NEW YORK LAW SCHOOL

NYLS Journal of International and Comparative Law

Volume 17
Number 1 *SYMPOSIUM: IMPLICATIONS OF THE RECONSTRUCTION OF LLOYD'S OF LONDON*

Article 4

1997

RECOGNITION AND ENFORCEMENT OF MONEY JUDGMENTS BETWEEN THE UNITED STATES AND SWITZERLAND: AN ANALYSIS OF THE LEGAL REQUIREMENTS AND CASE LAW

Yves P. Piantino

RECOGNITION AND ENFORCEMENT OF MONEY JUDGMENTS BETWEEN THE UNITED STATES AND SWITZERLAND: AN ANALYSIS OF THE LEGAL REQUIREMENTS AND CASE LAW

*Yves P. Piantino**

I. INTRODUCTION

On December 18, 1987, Switzerland enacted the Private International Law Statute [hereinafter PILS][1] which took effect on January 1, 1989. The PILS, a federal statute, replaced diverse rules contained in other federal statutes, in 26 cantonal[2] codes of civil procedure and in the case law of the Swiss Federal Tribunal.[3] This was a landmark development in the field of Swiss private international law. The statute is an example of macro, rather than micro-private international law[4] as it does not deal solely with questions of conflict of laws, but extends to matters of jurisdiction, recognition and enforcement of foreign judgments, bankruptcy and international arbitration.[5]

---

* Budin and Partners, Geneva, Switzerland. LL.M. Georgetown University Law Center. The author would like to thank Professor John R. Schmertz of the Georgetown University Law Center, and Professor Lucien Dhooge of the University of the Pacific for their helpful suggestions and comments, and Andrea E. Rusca for his assistance.

1. Loi fédérale sur le droit international privé (Fr.), Bundesgesetz über das internationale Privatrecht (Ger.). "Private international law" in Europe is the term used for the subject usually called "conflicts of law" in the United States.

2. There are 26 cantons: Zurich; Bern; Luzern; Uri; Schwyz; Obwald; Nidwald; Glaris; Zug; Fribourg; Solothurn; Basel-Stadt; Basel-Land; Schaffhausen; the two Appenzell; St-Gallen; Graubünden; Aargau; Thurgau; Ticino; Vaud; Valais; Neuchâtel; Geneva; Jura.

3. The Federal Tribunal, or Tribunal fédéral (Fr.), Bundesgericht (Ger.) is the highest court of appeal in Switzerland. It is located in Lausanne, canton of Vaud.

4. Adam Samuel, *The New Swiss Private International Law Act*, 37 INT'L & COMP. L. Q. 681 (1988).

5. Doubts were raised as to whether the Federal Parliament could legislate in matters

The first seven years of the PILS led to cases that concerned mostly the public policy principle for the recognition and enforcement of foreign judgments (article 27 PILS) and international arbitration (art 176 *et seq.* PILS). Some of these cases involved judgments from the United States that Swiss courts were asked to recognize, which they generally did.

Some authors already consider the PILS to be successful in practice.[6] Others are more cautious and point out that only practice will put the advantages and disadvantages of the new statute in perspective and that codification on the international level, in particular the Hague Conferences, may reduce its scope.[7]

Before analyzing the recognition and enforcement of foreign judgments in Switzerland, a brief review of the codification of Swiss private international law may be helpful.

II. HISTORY OF THE PRIVATE INTERNATIONAL LAW STATUTE (PILS)

A. The Early Codification

Swiss codification of private international law is related to the adoption in 1848 of the Swiss Federal Constitution [hereinafter Constitution]. The revised 1874 version survives to this day, although substantially amended. It provides for the unification of private law.[8] The

---

of procedure and international arbitration. Under the Swiss Constitution, procedure is normally the domain of the cantons. Some argued arbitration was a procedural matter and thus, in the domain of the cantons. Finally, the view prevailed that the new statute would not violate the Constitution. *See* PIERRE A. KARRER ET AL., SWITZERLAND'S PRIVATE INTERNATIONAL LAW 11 (2d ed. 1994)[hereinafter PILS]. *See also* Gov't Rep. on a F. Private Int'l L Stat., MESSAGE DU CONSEIL FÉDÉRAL CONCERNANT UNE LOI FÉDÉRALE SUR LE DROIT INTERNATIONAL PRIVÉ DU 10 NOVEMBRE 1982, F F pt.1 at 274, 283 (1983) [hereinafter Government Report]. The Government Report is cited to the pages of the French edition.

6. KARRER, ET AL., *supra* note 5, at 17; Symeon C. Symeonides, *The New Swiss Conflicts Codification: An Introduction*, 37 AM. J. COMP. L. 187, 188 (1989) ("Experience may soon demonstrate that this, the most recent of continental conflicts codification, is also the best").

7. Alfred E. von Overbeck, *The New Swiss Codification of Private International Law*, 16 F. INT'L 15 (1992).

8. In 1904, article 64 of the Federal Constitution extended the federal powers to all areas of private law. Article 64(1) reads: "The Confederation is entitled to legislate on civil capacity, on all legal matters relating to commerce and movable property transactions (law of contracts and tort including commercial law and law of bills of exchange), on copyrights in literature and arts, on protection of inventions suitable for industrial use, including

Parliament enacted federal statutes on marriage, personal capacity, as well as the Federal Code of Obligations at the end of the 19th century, but only in 1912 did the Swiss Civil Code and the revised Code of Obligations achieve complete unification of private law.[9] However, the federal judiciary and the federal parliament acted slowly in intercantonal and international conflict of laws. Until the PILS, most of international conflicts of jurisdiction, recognition and enforcement of foreign decisions remained an area where the role of federal law was limited to constitutional and treaty law, to be supplemented by cantonal law.[10] In particular, article 59 of the Constitution guarantees the forum of his Swiss domicile to any defendant and thus prevents enforcement of foreign judgments against him in matters of obligations.[11]

In 1891 the federal Parliament enacted a statute on private international law entitled "Statute on the private law conditions of domiciliaries and sojourners."[12] It dealt primarily with conflicts between cantons in family and inheritance law, subject matters which were still under the competence of the cantons.[13]

Upon enactment of the Swiss Civil Code, the statute lost its purpose to resolve intercantonal conflicts, since those had disappeared, but, as a new purpose, judges applied it by analogy to conflicts between or among nations.[14] The statute of 1891 covered jurisdiction and applicable law in

---

designs and models, on suits for debts and bankruptcy." Article 64(2) reads: "The Confederation is also entitled to legislate in the other fields of civil law." CST. of 1874 [Federal Constitution of 1874], *translated in* KARRER ET AL., *supra* note 5, at 239.

9. Overbeck, *supra* note 7, at 3.

10. *Id.*

11. CST. art. 59(1): "The solvent debtor having domicile in Switzerland must be sued for personal debts before the judge of his domicile; therefore, his property outside the canton in which he is domiciled may not be seized or attached for personal claims."; art. 59(2): "In the case of aliens the pertinent provisions of international treaties remain applicable." This refers especially to the Convention of Friendship, Commerce and Extradition between the United States and Switzerland, November 25, 1850, 11 Stat. 587, which went into force on November 8, 1855. Arts. 8-12 were terminated on March 23, 1900, as a result of notice given by the United States on March 23, 1899; arts. 13-17 on extradition were superseded and repealed by the extradition treaty of May 14, 1900. 31 Stat. 1928. Provisions on inheritance law are still in force. *See* KARRER ET AL., *supra* note 5, at 4.

12. Loi fédérale du 25 juin 1891 sur les rapports de droit civil des citoyens établis ou en séjour [LRDC] (Fr.), Bundesgesetz vom 25 Juni 1891 betreffend die zivilrechtlichen Verhältnisse der Niedergelassenen und Aufenthalter [NAG] (Ger.).

