

Enforcement of judgments in civil matters in Switzerland

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1. Introduction

We all know this situation: We have finally won a judgment against a difficult defendant. And now, the defendant does not want to pay or – which is even worse – cannot pay. In a national case you certainly know all the steps your law offers in order to protect your client from getting into such a situation.

But what do you do if the defendant debtor lives in Switzerland or has at least assets in Switzerland? If he is a business debtor or a wealthy private one, you can be sure that he has one “small” bank account either at the UBS, CS, Bank Sarasin or another well-known name. This may not be at the headquarters but could be in one of the many branches.

2. International conventions and statutes

As the list of participants shows, we are today a truly international community: I counted 19 different states. In terms of enforcement of judgments in Switzerland your countries have to be divided into three groups:

- Firstly: The members of the European Union, such as the UK, Germany, Austria, Italy, Spain, Belgium, Cyprus, Hungary, Sweden, Poland, the Netherlands and Finland.
- Secondly: The states which are still members of the EFTA (European Free Trade Association). Of the remaining four members we have today only Switzerland.
- Thirdly: And the rest of the world: The United States of America, India, Turkey, South Korea, Guernsey and the Isle of Man.

For the first two groups the so-called **Lugano-Convention** is applicable. The Lugano-Convention is more or less congruent with the Brussels Convention, which was converted into a European regulation in 2002. The Lugano-Convention has its name from an attractive Swiss town, where this Convention was negotiated amongst the member states. Lugano is in the southern part of Switzerland near the Italian border.

Although we are not an EU-Member, Switzerland has adopted in many fields and in different forms the European Law. Unfortunately, so far the Lugano-Convention has not been adjusted to the latest version of the European enforcement statute.

All the other countries which are represented today do not have any international enforcement-agreement with Switzerland. Therefore enforcement is ruled by national law. For 20 years Switzerland has had a modern statute of **Private International Law and Procedural Law (IPR)**. Similar to most European countries we accept any foreign judgment, if the given court had jurisdiction according to the Swiss rules and certain formal requirements are met (the defendant has to be given notice properly of the process et.al.).

Unless the judgment violates the essential principles of Swiss law (ordre public) it may not be reviewed on the merits. And furthermore Swiss law does not require that the foreign state grants reciprocity and accepts Swiss judgments under the same circumstances.

As we have seen, the requirements of enforcement are in general ruled either by the Lugano-Convention or the Swiss Code of International Private Law. The **procedure of enforcement** is a different matter. No less than three bodies of law are applicable:

- For money judgments there is a federal law, the Swiss debt enforcement and bankruptcy law (SchKG).
- For the other decisions the cantonal procedural law applies. Switzerland is a federal state with 26 little states which are about as autonomous as the states in America. The procedural law is – at least today – still cantonal law.
- Within the scope of the Lugano-Convention the general rules are given by this treaty itself (art. 31 ff.). But the details of the procedure are ruled by the federal and cantonal enforcement laws.

This sounds and is in fact rather complicated. In future it will become slightly easier when the unified Swiss code of procedural law comes into force, which is now in preparation by the legislator. Instead of 26 enforcement procedures we will then have only one.

3. Examples

Let us now take four examples of judgments which are rendered in some of the countries you come from:

- A German money judgment of a Berliner Landesgericht concerning 300'000 Euro, which is already enforceable although an appeal against the judgment is still available.
- An American judgment of a federal court in New York against a Swiss knife manufacturer. The venue was based on “doing business” of the defendant in the United States. Part of the claim consists of punitive damages for several million US dollars.
- An Indian interim injunction of a commercial court in New Delhi, which forbids a Swiss-based company to sell a product in India. We assume that the venue of India is given by a prorogation of jurisdiction by the parties.

- And finally a so-called “authentic instrument” issued by an Italian notary in Rome for 100'000 Euros (vollstreckbare öffentliche Urkunde). In most European countries the parties of a contract can agree that the creditor can enforce a given claim of a contract without first going to court. It only needs a formal act by a notary. If the defendant later wants to object to this claim he has to go to court himself.

4. Enforcement against a debtor domiciled in Switzerland

4.1.Judgments of a European state

Let us begin with the **German money judgment from Berlin**. This is an easy case. Germany is a member of the Lugano-Convention and therefore the enforcement is ruled by this international contract. According to art. 31 it is sufficient if the judgment is enforceable even though an appeal is still pending.

The creditor has basically two possibilities to choose from:

- **He can file an ordinary enforcement procedure** according to the federal enforcement statute, the “SchKG”. This procedure begins with an order of payment addressed to the debtor.
 - If the debtor does not object within 10 days the creditor can already ask the enforcement office to seize the debtor's assets or if the debtor runs a business file a motion for bankruptcy.
 - But if the debtor does not accept the payment order the creditor has to initiate a summary proceeding, where the defendant can dispute the requirements of enforcement.
 - If the creditor succeeds, the next step is either seizing the debtor's assets or bankruptcy of a business debtor.
- **Secondly, he can ask the Swiss court to authorise** the enforcement of the judgment (so-called “Exequatur”-procedure) according to art. 31 of the Lugano-Convention. If the court grants the enforcement, then the defendant can appeal and dispute the enforcement. If the creditor wins again, the next step will be a payment order, which leads finally to the seizure of the debtor's property or bankruptcy.

