

This chapter is from **Enforcement of Money Judgments**.  
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## Switzerland

by

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## Switzerland

### I. PRESENT ATTITUDE TOWARD ENFORCEMENT OF FOREIGN MONEY JUDGMENTS

#### A. Describe the receptiveness of your government (including courts) toward enforcement of foreign money judgments.

In Switzerland all enforcement proceedings are governed by federal law. The legal basis is the unified Swiss Code of Civil Procedure (CCP).<sup>1</sup> The CCP provides that a decision related to the payment of money is enforced in accordance with the Debt Collection and Bankruptcy Code (DCBA).<sup>2</sup> While the procedural law is thus uniformly applied in Switzerland, the judicial organization is regulated by cantonal law.

The enforcement of a foreign money judgment is governed by international treaties, if any, and Swiss statutory law, in particular the Swiss Private International Law Act (PILA) as well as the statutes mentioned above. Switzerland is a signatory to a number of bilateral and multilateral treaties governing the recognition and enforcement of foreign judgments. In practice, the most relevant multilateral treaty is the Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial (hereinafter “Lugano Convention”).<sup>3</sup> The Lugano Convention is a multilateral treaty to which all countries of the European Union and Norway as well as Switzerland are signatories.<sup>4</sup> The Lugano Convention of 2011, which entered into force on 1 January 2011 and replaced the former Lugano Convention of 1988 is, in essence, the equivalent of the Brussels Regulation (Council Regulation (EC) No. 44/2001 of 22 December 2000) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. Furthermore, Switzerland is party to a number of bilateral treaties on recognition and enforcement in civil and

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<sup>1</sup> Swiss Civil Procedure Code of 19 December 2008 (Civil Procedure Code, CCP [“Schuldbetreibungs- und Konkursgesetz, SchKG]), 272.

<sup>2</sup> Debt Collection and Bankruptcy Act of 11 April 1889 (DCBA), 281.1; art. 335 para. 2 DCBA.

<sup>3</sup> Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters of 30 October 2007, SR 0.275.12.

<sup>4</sup> STAEHELIN ADRIEN / BAUER THOMAS / STAEHELIN DANIEL (Hrsg.), Art. 1-158 SchKG, Bundesgesetz über Schuldbetreibung und Konkurs (hereinafter BSK SchKG-“writer“); BSK SchKG-STAEHELIN, art. 80 N 64.

commercial matters, in particular, with Germany, Austria, Belgium, Spain, Italy, the Principality of Liechtenstein, and Sweden<sup>5</sup>.

In the absence of an applicable bi- or multilateral convention, the recognition and enforcement of judgments in Switzerland is ruled by the PILA.<sup>6</sup> This is, e.g., the case with monetary judgments rendered by United States courts. In case the applicable convention or the PILA are silent, the fallback rules are art. 335 et seq. CCP.<sup>7</sup>

The request to declare the judgment enforceable can be combined with a request to freeze certain assets in Switzerland, be it during the enforceability proceedings or after the judgment has been declared enforceable. Attachment orders are subject to specific preconditions set forth by Swiss law.<sup>8</sup> Swiss-wide attachment orders are granted at the latter, as well as at a person's domicile or a company's main seat.<sup>9</sup> Debt collection proceedings relating to *foreign persons or entities* can only be brought at the place of the foreign person or entity's permanent office in Switzerland, limited to debts incurred by that office. In addition, debt collection proceedings can be brought in Switzerland if the parties chose a Swiss place of performance for their contractual obligations.<sup>10</sup>

Arbitral award, however, are enforced in Switzerland under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the "New York Convention").<sup>11</sup>

**B. Briefly describe recent illustrative attempts, whether successful or unsuccessful, to enforce a foreign money judgment in your country, particularly with regard to enforcement of any judgments from United States courts.**

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<sup>5</sup> For the entire list of international treaties relating to the enforcement of money judgments in Switzerland, see <http://www.admin.ch/opc/de/classified-compilation/0.27.html#0.276>

<sup>6</sup> Switzerland's Federal Code on Private International Law of 18 December 1987 (PILA), 291.

<sup>7</sup> See art. 335(3) CCP.

<sup>8</sup> See also para. II.A.1. below.

<sup>9</sup> Art. 46 et seq. DCBA.

<sup>10</sup> See also Thomas Müller, Recent and future developments in Swiss attachment law, Dispute Resolution 2010/11, at [www.practicallaw.com/1-502-2505](http://www.practicallaw.com/1-502-2505)

<sup>11</sup> See art. 194 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, SR 0.277.12.