13. KARRER, ET AL., *supra* note 5, at 6.

14. Overbeck, *supra* note 7, at 3.

matters of family and succession law, but case law handled the resolution of conflicts in contracts and torts because the statute did not embrace those matters.[15] The statute would also not give any guidance at the federal level in the recognition of foreign decisions, leaving to cantonal civil courts the difficult task of determining the applicable provisions between cantonal procedural rules, federal debt collection legislation and Federal Tribunal case law. Hence, different regimes governed the recognition and enforcement of foreign judgments in Switzerland, thereby creating great uncertainty as to the applicable rules.[16] Despite its weaknesses, this statute continued to apply virtually unchanged until 1989 except for the addition of a few scattered provisions concerning marriage, divorce, adoption and filiation.[17]

B. Desire for a New Comprehensive Codification

Legal scholars and judges considered the situation under the old statute unsatisfactory because Swiss private international law had changed considerably since 1891. Switzerland had become a party to a number of international treaties and, above all, jurisprudence in that field of law developed greatly, especially in the area of obligations.[18] In 1972, a motion in Parliament called for codification to end the difficulties of applying the 1891 Statute and the considerable body of case law. In compliance with the motion, the Federal Ministry of Justice established a Committee of Experts to study the matter and prepare a draft statute in 1973. The Committee published its Expert Draft in 1978.[19]

Cantons, universities, political parties, and interested organizations commented on the draft. A governmental Commission then amended the draft and submitted it to Parliament in its official version in 1983, along with the Government Report.[20] After numerous exchanges of amended

---

15. Overbeck, *supra* note 7, at 3.

16. As to this day, every U.S. State has its own regime regarding the recognition and enforcement of foreign judgments.

17. KARRER, ET AL., *supra* note 5, at 7.

18. KARRER, ET AL., *supra* note 5, at 8.

19. KARRER, ET AL., *supra* note 5, at 8.

20. The federal government noted in the report the confusing situation of international civil procedure in Switzerland due to the joint application of federal and state law in matters of international jurisdiction and recognition of foreign decisions. Government Report, *supra* note 5, at 257. It also emphasized the important role of the Federal Tribunal in filling the gaps left by existing law. Government Report, *supra* note 5, at 259.

drafts, both House and Senate finally adopted the present text on December 18, 1987.[21]

The PILS came into force on January 1, 1989. The PILS is a civil law-type code, standing as a separate piece of legislation containing 200 articles. Its division of chapters loosely follows the structure of the Federal Civil Code and Code of Obligations.[22]

C. Translation of Three Equal Versions of the PILS

Like all Swiss federal statutes, the PILS has three official texts, one in French, one in German and one in Italian. None takes precedence according to the Statute on Official Publications of March 21, 1986.[23] The three original versions occasionally contain discrepancies. For example, article 107 contains a reservation for the provisions of other laws with respect to rights in ships, aircraft and other means of transportation. The reservation is to "*andere Gesetze*" (German) and "*autres lois*" (French) whereas the Italian version speaks of "*altre legge federali.*" Some authors argue that the Italian version is the correct one because conflict of laws is exclusively a federal matter.[24] In the end, the Swiss Federal Tribunal will decide which text best expresses the law if a party brings before it a case where the linguistic difference plays a role.[25]

Teams of practicing attorneys, working independently, anticipated the demand for a reliable English translation of the PILS.[26] Consequently, there are at least four of them.[27] The translations also deviate in their

---

21. KARRER, ET AL., *supra* note 5, at 10.

22. Fifty thousand Swiss voters or eight cantons could have forced a referendum on the new statute but this did not happen within the statutory deadline. Overbeck, *supra* note 7, at 5.

23. *See* Walter Koenig, *Translation of Legal Texts: Three English Versions of the Swiss Federal Statute on Private International Law*, 11 MICH. J. INT'L L. 1297 (1990); *see also* Symeonides, *supra* note 6, at 191.

24. Koenig, *supra* note 23, at 1298-9.

25. Other similar discrepancies exist in articles 19 and 65(2)(c) of the PILS. Article 19 permits the Swiss judge to deviate from the provisions of the PILS if legitimate and preponderant *interests* so require. The German and Italian versions speak of *interests of a party*. The translating teams opt for the German and Italian translation. Article 65 allows the recognition of a divorce decree in Switzerland if the defendant gives his consent. The French version requires *express* consent. *Id.*

26. There is no official English translation of the PILS because English is not an official language of Switzerland.

27. The most sophisticated is the one by KARRER, ET AL., *supra* note 5, that contains extended notes and other texts related to private international law. The other translations

terminology[28] because the PILS contains many legal terms which either do not exist in common law jurisdictions or have different meanings in the case of literal translations.[29]

III. RECOGNITION AND ENFORCEMENT IN SWITZERLAND BEFORE THE PILS

Under article 64(3) of the Constitution,[30] judicial organization as well as civil and criminal procedure lie within the sphere of competence of the cantons. Cantonal jurisdiction referred to in article 64(3) is understood to extend to the limits set by federal law and by international agreements concluded with other countries.[31] In the matter of recognition and enforcement of a foreign money judgment, the federal[32] Debt Collection and Bankruptcy Statute [hereinafter DCBS][33] would govern the procedure on the collection of money,[34] but cantonal law would regulate the material conditions[35] of enforcement.[36] However, article 59 of the Federal

---

come from Jean-Claude Cornu et al., *The Swiss Federal Statute on Private International Law Of December 18th, 1987, An English Translation*, 37 AM. J. COMP. L. 193-246 (1989); THOMANN ET AL., SWISS FEDERAL ACT ON INTERNATIONAL PRIVATE LAW OF DECEMBER 18, 1987, ENGLISH TRANSLATION OF OFFICIAL TEXT (Swiss-American Chamber of Commerce, Zurich 1989); UMBRICHT ET AL., LDIP-LOI FÉDÉRALE SUISSE SUR LE DROIT INTERNATIONAL PRIVÉ-CPIL-SWITZERLAND'S FEDERAL CODE ON PRIVATE INTERNATIONAL LAW (1989).

28. The author will provide references whenever necessary to explain a particular concept that causes translating problems.

29. For example, with regard to articles 6, 26(c) and 27(2)(a) of the PILS in the matter of jurisdiction and of recognition of foreign judgments, the different authors translate the concept of "*vorbehaltlose Einlassung*" (Ger.), "*procède au fond sans faire de réserve*" (Fr.), "*l'incondizionata costituzione in giudizio*" (Italy) into "unconditional appearance," "appearance without reservation," and "proceed to the merits without objecting to the court's jurisdiction."

30. "The organization of the courts, their procedure and jurisdiction shall remain a matter for the Cantons." *See* KARRER, ET AL., *supra* note 5, at 243.

31. DR. GEORGE J. ROMAN, RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS IN VARIOUS FOREIGN COUNTRIES 36 (1984).

32. By provision of article 64(1) of the Federal Constitution, the Confederation has the authority to legislate in matters of debt collection and bankruptcy. *See* KARRER ET AL., *supra* note 5, at 239.

33. Also called "Federal Law on Debt Collection and Bankruptcy" or "On Debt Enforcement and Bankruptcy."

34. The procedure is governed by articles 80-81 of the DCBS. *See infra* section VI.

35. Although the conditions of recognition of foreign judgments were left to the cantons, Swiss legal scholars contended that the grant of competence to the Confederation

Constitution[37] would limit the powers of the cantons to set the material conditions of recognition by requiring foreign creditors to sue a solvent debtor domiciled in Switzerland in the court of the latter's domicile.[38] This means that the court of the debtor's domicile has exclusive jurisdiction in the enforcement of a foreign money judgment.[39]

Foreign judgments were enforceable if recognized by Swiss law or by international agreements on the enforcement of judgments to which Switzerland was a contracting party.[40] In their absence, a special recognition procedure was necessary for enforcement. The cantonal law where the plaintiff sought to enforce the judgment governed.[41] Abundant case law existed concerning the obligation to initiate a separate action to enforce a foreign money judgment.

