and less chances of getting to the underlying assets. An example of that is a domestic LLC, an offshore trust in the Cook Islands and an account in Switzerland.

[1] Gion Christian Casanova, *Switzerland: Freezing Orders and Asset Tracing*, Global Restructuring Review (2019).

swisspartners
Advisors Ltd.
Am Schanzengraben 23
P.O. Box | CH-8022 Zürich
Phone +41 58 200 0 800
toll free Phone US +1 888 772 5 830
info@swisspartners-advisors.com
SEC file No 80169940 | CHE-114.529.632
swisspartners-advisors.com

Because of this, Switzerland is a common place for the enforcement of foreign judgements and arbitral awards. Despite this fact, however, Switzerland has remained generally favorable to debtors.[2]

First, it is important to note that Switzerland is not a common law jurisdiction. Its civil code system is different in procedures and methodology of adjudication than those jurisdictions based upon the English common law. One major distinction is that in enforcement proceedings, Swiss law distinguishes between non-monetary claims, for example specific performance, and monetary claims, i.e. payment of money.[3] The distinction is material in fact as the non-monetary claims are subject to the Swiss Code of Civil Procedure ("SCCP") whereas the monetary claims are subject to the Swiss Debt Collection and Bankruptcy Act ("DCBA").[4] In addition, the recognition and enforcement of foreign judgments in Switzerland is generally governed by the Swiss Private International Law Act ("PILA") unless there is an applicable international treaty such as the Lugano Convention[5] or in case of an arbitral rewards, the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[6] For example, if an application is submitted for recognition and enforcement of a U.S. court judgment containing monetary claims, the applicable Swiss law would be PILA in combination with the DCBA because the U.S. is not a party to the Lugano Convention and the request is for a judgment and not for an arbitral award. If the request for recognition and enforcement is for an arbitral award for specific performance, then the PILA would not apply and the New York Convention together with the SCCP would govern.[7]

The Swiss law is quite extensive when it comes to defining what constitutes a judgment. A foreign decision is defined as any decision made by a judicial authority acting *de jure imperi*. It is irrelevant whether the authority is judiciary, administrative or even religious.[8] The only relevant point is that the decision must be final and not eligible for an appeal. This is further explained below in the section Enforcement.

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[2] André Brunschweiler, Sandrine Giroud, Deborah Hondius, *Enforcement of Foreign Judgments and Arbitral Awards in Switzerland: Cracking One of the World's Safe Boxes*, International Law Practicum, A publication of the International Section of the New York State Bar Association, Vol. 31, No. 2, pg. 82 (2018).
[3] *Id.*
[4] *Id.*
[5] Signatories to the 2007 revised Lugano Convention on Jurisdiction, Recognition and Enforcement of Judgments in Civil and Commercial Matter are the Swiss Confederation, the European Community, the Kingdom of Denmark, the Kingdom of Norway, and the Republic of Iceland.
[6] Aurelie Conrad Hari, Saverio Lembo, *The International Comparative Legal Guide to: Enforcement of Foreign Judgments 2018*, 3rd Edition, A practical cross-border insight into the enforcement of foreign judgments, Chapter 34 Switzerland (2018).
[7] Urs Feller, Marcel Frey, *Enforcing foreign judgments in Switzerland*, Prager Dreifuss, pg. 2 (2015).
[8] Hari, *supra* note 6, at 188.

Attachment

Before proceeding to the steps of enforcement, it is necessary to address the issue of attachment. In a case where an applicant/creditor seeks to recognize and enforce an already rendered U.S. judgment against a respondent/debtor, whose assets are in a Swiss bank, it is in the creditor's interest to secure his or her monetary claim by attaching the debtor's assets. In order to obtain a civil attachment in Switzerland, the creditor must demonstrate *prima facie* that (1) creditor has a claim against the debtor, (2) there are grounds for attachment in accordance with the DCBA[9], (3) there are assets in Switzerland that belong to the debtor. This gives the element of surprise to the creditor because the application for attachment is done on an *ex parte* basis and the debtor will only be informed if the attachment is successful.[10] However, once the attachment is placed, it will be applicable only to the funds in the account at the time of the attachment, but not to any funds that have been added to the account after the attachment has been placed.[11]