In a recent judgment the claimant (creditor) submitted a payment order rendered by a Warsaw court to a Swiss court of first instance, requesting a declaration of enforceability. The Swiss court of first instance held that the payment order were not a writ of summons according to the Lugano Convention arguing that it was not clear whether the defendant had been served properly. The Swiss Federal Court overruled this decision and held that the payment order was a writ within the meaning of the Lugano Convention and declared the foreign judgment enforceable.<sup>12</sup>

In another recent case, the claimant (creditor) applied for a declaration of enforceability of a judgement of a US court with the District Court of Zurich, Switzerland. The respondent (debtor), in contrast, maintained that the foreign judgment would be contrary to public policy because it allegedly was not based on proper legal grounds. The Swiss courts, however, rejected this objection. They held that the decision did not violate Swiss public policy or elementary procedural rights.<sup>13</sup>

In its decision 139 III 135 E. 4, the Swiss Federal Tribunal further held that a non-Lugano judgment constitutes a final decision within the meaning of art. 81 DCBA. The court seized with the attachment matter is entitled to grant exequatur based on a *summary legal review* of the case.

These three court cases illustrate that Swiss courts do not easily deny enforceability in case the basic rules set forth in international treaties are respected.

**C. Describe any proposed legislation or other governmental action in your country that could significantly affect the enforcement of foreign money judgments.**

The revised Lugano Convention entered into force on 1 January 2011 and replaced the former Lugano Convention of 1988 which was in force between 1992 and 2010. With this recent revision of the Convention a simple and fast procedure on a euro-international level is

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<sup>12</sup> Decision of the Swiss Federal Tribunal of 7 November 2011, BGer 4A\_372/2011.

<sup>13</sup> Decision of the Swiss Federal Tribunal of 5 June 2008, BGer 4A\_8/2008.

guaranteed with regard to the enforcement of foreign monetary judgments.

Today, no legislation or other governmental action is pending which might affect the enforcement of foreign money judgments.

## II. PROCEDURE TO ENFORCE A FOREIGN MONEY JUDGMENT

### A. General Summary of Procedure

Enforcement of a foreign judgement requires that a Swiss Court has declared the judgement<sup>14</sup> enforceable (so-called “*exequatur*”).<sup>15</sup> Thus, the declaration of enforceability is an indispensable prerequisite for the successful enforcement of the foreign judgment in Switzerland.<sup>16</sup> The enforcement as such is regulated by Swiss federal law (Art. 38 ff. DCBA).

There are different procedures which may be followed to attain *exequatur*. The main procedures are: (i) *exequatur* which can be applied for in a separate *exequatur procedure*. The *exequatur* decision has *res iudicata* effect.<sup>17</sup> (ii) *Exequatur* can further be achieved within the framework of the ordinary *Swiss debt collection procedure* applicable to monetary judgments, in particular by obtaining a definitive dismissal of the objection against enforcement of monetary judgments (so-called “*definitive Rechtsöffnung*”) according to art. 38 et seq. in connection with art. 81 DCBA.<sup>18</sup>

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<sup>14</sup> Please note that under the revised Lugano Convention, a document which has been formally drawn up or registered as an authentic instrument and is enforceable in one State bound by the Lugano Convention (“*public deed*”) shall, in another State bound by this Convention, upon application made in accordance with the procedures provided for in Article 38, et seq., be declared enforceable. Whereas objections of the debtor against the enforcement of such deed are not limited as defences of a debtor in case of a foreign judgment (see BSK SchKG-STAEHELIN, Art. 81 N 23-25 DBCA) and must be immediately evidenced by documents (art. 81(1) and (2) DBCA), in case of foreign public deeds, the provisions in the applicable convention (e.g., art. 57 Lugano Convention) or the PILA apply (see BSK SchKG-STAEHELIN, SchKG, Art. 81 N 28 DCBA).

<sup>15</sup> BSK SchKG-STAEHELIN, Art. 80 N 59 DCBA.

<sup>16</sup> BSK SchKG-STAEHELIN, Art. 80 N 59 DBCA.

<sup>17</sup> BSK SchKG-STAEHELIN, Art. 81 N 31 DCBA.

<sup>18</sup> WALTER GERHARD, Internationales Zivilprozessrecht der Schweiz, 4. ed. (hereinafter “WALTER”), p. 419.

In order to select a specific enforcement procedure, it has to be verified whether the state in which the decision was rendered is a signatory of an international treaty or not.

**1. Briefly summarize the procedure to enforce a foreign money judgment if a treaty provides for enforcement of judgments from the country of origin.**

If the foreign monetary judgement was rendered by a member state of the Lugano Convention, the creditors have basically two options:

First, the creditor may request the exequatur in a separate exequatur procedure as provided under the Lugano Convention<sup>19</sup> which results in a declaration of enforceability in form of an independent judicial decision.<sup>20</sup> Upon receipt of this decision, the creditor can initiate the debt collection proceeding according the DCBA.<sup>21</sup> This procedure allows the creditor to ask for the attachment of assets already after the court has rendered the declaration of enforceability. Hence, the defendant's assets can be secured.<sup>22</sup> However, the competent Swiss court only grants the attachment of assets if the creditor is able to specify the assets and their location and proves with preponderant probability that they belong to the debtor.