In *Cadmus Shipping Co. v. Lakeview Trading Co. SA*,[42] Cadmus petitioned for enforcement in Geneva of a judgment from the English High Court of Justice requiring Lakeview to pay monetary damages. Cadmus obtained an injunction of attachment of Lakeview's assets in Geneva since the latter had no domicile in Switzerland. In order to secure the attachment, Cadmus followed the procedure of debt collection provided by the federal DCBS. It served an official notice known as order for payment upon

---

by article 64(1) of the Constitution in matters of debt collection left open the possibility for federal rules on enforcement of foreign judgments in addition to the existing federal rules regarding the procedure of execution included in the DCBS. *See also* Government Report, *supra* note 5, at 283; W.J. HABSCHEID, DROIT JUDICIAIRE PRIVÉ SUISSE 335 (1981) *cited in* ROMAN, *supra* note 31, at 36 n.94.

36. Swiss legal scholars speak of *conditions d'exequatur.* Paul Volken, *Conflits de juridictions, entraide judiciaire, reconnaissance et exécution des jugements étrangers, in* LE NOUVEAU DROIT INTERNATIONAL PRIVÉ SUISSE, TRAVAUX DES JOURNÉES D'ÉTUDE ORGANISÉES PAR LE CENTRE DU DROIT DE L'ENTREPRISE LES 9 ET 10 OCTOBRE 1987 246 (1989).

37. *See Loi fédérale sur le droit international privé (Loi de d.i.p.), Projet de loi de la commission d'experts et Rapport explicatif*, 12 Etudes Suisses de Droit International 240 (1978).

38. CST. art. 59(1), *translated in* KARRER, ET AL, *supra* note 5, at 239. This provision is still in force today.

39. There are some exceptions to this general rule. If the debtor has no domicile in Switzerland, an attachment of his assets, if available, will create a valid forum in the canton where his assets are located. *See infra* section VI.

40. ROMAN, *supra* note 31, at 36.

41. I.s. Lawrence Juske gegen Fortis-Uhren AG und Obergericht des Kantons Solothurn, ATF 105 Ia 309 (Fed. Trib. 1979).

42. Cadmus Shipping Co. v. Lakeview Trading Co., SJ 1977 551 (Geneva Ct. of Appeal).

Lakeview which filed an opposition to the order. Cadmus began litigation before the Geneva Court of First Instance seeking the dismissal of the opposition. The court declared that it had no jurisdiction over the issue of enforceability of the English judgment in the absence of any treaty between Switzerland and England.[43] Following a literal interpretation of article 81(3) DCBS,[44] the court stated that the decision to enforce the English judgment could only result from a separate lawsuit that would scrutinize the conditions of enforcement more thoroughly than in an action aimed at removing the opposition as provided by the DCBS.[45]

Following appeal of this decision, the Geneva Court of Appeal reversed and ruled that the foreign judgment fulfilled the conditions of enforcement since: (1) the parties did not criticize the procedure the English court had followed; (2) the judgment debtor had been given due notice of the summons to appear; (3) the English judgment was clearly enforceable; and (4) as to reciprocity, England applied liberal principles in enforcing foreign judgments. Consequently, the Court of Justice decided that the wording of article 81(3) DCBS did not require Cadmus to initiate a separate action for enforcement and that the judge who was to dismiss the opposition should also enforce the foreign judgment simultaneously.[46]

In *Brownhill Resources Inc.*, the Federal Tribunal stated that a cantonal decision granting enforcement of a judgment from a country with which no international agreement existed, such as the United Kingdom, would only produce effects on the territory of the canton that rendered it.[47] If a party had to continue the debt collection procedure in another canton, in particular because of the debtor moving his domicile to such other canton, the judgment creditor would have to seek enforcement of the foreign judgment and removal of the opposition to the order for payment from a court of the new canton. However, all cantons would have recognized a judgment from another canton granting enforcement based on an international treaty without a separate procedure.[48] Both cases were

---

43. *Cadmus*, SJ 1977 551.

44. DCBS art. 81(3) provides: "If the judgment was rendered in a foreign country with which a treaty on the reciprocal execution of judgments exists, the defendant can oppose the grounds reserved in it."

45. *Cadmus*, SJ 1977 551.

46. *Cadmus*, SJ 1977 551.

47. Brownhill Resources Inc, ATF 115 III 28 (Fed. Trib. 1989).

48. *Id. See* JT 1991 II at 7 *citing* ATF 94 III 90, JT 1969 II 104, c.5 and ATF 105 Ia 309, JT 1981 II 92, c.2. It is with reason that scholars criticized the distinction made by the Federal Tribunal between foreign judgments whose recognition depended on an international treaty entered into by the federal Parliament and other judgments whose

typical and illustrated the different applicable conditions for the enforcement of foreign judgments in Switzerland.

The Court of First Instance erred in *Cadmus* in considering that article 81(3) DCBS prohibited it from examining the recognition of a judgment from a country without a bilateral treaty as this provision merely authorizes the defendant to raise an additional conventional defense when a treaty is applicable. Failing a conventional defense, the defendant can raise procedural grounds such as lack of jurisdiction of the foreign court, violation of his right to be heard, *lis pendens*, *res judicata*, violation of public policy of the enforcing country, lack of reciprocity, or may claim that the foreign judgment is not final.[49] The Court also misunderstood the nature of summary actions whose purpose is to speed up the proceedings by requiring the plaintiff to submit all written evidence at the filing of the action, whereas the defendant may present his defense only orally and only during the court hearing that follows the filing.[50] This does not mean that

---

recognition depended on cantonal law because, in both cases, cantonal courts only were competent to examine the recognition and enforcement of the foreign judgment. That cantonal court would have followed its own cantonal procedural rules to render an enforceable judgment, whether the material conditions of recognition were dictated by federal law in case of an international treaty or by cantonal law. Note that there are no federal civil courts of first instance in Switzerland.

49. Jean Graven, *Le principe de la chose jugée et son application en procédure civile suisse*, ETUDES DE DROIT COMMERCIAL EN L'HONNEUR DE PAUL CARRY 226 (1964) *cited in* ROMAN, *supra* note 31, at 33 n. 87.

50. The defendant does not have the right to file a written answer but the court may grant this privilege on a discretionary basis. In summary procedure, courts decide cases on the basis of the documents filed by the parties. However, even in summary actions, the Geneva Code of Civil Procedure [hereinafter LPC] entitles the judge to ask the parties, and not only their lawyers, to appear before him. He can also, but will rarely, call for other evidence if they are essential to the dispute. Bernard Bertossa, Louis Gaillard, Jacques Guyet, Commentaire de la loi de procédure civile de Genève du 10 avril 1987, art. 353(1) LPC (Genève 1993). Some Swiss statutes mandate the use of summary procedure depending on the nature of the case, such as debt collection, bankruptcy and recognition and enforcement of foreign judgments. *See infra* section VI. Summary procedure is opposed to ordinary procedure in which the defendant can file a written answer, or present evidence such as writings, testimony, material objects, or expert evidence. In Geneva, ordinary procedure always leads to an ordinary appeal because the LPC mandates the use of ordinary procedure for lawsuits in which the amount in dispute exceeds Swiss Francs 8000.- (about US$5400.-). *See infra* note 149. However, a judgment rendered in summary procedure may also open the way to an ordinary appeal if the Swiss Francs 8000.- limit is reached or passed, except in most cases governed by the DCBS where only an extraordinary appeal is available. *See infra* Part VI.; *see also* Bernard Dorsaz, *Switzerland*, (Mathew Bender) SWI 1, at 17. In contrast, U.S. federal courts permit any party to a civil action to move for a summary judgment on a claim, counterclaim, or cross-claim when he

a party would not be able to present a fair case or that the particularities of summary procedure would limit the court's power to duly examine the enforceability of the foreign judgment. In fact, the foreign judgment itself constitutes the main documentary evidence and permits a *prima facie* examination of its conclusiveness. The Court of Appeal's decision permits the use of a speedy, simple procedure that reduces the amount of litigation and avoids extra work for both courts and litigants by combining the power to decide on both the opposition and enforcement.