There are two hurdles that the applicant has to go over to secure the attachment – bank privacy and the prohibition of "fishing expeditions". Under Swiss law, the so-called "searching attachments" or "fishing expeditions" are not allowed.[12] Requests for attachment not sufficiently identifying the assets of the debtor are prohibited, thus stifling those whose goal is finding out whether the debtor has assets in Switzerland.[13] Moreover, creditors or plaintiffs chasing after debtors without verified information of an existent Swiss bank account cannot turn to a public register because there is no register of bank accounts in Switzerland due to bank privacy laws.[14] Also, creditors or plaintiffs cannot get information concerning the debtor's bank because the Swiss banks will only acknowledge the existence of an account and the funds therein after the time for appeal of the attachment has passed.[15] There are limited public sources that may be used for searching of assets such as the commercial register, Swiss Official Gazette of Commerce, land register, debt enforcement and bankruptcy register, and the Swiss aircraft and car registries.[16]

Furthermore, the attachment is limited to the assets that legally belong to the debtor. When it comes to assets that are legally owned by a shell company, attachment may be a challenge.[17] In order to get an attachment of assets owned by a shell company, the creditor must first pierce the corporate veil by proving the debtor is in control of the shell company, he/she shares *de facto* economic identity with it, and that the use

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[9] Brunschweiler, *supra* note 2, at 82; DCBA, Article 271 (1)(6) foreign judgment or arbitral award constitutes ground for enforcement.
[10] *Id.*
[11] *Id.* At 85.
[12] *Id.* at 84.
[13] *Id.*
[14] *Id.* at 85.
[15] *Id.*
[16] *Id.*
[17] Casanova, *supra* note 1, at 4.

of the shell company is deemed abusive.[18] Under Swiss law, abusive use is when the corporate body is involved with the circumvention of legal provisions, non-fulfillment of contracts, or obvious infringement of third party legitimate interests.[19]

Another way the Swiss law protects from unjustified attachments is by allowing the debtor to submit his or her position to the court in advance of a possible attachment request or other *ex parte* proceedings.[20] This instrument is called a *protective brief* and will only be communicated to the creditor/plaintiff when the attachment is formally requested.[21] This allows the respondent to prepare an argument of defense and the court to look at it *before* the attachment request has been made. The length of validity of the protective brief is six months after it has been filed.[22] If, after that time, no request for attachment has been filed, the respondent must re-submit the protective brief.

Enforcement

There is a distinction between recognition and enforcement of a foreign decision in Switzerland. Recognition is the natural prerequisite of enforcement. Hence, a decision may be recognized but not enforced and, in some cases, depending on applicable law, a decision may be automatically recognized when the party is requesting enforcement.[23] This is a key element when addressing the issue of *res judicata* (the Latin term for "a matter [already] judged"). When recognition is assessed by the Swiss court as a pre-judicial question in the context of an application for enforcement of the foreign judgment, the decision would not carry a *res judicata* effect.[24] Alternatively, if the recognition of the judgment is the subject matter of the application to the court, not only a pre-judicial question, the decision would trigger *res judicata*.[25]

In order for a foreign judgment that comes from a non-Lugano Convention member state (the U.S. for example) to be recognized in Switzerland, PILA Article 25 provides a three-pronged criteria that needs to be met: (1) the foreign authority that issued the decision had jurisdiction, (2) the decision is final or it is no longer subject to ordinary appeal, and (3) there are no grounds for denial as provided in Article 27 of PILA.[26] According to Article 27, grounds for denial include when the decision is manifestly incompatible with Swiss public policy, improper notice, i.e. service of process, the decision is against fundamental principles of Swiss procedural law, or the dispute is subject to a pending or completed Swiss proceeding.[27] With respect to prong number