Second, according to Swiss federal law,<sup>23</sup> the creditor may enforce the foreign monetary judgment by initiating the ordinary Swiss debt collection proceeding (art. 38 ff. DCBA).<sup>24</sup> Within this legal framework, the court approached by the creditor may issue a declaration of enforceability in the form of a partial award on a preliminary question (see (i) below) or in a separate decision (see (ii) below).<sup>25</sup>

- (i) This procedure is initiated by filing for a debt collection request ("Betreibungsbegehren") against the debtor with the competent cantonal debt collection office ("Betreibungsamt"). The debt collection office serves the debtor with a summons for payment

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<sup>19</sup> Art. 38 (1) Lugano Convention.

<sup>20</sup> WALTER, p. 465 f.

<sup>21</sup> WALTER, p.476

<sup>22</sup> Art. 47 Lugano Convention in connection with art. 271 DCBA.

<sup>23</sup> Art. 81 (3) DCBA, BSK SchKG-STAEHELIN, Art. 80 N 59 DCBA.

<sup>24</sup> Walter, p. 419.

<sup>25</sup> Art. 81 (3) DCBA; BSK SchKG-STAEHELIN, Art. 80 N 68a DBCA.

(“Zahlungsbefehl”). If the debtor contests the claim, he may object to the debt collection within ten days requiring the creditor to seek a court order dismissing the objection (“Rechtsöffnung; judicial annulment of an objection against the execution of a judgment”).<sup>26</sup> In order to get the foreign monetary judgment enforced, the creditor has to submit an application to the competent cantonal court, which is normally the court at the domicile of the debtor. For the procedure of “*exequatur* as preliminary question” the Lugano Convention does not apply<sup>27</sup> and the decision does not unfold its effect outside the ordinary debt collection proceeding.<sup>28</sup> Furthermore, a decision rendered in this proceeding does not have a *res judicata* effect, which allows the creditor in case of an unsuccessful attempt to enforce the foreign monetary judgment in this way to choose a different enforcement procedure.

- (ii) If the creditor seeks to obtain a declaration of enforceability in a *separate decision*, an express request to the competent court needs to be addressed. The court then renders a decision on the enforceability of the award. In that case the application for the dismissal of the debtor’s objection includes a request for declaration of enforceability (joinder of claims).<sup>29</sup>

Even for Lugano Convention cases, however, the second option is used more frequently in Switzerland because an unsuccessful attempt to enforce a money judgment in this procedure does not have a *res judicata* effect (while the situation is less clear under the Lugano Convention). A creditor is not prevented from bringing the enforcement request again at a later stage if his application was rejected in the debt collection procedure. Furthermore, this option may actually accelerate the debt collection because the debt collection proceedings need to be initiated at some stage anyway.

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<sup>26</sup> If the debtor objects to the summons to pay, such objection needs to be set aside in summary proceedings in which the debtor can raise very limited defences (such as documentary proof of the payment of the debt, that the debt is time-barred or that the creditor agreed to a deferral of the payment date).

<sup>27</sup> BSK SchKG-STAEHELIN, Art. 80 N 68a DBCA.

<sup>28</sup> Depending on the status of the debtor, the enforcement process is then continued by the opening of bankruptcy proceedings or by the seizure and the sale of specific assets of the debtor, or the seizure of a part of the debtor’s income. For other claims, the court declaring the foreign judgment enforceable usually determines how these claims are to be enforced.

<sup>29</sup> BSK SchKG-STAEHELIN, Art. 80 N 68 b DBCA.

**2. Briefly summarize the procedure to enforce a foreign money judgment if no bi- or multinational treaty provides for enforcement of judgments from the country of origin.**

If no international convention exists between the country in which the monetary award was rendered and Switzerland, the PILA applies.<sup>30</sup> In order for the foreign monetary judgment to be enforceable in Switzerland, it has to be declared enforceable by a Swiss court.<sup>31</sup> According to art. 25 PILA, a foreign decision is enforceable in Switzerland if three conditions are met: (i) The foreign court rendering the decision had jurisdiction in accordance with the conflict of law provisions of the PILA; (ii) the decision is no longer subject to any ordinary appeal, i.e. is final and enforceable; (iii) the decision is not incompatible with Swiss public policy as defined in art. 27 PILA. Once the foreign judgment has been declared enforceable, the enforcement follows the procedure described above.<sup>32</sup>

**3. What is the expected length of time necessary to enforce a foreign money judgment.**

The time expected for the enforcement of a foreign judgment in Switzerland varies depending on the procedure selected by the creditor and the remedies chosen by the debtor. Generally speaking, the procedure within the *framework of the ordinary debt collection*<sup>33</sup> is *faster* because in case a separate exequatur procedure is chosen, at the end of this procedure, the ordinary debt collection proceeding needs to be initiated anyway. Furthermore, an appeal in the debt collection proceeding does not have any suspensive effect.