Additionally, *Brownhill Resources Inc.* illustrates the weaknesses of the system by allowing reluctant defendants to elude their obligations by simply moving from one canton to another and thereby frustrating recovery despite existence of a final and enforceable judgment.[51]

Provisions concerning recognition and enforcement varied among the cantons. Some cantonal laws did not contain provisions on the enforcement of foreign judgments.[52] As a result, some scholars believed that recognition was not obtainable and that the judgment creditor had to bring a new suit in that canton.[53] One canton left the enforcement of judgments to international agreements and federal legislation.[54]

Despite this diversity, most of the cantonal laws provided for the recognition of foreign judgments. In general, the cantonal laws either expressly or tacitly required the following conditions for granting recognition:

1. A final judgment (res judicata).[55]

---

believes that there is no genuine issue of material fact and he is entitled to prevail as a matter of law. FED. R. CIV. P. 56(a) and (b). In *Am. State Bank of Killdeer v. Hewson*, 411 N.W.2d 57, 60, the court stated that "summary judgment is a procedural device available for the prompt and expeditious disposition of a controversy without a trial if there is no dispute as to either the material facts or the inferences to be drawn from undisputed facts, or if only a question of law is involved." Am. State Bank of Killdeer, 411 N.W. 2d at 60 (citing Herman v. Magnusom, 277 N.W. 2d 445 (N.D. 1979)).

51. In Abdel Moniem M. v. Hoirs de feu S. and Cour de Justice du canton de Genève, ATF 118 a 118, (Fed. Trib. 1992), the Federal Tribunal confirmed that the exequatur pronounced under federal law, whether based on a treaty or on art. 25-27 PILS, produces its effects in all cantons.

52. Such as the Glaris law of civil procedure. *See* Max Petitpierre, LA RECONNAISSANCE ET L'EXÉCUTION DES JUGEMENTS ÉTRANGERS EN SUISSE 32 (1925) *cited in* ROMAN, *supra* note 31, at 32.

53. *Id.*

54. *Id.* This was the case in the canton of Basle-Land.

55. The codes of civil procedure of Bern, Geneva, Neuchâtel and Zurich expressly required the foreign judgment to be final.

2. Valid jurisdiction of the foreign court under Swiss law and, in some cantons, also under its own law of origin.[56] However, if required to examine the validity of the judgment under its law of origin, Swiss courts would limit the review to finding whether a jurisdictional defect in the rendering country could prevent the enforcement of the judgment.[57]

3. Most of the cantonal codes of civil procedure, for example Geneva and Bern, provided that the foreign decision had to comply with Swiss public policy. According to the Swiss Federal Tribunal, a foreign judgment is contrary to public policy when it contradicts the fundamental concept of law generally accepted in Switzerland or when it violates the fundamental rules on which Swiss law is based.[58] In general, the foreign court would violate Swiss public policy if it did not observe the fundamental principle that the defendant has a right to defend himself in court.[59]

4. Most of the cantonal codes of civil procedure required reciprocity and stated that their courts would not enforce a foreign judgment if the respective foreign country did not enforce Swiss judgments.[60] Some cantons did not require reciprocity, but the law gave the court the option to refuse recognition for lack of reciprocity with the country in which the decision was rendered.[61] In other cantons, the cantonal

56. For example, Zurich and Schwyz. *See* ROMAN, *supra* note 31, at 34. A foreign court would never be considered to have jurisdiction in money matters if the defendant was domiciled in Switzerland. CST. art. 59(1), *translated in* KARRER, ET AL., *supra* note 5, at 239.

57. G. Perin, L'exécution des jugements étrangers en Suisse, 84 Recueil Penant (Revue de droit des pays d'Afrique) 58 (1974) *cited in* ROMAN, *supra* note 31, at 34. However, it is difficult to imagine how a regional Swiss court, with limited time and means of investigation, would complete the necessary legal research to find about a jurisdictional defect in the country of origin. For practical purposes, the court would certainly limit its examination to the validity of the foreign judgment under Swiss law only. Similarly, a United States court will not recognize a judgment if the rendering court did not have jurisdiction over the parties and the subject matter. *See* Fehlhaber v. Fehlhaber, 681 F.2d 1015, 1020 (5th Cir. 1982); Thomas v. Frosty Morn Meats, 266 N.C. 523, 525, 146 S.E.2d 397, 399 (1966); 28 USC § 1738 (1948).

58. H.v.M. and Zurich, JT 1970 I 539 (Fed. Trib, 1970). *See infra* section V for a more detailed study.

59. ROMAN, *supra* note 31, at 35. For example, a court would violate public policy if it refused to hear a defendant's defense or if it ruled against a defendant who was not served with process.

60. *Id.* The following codes of civil procedure contained an express requirement: Aargau art. 378; Basel-Stadt art. 258; Fribourg art. 236; Geneva art. 463; Ticino art. 511; Valais art. 383.

61. Codes of civil procedure in the cantons of Schwyz, art. 230; Vaud, art. 507; Zurich,

government itself, not the courts, could refuse recognition for reasons of reciprocity.[62] Other cantons did not require reciprocity as a condition of enforcement of foreign judgments.[63]

The new PILS unified and simplified the conditions for recognition and enforcement of foreign judgments in Switzerland. It restricted the scope of the cantonal civil procedure codes in that area and removed the condition of reciprocity except for bankruptcy decrees.[64]

IV. INTERNATIONAL TREATIES: THE HAGUE AND LUGANO CONVENTIONS

Article 1(2) PILS provides that international treaties take precedence over federal statutes such as the PILS.[65] Switzerland is a signatory to the Hague Conventions on Civil Procedure of 1954[66] and ratified the Hague Conventions on the Taking of Evidence Abroad in Civil and Commercial Matters of March 18, 1970,[67] the Service Abroad of Judicial and Extra-judicial Documents in Civil or Commercial Matters of November 15, 1965,[68] and International Access to Justice of October 25, 1980 in 1994.[69]

---

art. 302.

62. Codes of civil procedure in the cantons of Bern, art. 401; Jura, art. 394; Solothurn, art. 323.

63. Codes of civil procedure in the cantons of Graubünden, art. 291; Neuchâtel, art. 505; Schaffhausen, art. 400.

64. *See* PILS art. 166(1)(c).

65. KARRER, ET AL., *supra* note 5, at 33. *See also* Recueil Systématique du droit fédéral [hereinafter RS]. The other proposed translations of article 1(2) of the PILS: "The international treaties are reserved" or ". . . are not affected." The term 'treaty' is too narrow. What is meant is public international law or the law of nations, which includes areas of customary law, for instance on state and diplomatic immunity. Treaties that provide for uniform substantive law in certain areas are also covered, such as the Geneva Convention on Bills and Notes.