Normally, I strongly recommend the second procedure. This has the big advantage that you can ask for a freezing order already after the court authorises the enforcement before the defendant has had an opportunity to answer (art. 39 LC).

The Swiss freezing order according to art. 271 SchKG (as a part of the enforcement procedure) is a very effective tool for the creditors.

- You may be able to get such an order within 10 days after filing a motion.

- If the debtor is a company and not an individual, you freeze all the debtor's assets even if he needs them to carry on his business.

But this tool can also be tricky. First of all the court will only grant a freezing order if you are able to indicate the assets which you want to have seized and prove that these assets belong to the debtor. For example: If you want to freeze an account in a Swiss bank you have to have a letter or another document where this bank account is mentioned. If you are not in possession of such a document you may ask a private detective for assistance.

Let's turn now to the so-called "**authentic instrument**" from **Italy**. Even this unusual title will not cause any problems. The Lugano-Convention makes the international enforcement very easy. According to art. 50 of the Convention this title can be enforced in Switzerland like an ordinary judgment. A disputed question is where the defendant can bring up his counterclaim if he wants to challenge this title. In my opinion the defendant should have a forum here in Switzerland.

4.2.Judgments of a non European state

Now we want to look at the **American judgment**. The United States are of course not a member of the Lugano-Convention. Therefore the Swiss Code of International Private Law is applicable. The American judgment mainly causes two problems: The US-court needs to have had jurisdiction over the Swiss knife manufacturer according to Swiss law and the punitive damages judgment could violate the essential principles of Swiss law (so-called *ordre public*).

If a defendant has domicile in Switzerland such as the knife manufacturer, we accept foreign judgments more or less only if the foreign forum was chosen by both parties or if the defendant has a subsidiary in this country. "Doing business", the classical venue for a US court, would not be sufficient. Therefore the enforcement of the US-judgment would fail. Furthermore, the US-judgment could violate – as I have already mentioned – the Swiss "ordre public". So far the Swiss Supreme Court, the federal court in Lausanne, has not taken a clear view about punitive damages. But according to the majority of scholarly opinions and some cantonal cases, punitive damages judgments are acceptable in general. But the amount of the money judgment has to be reduced to the amount of damages which the plaintiffs have been proved to have suffered.

What about the **interim injunction from India**? Unlike the Lugano-Convention the Swiss Code of International Private Law does not say expressively whether or not interim remedies from abroad could be enforced in Switzerland. Some scholars (including myself) and a few cantonal decisions suggest that this should be possible under the same circumstances as normal judgments. The Indian

court has jurisdiction over the Swiss company because – as we have supposed in our case – the forum was chosen by the parties.

5. Enforcement against a debtor domiciled abroad

Until now we have always looked at cases where the defendant was domiciled in Switzerland. But an enforcement of a foreign judgment in Switzerland can also make sense if the debtor has property in this country, such a house in St. Moritz or a bank account in one of the numerous Swiss banks.

The requirements of enforcement and the ways of procedure are more or less the same as if the debtor lives in Switzerland. There is only one major difference: You can only enforce the judgment if you are able to get a freezing order according to art. 271 SchKG. Otherwise you do not have a venue for filing an enforcement procedure. In other words: You have first to seize assets of the debtor. This then gives you a basis for an enforcement procedure.

6. Recent Developments of national and international enforcement law

Europe is now heading towards a unified procedural law. Apart from the enforcement statute, the former Brussels Convention, I would like to mention the following recent regulations:

- The regulation on insolvency proceedings of 2000 (No 1346/2000),
- The regulation on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters of 2001 (No 1206/2001),
- The so-called “Brussels II Regulation” concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility of 2003 (No 2201/2003),
- The regulation of a new European Enforcement Order for uncontested claims of 2004 (No 805/2004).
- Most recently the EU has enacted a regulation creating a European order for payment procedure of 2006 (No 1896/2006), which will come into force by 2008.

Switzerland has only adopted the Brussels Convention in the form of the Lugano-Convention. All the other European regulations are not applicable in Switzerland. This certainly raises the question whether this isolation from the European law could finally affect the economy in Switzerland. In my opinion we should at least somehow adopt the EU-regulations concerning international insolvencies. The Swiss rules on handling international insolvency cases are far too complicated and not efficient. If a foreign insolvency trustee wants to take a

single legal action against a debtor domiciled in Switzerland, a very expensive insolvency procedure has to be started.

7. Conclusion

Generally spoken, in Switzerland foreign judgments are widely accepted and relatively easy to enforce. This is certainly the case within the scope of the Lugano-Convention, – that is to say for judgments from a European state. For judgments from any other state an enforcement is also possible. But especially the requirement that the foreign court need have jurisdiction in the view of Swiss law sets limits to recognition and enforcement. A very effective tool to save the results of the enforcement activities is the freezing order according to art. 271 SchKG.