**B. Detailed Discussion of Procedure**

**1. Indicate the courts in your country that are competent (i.e., have jurisdiction) to grant enforcement of a judgment.**

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<sup>30</sup> WALTER, p. 420; BSK SchKG-STAEHELIN Art. 80 N 98 DBCA.

<sup>31</sup> Art. 28 CPIL; for a detailed discussion of the enforcement requirements, see section III.

<sup>32</sup> Decision of the Swiss Federal Tribunal of 19 July 1996 (ZR 96/1997 S. 229, 231); WALTER, p. 419.

<sup>33</sup> For the options, see above, FN 28.

The request for declaration of enforceability and consequently, the enforcement of the foreign monetary judgment has to be submitted to the *cantonal enforcement court*.<sup>34</sup> Since the organization of the cantonal court is subject to cantonal law, although the procedure is the same in any canton, the actual title of the competent court may vary from canton to canton. The enforcement can generally be sought in the district in which the *debtor is domiciled*.<sup>35</sup> This is both true under the Lugano Convention<sup>36</sup> as well as under the PILA.<sup>37</sup> If, in contrast, the exequatur is granted within an ordinary debt collection proceeding, the creditor has to lodge his application with the cantonal court at the *place of the debt collection office*.<sup>38</sup>

Under Swiss law, the enforcement of monetary awards can be secured by attachment.<sup>39</sup> Unless the PILA provides for an alternative venue, the obtaining of an attachment order results in the establishment of jurisdiction over the debtor for the *validation of the claim* (so-called “*Arrestgerichtsstand*”, or forum of attachment; see art. 4 PILA) at the place of the attachment (i.e., where the attached assets are located) and where the attachment was granted and executed (art. 272 and 275 DCBA).

**2. Describe the requirements regarding translation and authentication of the documents evidencing the original judgment.**

A party seeking recognition and enforcement of a foreign judgment in Switzerland needs to file the *original final foreign judgment or a certified copy* with the competent court. The documents evidencing the original judgment need to be validated (“apostilled”) by a Swiss Consulate in the country where the decision was rendered. Translation to the *official language* of the respective part of Switzerland (German, French or Italian) will be required.

**3. Indicate whether jurisdiction over the judgment debtor must be obtained by your courts in the enforcement action.**

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<sup>34</sup> WALTER, p. 467 f.

<sup>35</sup> Art. 10 (1) CCP.

<sup>36</sup> Art. 39 Lugano Convention. See also WALTER, p. 467 f.

<sup>37</sup> Art. 339 (1)(a) and (b) CCP, BSK SchKG-STAEHELIN, Art. 80 N 59 DBCA.

<sup>38</sup> Art. 46 (1) and art. 84 (1) DCBA.

<sup>39</sup> See KURT AMONN/FRIDIOLIN WALTHER, Grundriss des Schuldbetreibungs- und Konkursrechts, Berne 2008, §51 N 3.

In Switzerland, the enforcement court has the competence to decide on its own competence over the judgment debtor.<sup>40</sup> No further (in particular: separate) action needs to be taken by the creditor in this respect.

**4. If the original judgment is in a foreign currency, describe whether the judgment need be converted into local currency. [Ed. Note: Indicate how the conversion should be calculated (e.g., exchange rate when judgment awarded, when enforced, or at another time?)]**

The Swiss enforcement system requires the creditor to convert the claim into *Swiss francs*.<sup>41</sup> The conversion has to be conducted by the creditor himself.<sup>42</sup> The determining time factor for the exchange rate is the cash exchange rate on the day the creditor submits the debt collection request to the debt collection office.<sup>43</sup> In case of discrepancies between the day of such request and the time of the effective enforcement of the debt, art. 88 (4) DCBA allows the creditor to convert its claim anew when requesting the continuation of the debt collection upon receipt of the enforcement decision by the court.<sup>44</sup> Such conversion, however, does not alter the fact that the debtor is, in principle, liable to pay the requested amount in the currency in which the claim was awarded. Accordingly, currency fluctuations are usually borne by the debtor.