66. RS 0.274.12. The parties to the French-language 1954 Hague Convention are almost all European countries, and the United States is not a party.

67. Hague Convention on Taking of Evidence Abroad in Civil and Commercial Matters, Mar. 18, 1970, 23 U.S.T. 2555. In Swiss law, "civil and commercial" are defined in opposition to criminal and administrative or public law. *See* art. 1 of said Convention and of the Lugano and Brussels Conventions, *infra* notes 67 and 68, on the scope of application and exclusions.

68. Hague Convention on the Service Abroad of Judicial and Extra-judicial Documents in Civil or Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163 [hereinafter Hague Service Convention].

69. Hague Convention on International Access to Justice, Oct. 25, 1980, 19 I.L.M.

Switzerland also ratified the Lugano Convention[70] on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters of September 16, 1988 between the EU and EFTA States.[71] The importance of the Lugano Convention will increase with subsequent ratification by other States. However, the Convention does not affect American judgment creditors except in the cases where they possess a judgment rendered in a country that ratified the Lugano Convention.[72] Bilateral treaties, if any[73],

---

1505. For Switzerland, the three Conventions went into force on January 1, 1995.

70. Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 16, 1988, 28 I.L.M. 620. The adoption of the Lugano Convention raised a constitutional difficulty because its article 5(1) provides for the jurisdiction of the courts at the place of performance of the obligation in contractual matters. A judgment rendered outside Switzerland against a defendant domiciled in Switzerland would permit a defense against the enforcement of such judgment because of art. 59 of the Constitution. *See supra* note 11. The Swiss delegation to the Lugano Conference sought a limited reservation to the conventional rules conferring jurisdiction to courts other than those of the defendant's domicile. The Swiss reservation is set out in article I(a) of Protocol No.1 to the Convention. It will cease to have effect on December 31, 1999. This reservation does not alter the provisions of the Convention on jurisdiction; it simply enables a Swiss domiciliary to resist recognition and enforcement of judgments given pursuant to article 5(1). *See* KARRER, ET AL., *supra* note 5, at 20.

71. The Convention of Lugano was signed between the Member States of the European Union (EU) and the six Member States (Iceland, Norway, Austria, Switzerland, Finland and Sweden) of the European Free Trade Association (EFTA). Austria, Finland and Sweden have joined the EU in 1995. The Convention is parallel to the Convention of Brussels on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, Sept. 27, 1968, 29 I.L.M. 1417. The latter is applicable only between the member States of the EU. The Lugano Convention, when applicable, takes precedence over the PILS. *See infra* note 72. The Convention went into force on January 1, 1992 for Switzerland, France and the Netherlands. As per September 1, 1996, the Convention is in force between Switzerland, France, the Netherlands, Luxembourg, United Kingdom, Portugal, Italy, Norway, Sweden, Ireland, Finland, Spain, Germany, Austria, Denmark, and Iceland. Belgium and Greece have signed but not yet ratified the Convention.

72. This is the case if the American creditor decided to sue in a Lugano country because of debtor's domicile or place of business, place of performance of a contract, or place where a tort occurred or had its effects.

73. Such treaties dealing with recognition and enforcement of money judgments exist with Austria RS 0.276.191.632; Belgium 443 U.N.T.S. 35; Liechtenstein RS 0.276.195.141 and Czechoslovakia RS 0.276.197.411, which is being applied with the two new republics which emerged out of the former Czechoslovakia. With the Czech Republic, Switzerland has already agreed formally on the future application. With the Slovak Republic, the negotiations are still going on. *See* NEDIM PETER VOGT & DANIEL HOCHSTRASSER, *Switzerland, in* ENFORCEMENT OF FOREIGN JUDGMENTS 18 (1995). No official English versions of these treaties exist. The Lugano Convention, *supra* note 67, once ratified by Austria and Belgium, will supersede the provisions of the bilateral treaties. *See* Lugano Convention, art. 55; KARRER, ET AL., *supra* note 5, at 52, 215-217 (in the long run, only

and the PILS govern recognition and enforcement of judgments from countries which have not ratified the Lugano Convention.

V. THE STRUCTURE OF THE PILS

A. In General

The PILS is a codification containing 200 articles. The first chapter, articles 1-32, is the general part, which includes sections on scope, jurisdiction, applicable law, domicile, seat, nationality (or citizenship) and recognition and enforcement of foreign judgments.[74] It also defines the various connecting factors[75] and certain procedural rules that condition the application of the entire act,[76] as well as a series of general rules, which are applicable if no specific rule dictates a different solution.[77] Finally, it includes overriding rules which apply in spite of any contrary stipulation in the act.[78] In practice, one finds the solution to most private international law questions in a three-stage process: First, by looking for the applicable rule in the part of the act devoted to the specific topic, for example, contract law; second, if there is no specific applicable rule, a general rule may apply; third, one must verify that the overriding rules of the general part do not exclude the solution reached. For example, foreign law may be excluded for reasons of public policy.[79]

---

the treaties with Liechtenstein and the former Czechoslovakia will continue to apply since these countries are not parties to the Lugano Convention).

74. PILS art. 1 (scope), arts. 2-12 (jurisdiction), arts. 13-19 (applicable law), arts. 20-24 (connecting factors: domicile, seat and nationality), arts. 25-32 (foreign judgments). The PILS is the first statute in Europe to overcome the traditional division between procedural and substantive law and to treat in a single integrated document the three topics [of] . . . jurisdiction, choice of law, and recognition of foreign judgments. Symeonides, *supra* note 6, at 188.

75. It is also called *point de rattachement*. In conflict of laws, connecting factors are legal categories such as the domicile or the place of making a contract which serve to determine the choice of law in a particular case.

76. PILS arts. 10-12, 16, 20-24, 28-32.

77. PILS arts. 2, 5(1) and (3), 6, 8, 13-14, 25-26.

78. PILS arts. 1(2), 3, 4, 5(2) and (3), 7, 15, 17-19, 27.

79. Samuel, *supra* note 4, at 682. PILS, art. 4 (An important illustration of Swiss nationalist policy is PILS art. 4 that provides for a subsidiary Swiss *forum arresti* jurisdiction for an action to secure an injunction restraining the disposal of assets (attachment); however, this is only available if the PILS does not expressly provide for the jurisdiction of another Swiss court. It is abandoned in the Lugano Convention towards residents of signatory countries).

The specific part, which begins at chapter 2 with article 33, is subdivided into eleven chapters, according to the divisions of the Swiss Civil Code and Code of Obligations.[80] Each chapter contains rules on direct jurisdiction, applicable law, and indirect jurisdiction for recognition and enforcement of judgments.[81]

B. Direct and Indirect Jurisdiction

1. General Grounds Creating Jurisdiction

First, it is necessary to differentiate the requirements under which a Swiss court will itself under Swiss law take jurisdiction in international matters (so-called *direct* jurisdiction) from those where the issue is to acknowledge the jurisdiction of foreign authorities for the purpose of recognition and enforcement of a foreign judgment (so-called *indirect* jurisdiction).[82] The central presumption, as mandated by article 59 of the

---

80. *Code des obligations* (Fr.), *Schweizerisches Obligationenrecht* (Ger.), *Diritto delle obligazioni* (It.). In Swiss substantive law, this includes all contracts, torts, unjust enrichment and *negotiorum gestio* (also translated into agency without a mandate. It means a species of spontaneous agency, or an interference by one in the affairs of another in his absence, from benevolence or friendship, and without authority). The Federal Code of Obligations covers all these areas of the law.