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[18] *Id.*
[19] *Id.*
[20] Brunschweiler, *supra* note 2, at 85.
[21] *Id.*
[22] *Id.*
[23] Hari, supra note 6, at 189.
[24] *Id.*
[25] *Id.*
[26] *Id.* at 188.
[27] *Id.*

two (2) of Article 25 of 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 that the decision is final.[28]

There are not many cases brought from the U.S. for enforcement in Switzerland. However, those cases brought for recognition and enforcement by a creditor are often entered in default by a U.S. court because the defendant did not appear in the proceedings. In those cases, the debtor invokes Article 27(2)(a) that he or she did not receive proper service of process in combination with Article 29(1)(c) that the applicant did not produce evidence to the Swiss court that the defendant was duly notified and was given an opportunity to present its defense before the U.S. court.[29]

This is demonstrated by case *4A_120/2015* of the Swiss Federal Supreme Court.[30] There, a U.S. court rendered a default judgment against a defendant/debtor and ordered him to pay $1.4 million to the plaintiff. The plaintiff/creditor filed an application for recognition and declaration of enforceability in Switzerland with the District Court in Lausanne, which refused to recognize the judgment. The Federal Court for the Canton of Vaud confirmed the District Court of Lausanne's decision and the Swiss Federal Supreme Court also confirmed and dismissed the appeal before it. The Swiss Federal Supreme Court looked at whether the requirements under Article 25 of PILA were fulfilled. The Court provided that since the case for recognition was a default judgment, Articles 27(2)(a) and 29(1)(c) of PILA must be satisfied. The Court opined that not only the summons for the hearing in the U.S. but also the service of process must have been duly served. Since it was up to the complainant who had submitted the application for recognition and declaration of enforceability to prove that the defendant was duly served, and because the documents required under Article 29(1)(c) had not been produced in this regard, the Federal Supreme Court rejected the requested recognition and declaration of enforceability.

Thus, the Swiss Federal Supreme Court looks closely at the requirements of PILA when assessing whether to enforce a U.S. default judgment. The creditor in the above case did not produce the necessary documents to show that service of process and summons were duly served on the defendant/debtor as provided in the articles of PILA and the Court dismissed the case in favor of the debtor.

It is explicitly stated in Article 27, paragraph 3 of PILA that a foreign decision may not be reviewed on the merits by a Swiss court. Moreover, if there is a conflicting Swiss law or precedent, the Swiss court will not take it into consideration unless the law or precedent is within the realm of Swiss public policy applicable to the recognition and enforcement of foreign decisions.[31] Essentially, the Swiss courts do not have much room for interpretation or discretion in their analysis of recognition and enforcement

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[28] Feller, *supra* note 7, at 5; Swiss Federal Act on Private International Law (PILA), Article 29(1)(b).
[29] *Id.*
[30] *4A_120/2015*, Swiss Federal Supreme Court, (The names of the parties are redacted).
[31] Hari, *supra* note 6, at 190.

of foreign decisions.[32] With respect to the arguments based on public policy, the Swiss courts tend to have restrictive approach and the violation of public policy must be gross.[33] In other words, the courts favor as much recognition as possible.

In *Rostuca Holdings v. Polo and Cour de Justice du Canton Geneve*, the plaintiff sued the defendant, Roberto Polo, in the United States District Court for the Southern District of New York for the reimbursement of funds he was managing.[34] The defendant, a U.S. citizen domiciled in the U.S., was properly served but did not appear in the proceedings. The court entered a default judgment in favor of the plaintiff, ordering Mr. Polo to pay $60.9 million. Rostuca Holdings successfully attached the defendant's assets located in Geneva and initiated enforcement proceedings. Both, the first instance court and the appellate court in Geneva ruled in favor of the defendant stating that the U.S. judgment violated Swiss public policy because the U.S. court did not rule the case on the merits and the decision contained no reasoning. The Swiss Federal Supreme Court overturned the decision of the lower courts stating that the public policy exception applies only when the foreign judgment conflicts with the sense of justice in an intolerable manner and the burden of proof lies with the defendant. The Court reasoned that lawful service of process, fair progression of the proceedings, and the right of parties to voice their case are among the fundamental principles protected by Swiss law and that in order not to create legal uncertainty, judges should apply the public policy exception only in rare situation since a foreign court has already settled the legal dispute abroad. In this case, the defendant was properly notified that a default judgment would be entered against him if he did not appear in the proceedings in New York. The defendant knew that refusing to follow the order of the District Court would result in a default judgment without a reasoned opinion, and, by choosing not to appear, he accepted the circumstances. Thus, withholding recognition in this case would simply favor the party who defaults abroad, and therefore, would be arbitrary.