With regard to foreign exchange control, the situation is more complex. Under the PILA, mandatory foreign provisions may be taken into consideration by the enforcement court. Depending on the circumstances, foreign exchange control regulations may therefore be of relevance. Furthermore, if the parties have agreed on effective payment in a certain currency (so-called “*effectiveness clause*”), under art. 84(2) of the Swiss Code of Obligations, no conversion of the currency of the debt into Swiss francs will occur. Such enforcement proceedings are governed by the CCP.<sup>45</sup>

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<sup>40</sup> Art. 46 (1) and art. 84 (1) DCBA.

<sup>41</sup> Art. 67 (1) para. 3 DCBA; BSK-EHRENZELLER, Art. 67 SchKG N 40.

<sup>42</sup> BSK SchKG-EHRENZELLER, Art. 67 N 40.

<sup>43</sup> BSK SchKG-EHRENZELLER, Art. 67 N 40; BGE 135 III 88, 89.

<sup>44</sup> BSK SchKG-EHRENZELLER, Art. 67 N 40.

<sup>45</sup> See, e.g., SUTTER-SOMM/LÖTSCHER/PESENTI/SEILER/VONTOBEL, *Schweizerisches Zivilprozessrecht*, Zurich 2012, §19 N 1512.

**5. Indicate whether the judgment creditor can receive interest on the original judgment amount regardless of whether the original judgment amount included interest.**

Whether a creditor is entitled to interest on the original judgment amount is determined by the law governing the subject matter, e.g. the underlying contract or tort law. The rate of interest is entirely governed by the foreign judgment or the law applicable on the merits (*lex causae*). Under Swiss law, the creditor is entitled to interest of 5% per annum on its claim.<sup>46</sup> The interest of 5% may be requested from the day on which the debtor was in default.<sup>47</sup>

**6. Indicate whether the successful judgment creditor is entitled to reimbursement of its attorneys fees or court costs incurred in bringing the enforcement proceeding.**

In general, in Swiss legal proceedings the legal costs are borne by the unsuccessful party (“*costs follow the event*”).<sup>48</sup> In allocating the costs, the court may deviate from this rule and take into consideration the specific circumstances of the case (in our case: of the enforcement procedure).<sup>49</sup>

The costs allocated by the court include court fees and reasonable attorney’s fees as set forth under the applicable cantonal and federal fee schedules.

**7. Describe the conditions under which the losing party may appeal your court’s decision whether or not to enforce a judgment.**

The losing party may file an appeal against an unfavorable enforcement judgment rendered by the court of first instance with the competent court of second instance (court of appeal). Normally, the appeal must be lodged within the time limit of thirty days starting upon receipt of the judgment by the parties.<sup>50</sup> However, if the party against

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<sup>46</sup> Art. 104 (1) of the Swiss Code of Obligations (CO; SR 220).

<sup>47</sup> Art. 102 (1) CO.

<sup>48</sup> Art. 106 (1) CCP.

<sup>49</sup> Art. 107 (1) CCP. The court may allocate the costs in deviating from said rule if the creditor has caused lengthy proceedings by initially not complying with the formal requirements of the enforcement procedure under Swiss law.

<sup>50</sup> Art. 321 (1) CCP.

whom enforcement is sought is domiciled in a Lugano Convention State other than the state in which the declaration of enforceability was rendered, the time to file an appeal is two months.<sup>51</sup>

If the appeal is directed against a decision of the enforcement court which has rendered its decision under the Lugano Convention, the court of appeal has full discretion to examine the decision of the court of first instance, i.e., with regard to the assessment of the facts, the weighing of evidence and the application of the substantive as well as the procedural law.<sup>52</sup>

**8. Describe any other procedures which could seriously affect the enforcement action.**

A foreign decision is not recognized in Switzerland if it is contrary to Swiss public policy. Please note, however, that Swiss courts accept a public policy defence only in very rare instances. For example, traditionally, punitive damages are not enforceable in Switzerland.

### **III. REQUIREMENTS FOR ENFORCEMENT OF A FOREIGN MONEY JUDGMENT**

#### **A. General Summary of Requirements**

**1. Assuming the proper procedure is followed as set out in Section II, briefly summarize the requirements which must be met to enforce a foreign money judgment if a treaty provides for enforcement of judgments from the country of origin.**

As mentioned in section II, the enforcement of a foreign judgment requires that it has been declared enforceable by a Swiss Court. The only requirements to attain exequatur under the *Lugano Convention* are (i) that the judgment is enforceable in the State of origin<sup>53</sup> and (ii) that the application for enforcement complies with the formal requirements under the Lugano Convention.<sup>54</sup> To be more specific, under the Lugano Convention, a foreign judgment rendered by a court or authority of a

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<sup>51</sup> Art. 43 (5) Lugano Convention.

<sup>52</sup> Art. 327a CCP.

<sup>53</sup> Art. 38 (1) Lugano Convention.

<sup>54</sup> Art. 53 Lugano Convention.