81. The chapters in the special part cover: individuals (ch. 2, arts. 33-42); marriage (ch. 3, arts. 43-65); parent-child relationship (ch. 4, arts. 66-84); guardianship and other protective measures (ch. 5, art. 85); inheritance law (ch. 6, arts. 86-96); real rights (ch. 7, arts. 97-108); intellectual property (ch. 8, arts. 109-111); obligations (ch. 9, arts. 112-149); companies (ch. 10, arts. 150-165); bankruptcy and composition with creditors (ch. 11, arts. 166-175); international arbitration (ch. 12, arts. 176-194).

82. These requirements are usually identical for both direct and indirect jurisdiction but not necessarily. In some cases, Switzerland accepts direct jurisdiction over a dispute but denies the indirect jurisdiction of the foreign court despite the use of the same connecting factors because of the constitutional guarantee of his Swiss domicile granted to the defendant. *See* CST. art. 59, *translated in* KARRER, ET. AL., *supra* note 5. *See, e.g.*, PILS art. 113 (providing that if the defendant has neither a domicile nor an ordinary residence, nor a business establishment in Switzerland, but if performance of the contract is in Switzerland, the Swiss court at the place of performance can take direct jurisdiction over the case). PILS art. 149(2)(a) (Switzerland will also under PILS art.149(2)(a) acknowledge the foreign court's indirect jurisdiction taken on the basis of the contractual place of performance but only if the defendant did not have domicile in Switzerland) and PILS art. 129(2) (the same reservation applies in tort cases where, under PILS art. 129(2), direct jurisdiction of Swiss court lies where the act occurred or had its effects, but if a foreign court took jurisdiction on the same basis, PILS art. 149(2)(f) mandates the enforcement of its judgment only if the defendant was not domiciled in Switzerland). *See* Government Report, *supra* note 5, 317.

Constitution, is that the courts of the defendant's (last) domicile[83] or place of incorporation[84] have jurisdiction over him.[85] For persons without a domicile in Switzerland, particularly children, many provisions secure jurisdiction at the place of the defendant's habitual residence.[86]

Other grounds create valid direct and indirect jurisdiction under Swiss private international law. First, parties involved in a legal relationship, whether contractual or not, are free to make a choice of jurisdiction, in which case, the choice is presumed to be exclusive, unless otherwise stated.[87] Occasionally, the law limits or even excludes[88] the parties' choice of jurisdiction. Similarly, a Swiss court will uphold a judgment from a foreign court that took direct jurisdiction based on a choice of forum clause.[89]

Second, under the *lis alibi pendens* principle, if a lawsuit on the same matter between the same parties is pending in another country, the Swiss court must stay its proceedings if it is expected that, within a reasonable time, the foreign court will render a judgment recognizable in

---

83. PILS art. 20(1)(a). The definition of domicile follows word by word art. 23 Civil Code but a line of cases has interpreted it to target the place where the person's relationships are centered. *See I.S. Ehlente Matter*, ATF 97 II 3 (Fed. Trib. 1971). These cases are meant to apply to PILS art. 20. *See* KARRER, ET AL., *supra* note 5, at 48.

84. PILS art. 21.

85. Government Report, *supra* note 5, at 289. PILS art. 2 (affirming the principle that "unless otherwise provided by this Statute, jurisdiction lies with the Swiss judicial or administrative authorities at the defendant's domicile"). PILS art. 26 (Accordingly, the domicile factor applies under article 26 of the PILS where Switzerland must examine indirect jurisdiction of the foreign court at the enforcement stage). In the United States, the RESTATEMENT (SECOND) OF LAWS §§ 29-30 (1971), also mentions the domicile and the residence as a base of judicial jurisdiction over individuals, as well as, in §28, the presence in the state of the defendant, even if his presence is only temporary. Such basis does not exist under Swiss law and may prevent the enforcement of a U.S. judgment. *See infra* note 110.

86. PILS art. 20(1)(a). Habitual residence serves to replace domicile of a person who has no domicile. However, in the latter case, the claim must relate to activity conducted at the habitual residence under PILS art. 149 (1)(b). Martin Bernet & Nicolas Ulmer, *Recognition and Enforcement of Foreign Civil Judgments in Switzerland*, 27 INT'L. LAW. 317, 320 (1993).

87. PILS art. 5(1).

88. PILS arts. 59-60 (divorce and separation), 66-67 (limited choice of jurisdiction in parent-child relationship), 114 (contracts with consumers), 151 (exclusion of choice of jurisdiction in company law statututes).

89. PILS arts. 26(b), 5(2) (PILS adds that the selection of a forum is void if it abusively denies a party a place of jurisdiction provided by Swiss law). PILS art. 114 (regarding consumer and employment contracts). *See also* Bernet & Ulmer, *supra* note 83, at 321.

Switzerland.[90] However, the PILS denies recognition of a foreign judgment if the claimant had first introduced the same lawsuit in Switzerland against the same party concerning the same case.[91]

Third, the court before which the principal claim is pending has jurisdiction over the counterclaim, provided a factual connection exists between them.[92] The factual connection requirement applies also when the enforcing court checks the indirect jurisdiction of the requesting authority.[93]

Finally, the unconditional appearance of the defendant before a Swiss court also establishes its jurisdiction over him.[94] Similarly, the appearance without reservation of the defendant in the first court justifies its indirect jurisdiction.[95]

2. Jurisdiction in Non Monetary Cases

Domicile or habitual residence determines adjudicative jurisdiction in the fields of marriage, divorce, family, succession law, and intellectual property. The statute uses nationality where domicile or habitual residence is not available, or to favor some substantial result.[96] In divorce cases, the courts of the defendant's domicile have jurisdiction as well as those of the plaintiff's if he or she has lived in Switzerland for one year or is Swiss.[97] Article 86(1) PILS gives jurisdiction in estate matters to the courts of the last domicile of the deceased except with regard to immovable property. Article 86(2) PILS ensures that only the courts where such property is located decide questions of title to it. A Swiss citizen can, by a written

---

90. PILS art. 9.

91. PILS art. 27(2)(c).

92. *Compare* PILS art. 8 *and* FED. R. CIV. P. 13(a) which requires a factual connection and states, in part, that: "a pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim. . . ."

93. PILS art. 26(d) (the factual connection is also called *connexité* (Fr.) or *sachlicher Zusammenhang* (Ger.). This exception to the principle of CST. art. 59 originated in case law prior to the PILS. Such factual connection exists when the claim and the counterclaim are based on the same contractual relationship). *See* Bernet & Ulmer, *supra* note 83, at 324.

94. PILS art. 6.

95. PILS art. 26(c). *See infra* section VI(C)(1) and note 142. There is no provision for a Swiss court to decline to hear a case on *forum non conveniens* grounds. *See* Samuel, *supra* note 4, at 683.