Rostuca Holdings v. Polo demonstrates that the public policy argument under Article 27(1) is not an easily satisfied defense and the Swiss Federal Supreme Court tends to dismiss it. The Court stated that the burden of proof lies with the debtor to show that great injustice was done towards him or her in a sense that is *intolerable* and should be overturned. A high threshold is placed here in order to avoid legal uncertainty in future claims.

There are also substantive grounds that allow the debtor to challenge the enforcement of a pecuniary claim. The foreign decision will not be enforced if (a) the debt has already been totally or partially paid, (b) the statute of limitations has already passed, or (c) the creditor has been granted relief.[35] On the other hand, in cases of specific performance, those can be challenged on the basis of (a) the obligation is subject to a

[32] *Id.* at 189.
[33] *Id.*
[34] *Rustica Holdings v. Polo and Cour de Justice du Canton Geneve*, ATF 116 II, JT 1992 II 82, Geneva (1992).
[35] Hari, *supra* note 6, at 189.

condition precedent, (b) the performance is subordinated to a counter-performance, (c) a set off has occurred, or (d) the statute of limitation has passed.[36] With respect to the statute of limitation period, under Swiss law this is a matter of substantive and not procedural law.[37] Hence, the court would only look whether the limitation period has passed in the country where the foreign judgment was rendered, and if so, it would consider the judgment non-enforceable.[38]

With respect to the question of the applicant's connection to Switzerland, there is no particular requirement, however, a Swiss court is likely to deny the recognition of a foreign judgment if the applicant has no interest in recognizing the judgment in Switzerland. Essentially, the applicant should be able to demonstrate that he or she has a legitimate interest in a recognizing the judgment in Switzerland.[39]

Conclusion

In conclusion, the process of enforcing U.S. judgments in Switzerland is not based on the review of the case on its merits. Rather, Swiss courts follow a process that entails specific requirements that have to be met by the parties involved and procedures they must strictly follow. If the case contains monetary claims, the DCBA governs in combination with PILA, which requires that the applicant proves that the foreign authority had jurisdiction over the matter, the decision is final, and there are no grounds for denial. As shown in *Rostuca Holdings v. Polo*, the public policy argument has a high threshold and the defendant has to prove the decision violates the sense of justice in an intolerable manner. On the other hand, in case of default judgment, as seen in case *4A_120/2015*, if the applicant does not provide evidence that the defendant was duly served service of process and properly notified of the court proceedings, recognition will not be granted and the case will not be enforced.

The bottom line is that recognition and enforcement of U.S. judgments in Switzerland is complex work that needs to be carried out by a Swiss lawyer who is familiar with the civil procedure and applicable law of the canton. Because Switzerland is a top choice for custody and asset management services, the underlying funds of many estate planning structures are kept in Swiss banks and managed by Swiss asset managers. The more complex those structures, the more hurdles a plaintiff would face, i.e. more jurisdictions in which to pursue enforcement and lower chances of piercing the corporate veil. Factors such as time, the expense involved, and the effort that needs to be made have to be carefully taken into consideration in order for the ends to justify the means. Therefore, it is only in rare situations that U.S. plaintiffs take on the onerous task of brining the decision to Switzerland instead of settling with the defendant in the U.S.

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[36] *Id.*

[37] Dieter Hofmann, Oliver Kunz, *Enforcement of Foreign Judgments in Switzerland*, Walder Wyss, Globe Business Publishing Limited (2020).

[38] *Id.* at 5.

[39] Hari, *supra* note 6, at 188.