Convention member state is declared enforceable in Switzerland if the formal requirements of article 53 of the Lugano Convention are met.<sup>55</sup> The party seeking the declaration of enforceability thus must submit the following documents to the enforcement court:

- (i) the original, or an authentic copy, of the judgment rendered by a court of a member state and falling within the scope of application of the Lugano Convention (article 53, Lugano Convention); and
- (ii) the standard form of Annex V satisfying the requirements of article 54 of the Lugano Convention or other documents proving the enforceability of the judgment in the state of origin. In case the enforceability is subject to a security to be provided by the creditor, evidence needs to be provided that such condition has been met.<sup>56</sup>

**2. Assuming the proper procedure is followed as set out in Section II, briefly summarize the requirements which must be met to enforce a foreign money judgment if no treaty provides for enforcement of judgments from the country of origin.**

In the absence of a treaty, the enforcement of a foreign money judgment will be determined in accordance with art. 25 PILA. Under the *PILA*, a foreign decision is recognized as enforceable if three conditions are met: (i) The foreign court rendering the decision had jurisdiction under the *PILA*; (ii) the decision is no longer subject to any ordinary appeal, i.e. is final and enforceable; (iii) the decision is not incompatible with art. 27 *PILA*.

Under this provision, the enforcement of a foreign judgment can be denied if (i) the foreign judgment is not manifestly contrary to Swiss public policy;<sup>57</sup> (ii) the defendant was properly served or has accepted

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<sup>55</sup> Art. 41 Lugano Convention.

<sup>56</sup> There is no need to provide evidence that the judgment was served on the debtor. It may be necessary, however, to provide additional documents if the judgment was rendered in default of appearance of the defendant. In such a case, the applicant must show that the defendant was duly served with the documents that instituted the proceedings or with an equivalent document showing that he or she was enabled to arrange for his defence (article 34(2), Lugano Convention. See sect. III.B.2. below.

<sup>57</sup> Art. 27(1) *PILA*.

the jurisdiction of the foreign court;<sup>58</sup> (iii) the procedure leading to the judgment did not violate basic principles of Swiss law, in particular, the defendant was able to exercise its right to be heard;<sup>59</sup> or (iv) the dispute has not first been pending in Switzerland or has not first been decided by a Swiss court or by a court in a third country the judgment of which could be recognised in Switzerland (*res iudicata*).<sup>60</sup>

For enforceability purposes, the term used for the title of the foreign money judgment is not relevant.<sup>61</sup> It can be said that any foreign money judgment representing a decision binding on the parties qualifies as a judgment within the meaning of the PILA.<sup>62</sup>

In this context, it is to be noted that according to Article 194 PILA, foreign money decisions rendered by arbitral tribunals do not fall within the ambit of the PILA because such decisions are governed by the New York Convention.<sup>63</sup>

## **B. Detailed Discussion of Requirements**

- 1. Describe any requirements of your country with regard to the jurisdiction (i.e., competence) of the court of origin over the parties and subject matter of the original action. [Ed. Note: Indicate whether the jurisdiction of the court of origin must have been based on a ground which can be exercised by a court of your country. Can the defendant submit to jurisdiction or waive rights to protest jurisdiction?]**

Under the Lugano Convention, Swiss courts are *not entitled to review the jurisdiction* of the court in a member state which has rendered the judgment for which enforcement is sought.<sup>64</sup>

In contrast, foreign judgments from countries not bound by a bi- or multinational treaty can only be recognised and enforced if the foreign

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<sup>58</sup> Art. 27(2)(a) PILA.

<sup>59</sup> Art. 27(2)(b) PILA.

<sup>60</sup> Art. 27(2)(b) PILA.

<sup>61</sup> WALTER, p. 385 f.

<sup>62</sup> WALTER, p. 386.

<sup>63</sup> New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (SR 0.277.12).

<sup>64</sup> Art. 35 (3) Lugano Convention; WALTER, p. 440.

court had jurisdiction over the defendant pursuant to the rules set forth in the PILA.<sup>65</sup> This is the case if:

- (i) a provision of the PILA so provides or, in the absence of such a provision, if the defendant had his domicile in the state in which the decision was rendered;
- (ii) in case of pecuniary claims, the parties have submitted by an agreement valid under the PILA to the jurisdiction of the authority that rendered the decision;
- (iii) in case of pecuniary claims, the defendant proceeded to the merits without objecting to jurisdiction; or
- (iv) in case of a counter-claim, the authority which rendered the decision had jurisdiction over the principal claim and there is a factual connection between the principal claim and the counterclaim.<sup>66</sup>

**2. Describe any requirements of your country with regard to notice to the defendant in the original action. [Ed. Note: Must the court of origin have followed your country's service of process rules? Could service have been by mail or publication?]**