96. Overbeck, *supra* note 7, at 13. The purpose of having many different factors creating jurisdiction is to favor the access to courts to parties seeking redress. *Id.*

97. PILS art. 59.

declaration,[98] subject his assets situated in Switzerland or his entire estate to Swiss jurisdiction.[99]

Accordingly, Swiss courts will recognize the indirect jurisdiction of the foreign authority where one party, usually the defendant, had a domicile. In divorce cases, in order to protect a defendant spouse domiciled in Switzerland, special domicile requirements apply when the divorce decree comes from a country of which neither spouse or only the plaintiff is a citizen.[100]

3. Jurisdiction in the Law of Obligations: Contracts, Unjust Enrichment and Torts

Chapter 9 PILS,[101] on the law of obligations,[102] covers, among other topics, jurisdictional questions in the areas of contracts,[103] unjust enrichment,[104] torts,[105] and recognition and enforcement of foreign judgments.[106]

Regarding contract claims, the Swiss court at the defendant's domicile or, in the absence of such domicile, at his habitual residence, has direct jurisdiction.[107] Where a Swiss branch of a foreign corporation makes a

---

98. He may make such declaration in his will or by any other means that would prove his wish.

99. PILS art. 87(2).

100. PILS art. 65.

101. PILS arts. 112-149.

102. For an explanation, *see supra* note 77.

103. PILS arts. 112-126.

104. PILS arts. 127-128. *Enrichissement illégitime* (Fr.), *Ungerechtfertige Bereicherung* (Ger.), *Indebito arricchimento* (It.). Unjust enrichment is subsidiary to contracts and torts: nobody should be permitted to enrich himself at another's expense but should make restitution of or for property or benefits received, retained or appropriated, where it is just and equitable that such restitution be made. *Tulalip Shores v. Mortland,* 511 P.2d 1402, 1404 (Wash.App. 1973); *Everhart v. Miles*, 422 A.2d 28 (Md. App. 1980) (stating that in order to sustain a claim based upon unjust enrichment the plaintiff must establish: a benefit conferred upon the defendant by the plaintiff; an appreciation or knowledge by the defendant of the benefit; and the acceptance or retention by the defendant of the benefit under such circumstances as to make it inequitable for the defendant to retain the benefit without the payment of its value). *See generally* ANNE-CATHERINE IMHOFF-SCHEIER & PAOLO MICHELE PATOCCHI, TORTS AND UNJUST ENRICHMENT IN THE NEW SWISS CONFLICT OF LAWS (1990).

105. PILS arts. 129-142.

106. PILS arts. 143-149.

107. PILS art. 112(1).

contract, article 112(2) PILS gives jurisdiction over an action arising out of the activities of such branch to the court of its headquarters.[108] The statute also provides for Swiss jurisdiction where the defendant has no domicile, habitual residence or place of business in Switzerland, but where the contractual performance takes place in Switzerland.[109]

With regard to the recognition of foreign judgments concerning claims under the law of obligations, article 149(1) PILS permits the enforcement of judgments rendered at the defendant's domicile[110] or, failing that, at his habitual residence,[111] provided the claims are connected with activities there. Swiss courts will also recognize foreign jurisdiction over contract claims in the country of that obligation's performance *if the defendant was not domiciled in Switzerland.*[112]

In consumer and employment contracts, the statute limits the choice of forum in order to protect the so-called weaker party. A consumer can choose between his own domicile or residence or that of the supplier, and is not permitted to waive his right in advance with respect to domicile or residence.[113] Similarly, the PILS recognizes the foreign judgment rendered at the consumer's domicile or ordinary residence.[114] In employment contracts, the Swiss courts of the defendant's domicile, whether it is the

---

108. PILS art. 112(2) (modifying the rule under Swiss law that a branch is not a legal entity that can sue or be sued but only an instrumentality of a corporation. The main office only can sue or be sued on behalf of the branch). *Id.* at art.149(2)(d) (stating that Switerland recognizes foreign judgments concerning activities of a foreign branch rendered at the place of incorporation of the branch).

109. PILS art. 113. Unlike England, Swiss law does not provide for any jurisdiction specifically based on the applicability of Swiss law to the contract. *See* Samuel, *supra* note 4, at 686. In the United States, the Restatement (Second) of Conflict of Laws §§ 27-52 (1971), does not mention this criteria as a possible base of judicial jurisdiction over a defendant.

110. KARRER, ET AL., *supra* note 5.

111. KARRER, ET AL., *supra* note 5.

112. PILS art. 149(2)(a). Thus, the requirements for indirect jurisdiction do not coincide with those for direct jurisdiction set forth in article 113 of the PILS. *See* Government Report, *supra* note 5, at 317. Nedim Peter Vogt, *Switzerland, in* INTERNATIONAL EXECUTION AGAINST JUDGMENT DEBTORS, 6 (1993). *See also* Bernet & Ulmer, *supra* note 83, at 320. Not included among the grounds for jurisdiction of a foreign court is the existence of contacts with a foreign jurisdiction sufficient for long-arm jurisdiction to attach under U.S. law. Consequently, a U.S. judgment in a case based on long-arm jurisdiction will generally not be enforced in Switzerland against a debtor domiciled in Switzerland, provided that the defendant did not plead on the merits without reservation. *Id.* at 319-20. *See also* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §§ 28-30 (1971).

113. PILS art. 114.

114. PILS art. 149(2)(b).

employer or the employee, and also courts of the place of performance of the work have jurisdiction. However, the employee can also sue in the court of his own domicile or habitual residence if different from the company's location.[115] Swiss law recognizes employment contract decisions if rendered at the place of work or at the place of the company, only if the employee did not have his domicile in Switzerland.[116]

Article 129(1) establishes jurisdiction over tort claims at the defendant's Swiss domicile, habitual residence or place of business. Where the defendant has neither a domicile nor habitual residence, nor place of business in Switzerland, jurisdiction lies with the Swiss courts at the place where the tortious act occurred or where it produced an effect.[117] However, article 149(2)(f) PILS permits the recognition of foreign tort judgments if rendered where the tortious act took place or had effects, but only if the defendant had no domicile in Switzerland.[118]

Finally, unjust enrichment claims are subject to the jurisdiction of the Swiss courts at the Swiss domicile, habitual residence or place of business of the defendant.[119] However, as with contract and tort claims, the statute recognizes an unjust enrichment claim decided by a foreign court at the place where the defendant committed the act or where it had its effects, provided the defendant had no domicile in Switzerland.[120]

VI. CONDITIONS OF RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENT

A. Applicability of the PILS

The conditions set forth in the PILS apply to the recognition and enforcement of foreign judgments in Switzerland only if no bilateral or

115. PILS art. 115.

116. PILS art. 149(2)(c). Will Swiss courts recognize the foreign decision if the employee, working abroad, sued a Swiss company at one of the foreign forums, won his case but had kept his own domicile in Switzerland? Although art. 149(2)(c) does not distinguish between a suit brought by the employee or by the company, the answer should be affirmative although there is no authority on this issue.

117. PILS art. 129(2).

118. CST. art. 59; PILS art. 149(2)(f).

119. PILS art. 127.

120. PILS art. 149(2)(e).

multilateral treaty supersedes it.[121] The PILS, as noted previously,[122] preempts cantonal legislation and replaces it with uniform federal rules.

The United States did not adhere to the Lugano Convention, and no bilateral treaty exists between Switzerland and the United States in the area of recognition and enforcement of civil judgments.[123] Therefore, the recognition and enforcement in Switzerland of a judgment or decision rendered by a United States court or authority must meet the requirements of the PILS.

B. Definition of a Foreign Judgment

The PILS does not define the term "foreign judgment". By referring to the "judicial or administrative authorities" of the state in which the judgment was rendered, however, it may be inferred that the statute does not confine the notion to decisions rendered by a court.[124] Judgments ordering the defendant to perform or abstain from performing an act or to tolerate the act of another are capable of both recognition and enforcement. In addition, the statute does not preclude the recognition of declaratory judgments.[125]

---

121. PILS art. 1(2). *See supra* section III.

122. *See supra* section II.

123. Note that art. 62(1)(b) of the Lugano Convention, *supra* note 67, states that the "Convention shall be open to accession by . . . other States which have been invited to accede upon a request made by one of the Contracting States to the depository State." However, such a state will be invited to accede only if the existing parties to the convention unanimously agree to its participation; *See also* Ronald A. Brand, *Symposium on U.S.-E.C. Legal Relations: Enforcement of Judgments in the United States and Europe*, 13 J.L. & COM. 208 (1994). The United States and Switzerland have ratified the Treaty on Mutual Assistance in Criminal Matters. Treaty of Mutual Assistance in Criminal Matters, May 25, 1973, U.S.-Switz., 27 U.S.T. 2019.