The requirements under Swiss law with regard to the notice to the defendant are strict. The Swiss courts take a formal stand on proper service. For judgments by a court of a member state of *the Lugano Convention*, the provisions of the Hague Convention on the Service of Judicial Documents Abroad apply.<sup>67</sup> According to art. 15 of the Hague Convention, the document initiating the proceedings had to be served by one of the forms provided by the local law applicable at the domicile of the debtor. In order to prove that the defendant has been served in a formally correct way, a certificate on the successful delivery must be produced. Serving a notice by mail or publication would therefore not be in compliance with the Convention. Switzerland specifically declared a reservation to the Lugano Convention with

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<sup>65</sup> Art. 25 PILA; WALTER, p. 390 ff.

<sup>66</sup> Art. 26 PILA.

<sup>67</sup> Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial matters (HZUe65), Sr 0.274.131; AS 1994 2809).

regard to judgments given in default of appearance of the defendant (article 34(2), Lugano Convention). This article provides that a judgment given in default of appearance of the defendant cannot be recognised if the defendant was not served with the document instituting the proceedings or with an equivalent document in sufficient time and in such a way as to enable him or her to arrange for his or her defence. Consequently, a default judgment cannot be enforced in Switzerland if the defendant was not properly served in the first place, even if he or she could have appealed against the decision in the country of origin. This needs to be taken into account by the claimant early on in the proceedings.

Failure to adhere to the above service requirements would further qualify as a ground for the courts not to grant enforcement.<sup>68</sup>

For judgments that are *outside* the scope of application of the Lugano Convention, a foreign decision will not be recognized if a party establishes that it was not duly summoned. Hence, the defendant has to prove that the notice was either not served in accordance with the law applicable at the place of his domicile or according to the law of his place of habitual residence. An exception is made when the debtor did not raise a jurisdiction defence during the court proceeding.<sup>69</sup>

Please note that any attempt to serve parties in Switzerland in non-compliance with the Hague Convention is, from a Swiss law point of view, invalid and will make it difficult, if not impossible, to have the judgment enforced in Switzerland. In addition, such an attempt may qualify as a criminal offence under article 271 of the Swiss Penal Code.

### **3. Describe any requirements of your country with regard to finality and non-appealability of the court of origin's judgment.**

A decision rendered by a foreign court of a state bound by the *Lugano Convention* is recognized in Switzerland even if the judgment is not final and executable in the State of origin<sup>70</sup>. Consequently the

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<sup>68</sup> Art. 27(2)(a) PILA.

<sup>69</sup> Art. 27 (2)(a) PILA.

<sup>70</sup> See, e.g., SUTTER-SOMM/LÖTSCHER/PESENTI/SEILER/VONTOBEL, Schweizerisches

Swiss court recognizes the decision even if an ordinary appeal against the judgment has been lodged.<sup>71</sup>

Under the *PILA*, on the other hand, a foreign decision is only recognized in Switzerland if no ordinary appeal can be lodged against the decision or if the decision is final and executable.<sup>72</sup> The decisive factor, therefore, is that the judgment is binding and final. Hence, Swiss courts will not enforce a judgment if an appeal is pending against the court of origin's decision.

**4. Describe the position of your country with regard to refusal to enforce a judgment on grounds of public policy, particularly with respect to whether your courts will refuse to enforce a judgment if the original claim could not have been brought under the laws of your country.**

A final judgment rendered by a foreign court at the place of domicile of defendant will, as a rule, be recognized in Switzerland. However, Swiss Courts refuse the recognition and enforcement both under the Lugano Convention (art. 34 (1) Lugano Convention) as well under Swiss national law (Art. 27 *PILA*) if the foreign decision is contrary to public policy or elementary procedural rights.<sup>73</sup>

Under Swiss law, public policy comprises both material matter and procedural aspects. An important point in the latter regard is the observation of the defendant's right to be heard.<sup>74</sup> A violation of this right, if properly invoked by the debtor, results in the refusal of the recognition of the foreign judgment. Another important aspect is the fairness of the foreign proceedings.<sup>75</sup> Public policy regarding the subject matter (material aspects) of the decisions concerns the content of the foreign decision.<sup>76</sup> As an example, Swiss courts have consistently refused to enforce punitive damages awarded by foreign courts arguing that such damages would be contrary to Swiss public policy.

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Zivilprozessrecht, Zurich 2012, §19 N 1522.

<sup>71</sup> Art. 27 (1) Lugano Convention.

<sup>72</sup> Art. 25 (b) *PILA*; SUTTER-SOMM/LÖTSCHER/PESENTI/SEILER/VONTOBEL, §19 N 1524.

<sup>73</sup> WALTER, p. 397.

<sup>74</sup> Art. 27 (2)(b) *PILA*.

<sup>75</sup> WALTER, p. 405.

<sup>76</sup> WALTER, p. 401.

**5. Describe any requirements of your country with regard to showing reciprocity between the court of origin and your country.**

The recognition of a judgment by a member State of the Lugano Convention does not depend upon reciprocity. The Convention may apply, even if the applicable law does not conform to the law of the contracting State. The same applies under the PILA.

**6. Indicate whether the courts of your country will review the merits of the case before granting enforcement.**

According to the Lugano Convention, Swiss courts are under no circumstances entitled to review the foreign judgment as to the merits of the case.<sup>77</sup> The same applies under the PILA.<sup>78,79</sup>

An exception is made where the recognition of a foreign judgment would be manifestly incompatible with Swiss public policy or if the judgment conflicts with an earlier judgment in the same subject and between the same parties (*res judicata*).<sup>80</sup>

**7. Describe whether the courts of your country will examine if the court of origin applied the same rules of law which a court in your country would have followed had it heard the case originally (i.e., the proper choice of law).**

Swiss courts do not examine whether the court that rendered the judgment applied the same rules of law which a Swiss court would have applied. The “wrong” choice of law under Swiss law is not a basis for declining the enforcement of a foreign judgment. The issue is, however, whether the foreign court had jurisdiction under its own law or not.<sup>81</sup>

**8. Describe whether enforcement of a judgment will be denied if the underlying cause of action is barred under your country’s statute of limitations.**

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<sup>77</sup> Art. 36 Lugano Convention.

<sup>78</sup> Art. 27 (3) PILA.

<sup>79</sup> WALTER, p. 450.

<sup>80</sup> Art. 34 Lugano Convention and Art. 27 (1) and (2) PILA, see question 4 in this section.

<sup>81</sup> See question 1 in this section.

Under Swiss law the statute of limitations is considered to be an issue of substantive, not procedural law.<sup>82</sup> Under the Lugano Convention as well as under the PILA, the statute of limitations is governed by the law applicable on the merits of the case.<sup>83</sup> Hence, a foreign judgment can be enforced in Switzerland as long as it is enforceable in the country where it was rendered<sup>84</sup> notwithstanding any statute of limitations objection of a debtor before the enforcement court. Such objection has to be made before the court, which decides on the merits of the case. If a claim is time-barred *after* the judgment to be enforced was rendered, however, the debtor is entitled to raise such defence in the debt collection procedure. The same applies to of the debtor's defence that in the meantime the claim was paid or has otherwise extinguished.<sup>85</sup> To such defences, which have to be manifest and evidenced by documents, the *lex causae* applies.<sup>86</sup>

As a rule, if Swiss law applies, the general limitation period is ten years for all claims based on contracts and one year for claims based on torts, unless the federal civil law does not provide otherwise.<sup>87</sup>

**9. Describe any other requirements or defenses which could prevent the enforcement of a judgment. [Ed. Note: For example: fraud in the original action; a prior inconsistent judgment; the original court was an inconvenient forum; etc.]**

As discussed above, under Swiss law, a foreign judgment is neither examined with regard of its merits nor regarding the proper choice of law. As a consequence, in enforcement proceedings, Swiss courts do generally not examine allegations of fraud, of an inconsistent judgment, any objection alleging that the original court was an

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<sup>82</sup> WALTER, p. 315.

<sup>83</sup> Art. 148 (1) PILA.

<sup>84</sup> Please note that if the law of the country where the judgment was rendered provides for a limitation period for the enforcement of the judgment, in case this period has lapsed, Swiss courts are likely to consider the foreign judgment as non-enforceable.

<sup>85</sup> This includes set-off defences. - See Art. 81(1) DCBA and BSK-SchKG STAEHELIN, Art. 81 N 4-6 and 30 DBCA; VOCK/MÜLLER, SchKG-Klagen nach der Schweizerischen ZPO, Zurich 2012, p. 123.

<sup>86</sup> Art. 148(2) PILA.

<sup>87</sup> E.g., under the Swiss Product Liability Law of 18 June 1994 (PrHG, SR 221.112.944), the statute of limitations is three years (art. 9 PrHG).

inconvenient forum or alike. However, if the irregularity amounts to a manifest violation of Swiss public policy, it becomes relevant both under the Lugano Convention as well as under the PILA.<sup>88</sup>

### **III. NOTE: ENFORCEMENT OF ARBITRAL AWARDS**

According to art. 194 PILA, the recognition and enforcement of foreign arbitral awards is governed by the New York Convention. The enforcement of arbitral awards, however, is not subject of this article.

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<sup>88</sup> Both under art. 34(1) Lugano Convention and art. 27(1) PILA , a decision which is contrary to public policy principles will not be recognized. - See also question four in this section.