124. NEDIM P. VOGT & STEPHEN V. BERTI, *Switzerland, in* ENFORCEMENT OF FOREIGN JUDGMENTS WORLDWIDE 213 (2d ed. 1993). For instance, a decision, determination, decree, or ruling from a government, or one of its departments, agencies, commissions, or any other independent establishment, board, or bureau having the power to implement particular legislation.

125. *Id.* Declaratory judgments represent binding adjudications of the rights and status of litigants even though no relief is awarded. Such judgment is conclusive in a subsequent action between the parties as to the matters declared (positive res judicata effect). There is no convincing authority as to what extent *interim injunctions* and similar orders of foreign courts and authorities fall under the recognition and enforcement rules of the PILS. State case law diverges in results. *See* Paolo Michele Patocchi & Elliott Geisinger, *Code de droit international privé suisse annoté*, 149 ad art. 25 (Payot, Lausanne, 1995). *See also* Vogt, *supra* note 109, at 4, 5. For example, PILS arts. 50 and 96(3) of the PILS recognize

Articles 30-32 PILS assimilate court settlements to a "foreign judgment" as per articles 25-27 PILS, provided they are equivalent to a court judgment in their country of origin.[126] This applies as well to judgments or documents in matters of voluntary jurisdiction,[127] and to foreign judgments or documents regarding civil status submitted for entry in the civil status register.[128]

C. General Conditions: Articles 25 to 27 PILS

Articles 25-32 PILS contain the general provisions on recognition and enforcement of foreign decisions. The general policy of the PILS is to grant recognition to foreign decisions (*favor recognitionis* principle) provided the first court complied with certain, mainly procedural safeguards.[129] The most important feature is deletion of the reciprocity requirement found in a number of cantonal laws.[130] However, article 166(1)(c) PILS retains a reciprocity test concerning bankruptcy decrees. The PILS preempts cantonal provisions in the matter of recognition, therefore mandating changes in all cantonal codes since the entry into force of the PILS.[131] Otherwise, generally accepted rules apply to the recognition

---

all measures relating to matrimonial rights and duties, and the precautionary measures ordered in countries in which property of the deceased is located. One could argue against recognition of such measures because they are usually ordered by a single judge in *ex parte* proceedings. Thus, interim awards cannot constitute *res judicata* until the respondent has had a chance to do so. In addition, proper service of summons is a condition of recognition and enforcement that is not present in *ex parte* proceedings. The Government Report mentions the issue but does not purport to give any solution. *See* Government Report, *supra* note 5, at 320.

126. PILS art. 30.

127. Also called "noncontentious jurisdiction." PILS art. 31.

128. PILS art. 32. This disposition is aimed in particular at birth, death, marriage certificates, acknowledgment of paternity and change of family names decisions.

129. PESTALOZZI ET AL., BUSINESS LAW GUIDE TO SWITZERLAND 538 (1991); Government Report, *supra* note 5, at 317; KARRER ET AL., *supra* note 5, at 16; Bernet & Ulmer, *supra* note 83, at 317; Vogt, *supra* note 109, at 4.

130. Government Report, *supra* note 5, at 317; Samuel, *supra* note 4, at 685-86; Dorsanz, *supra* note 47, at 6; VOGT & HOCHSTRASSER, *supra* note 70, at 7. VOGT & BERTI, *supra* note 121, at 213, 215. The general part of the PILS does not mention the elimination of the reciprocity rule, but it conditions the entire statute.

131. Bertossa et al., *supra* note 47, at art. 472A LPC. To this date, most cantons have harmonized their rules of civil procedure. Geneva introduced a new article 472A LPC directed at the recognition and enforcement of foreign decisions.

and enforcement of judgments which are no longer open to appeal.[132] In no case does the recognition and enforcement of a foreign judgment depend upon the law applied by the judge who rendered it.[133] Swiss courts will always consider the enforceability of the foreign judgment under Swiss law provided no treaty is applicable.[134] However, foreign procedural rules may play a role whenever the defendant raises questions of procedural public policy,[135] or when the Swiss court examines the finality of the judgment under the law of the country where it was rendered.[136] In addition, article 27(3) PILS expressly states that Swiss courts may not review the merits of the case before granting enforcement.[137]

Under article 25 PILS, Swiss courts will recognize a foreign decision if:[138]

1) Jurisdiction lies[139] with the judicial or administrative authorities of the country in which the decision was rendered;

2) No party can bring any further judicial remedy against the decision in the country of origin, or if the decision is final;[140] and

---

132. PILS arts. 25-32. *See infra* section VII.

133. Overbeck, *supra* note 7, at 8.

134. *Id.*

135. *See* PILS art. 27(2)(a).

136. Overbeck, *supra* note 7, at 8. An example of such a control of the law applied by the foreign judge can be found in art. 27(4) of the Brussels and Lugano Conventions: "A judgment shall not be recognised . . . if the court of the State of origin, in order to arrive at its judgment has decided a preliminary question . . . in a way that conflicts with a rule of the private international law of the State in which the recognition is sought, unless the same result would have been reached by the application of the rules of private international law of that State." *Id.*

137. PILS art. 27(3). In G. v. B. Laboratories, X. and Y. Corporation, SJ 1994 470, 471 (Fed. Trib. 1994), the Federal Tribunal explained that art. 27(3) applies not only to the substance of the decision but also to the fact that it is binding. Therefore, a Swiss judge can rely on the declaration of the foreign one regarding the enforceability of the judgment. *Id. See infra* section VI(C)(3) and note 176.

138. The PILS uses the terms "judgment" and "decision" interchangeably.

139. Also translated as, "if the jurisdiction was established," "*Si la compétence de l'Etat dans lequel la décision a été rendue était donnée*" (Fr.), "*Wenn die Zuständigkeit der Gerichte oder Behörden des Staates, in dem die Entscheidung ergangen ist, begründet war*" (Ger.), "*Vi era competenza dei tribunali o delle autorità dello Stato in cui fu pronunciata*" (It.).

140. PILS art. 25(b): "A foreign decision is recognized in Switzerland . . . if no ordinary judicial remedy can any longer be brought against the decision or if the decision is final," also translated "if no ordinary appeal is available against the decision or if it is final" by Thomann et. al.. The three original texts say "*Si la décision n'est plus susceptible de recours ordinaire ou si elle est définitive*" (Fr.), "*Wenn gegen die Entscheidung kein*

3) No ground for non-recognition exists under article 27.

1. Jurisdiction of Foreign Authority

Article 25(a) PILS requires the Swiss court to examine *sua sponte* whether the courts or authorities of the State that rendered the judgment had proper jurisdiction under Swiss law (indirect jurisdiction).[141] Article 26 contains general rules,[142] which are supplemented by further rules in the

---

ordentliches Rechtsmittel mehr geltend gemacht werden kann oder sie endgültig ist" (Ger.), "*Non può più essere impugnata con un rimedio giuridico ordinario o è definitiva*" (It.). Some judicial systems may not distinguish between ordinary and extraordinary appeal or may give different definitions. For the Swiss definition, *see infra* note 148. The PILS uses the notion of "final" decision, however, "final" has different meanings as well. Under United States law, this word is generally contrasted with "interlocutory." For *res judicata* purposes, a judgment is "final" if no further judicial action by court rendering judgment is required to determine the matter litigated. Adolph Coors Co. v. Sickler, 608 F.Supp. 1417, 1429 (D.C. Cal. 1985). Under a definition used by the Supreme Court, a "final judgment or decision" is one which settles rights of parties respecting the subject-matter of the suit and which concludes them *until it is reversed or set aside* (emphasis added). *Ex parte* Tiffany, 252 U.S. 32 (1920). In contrast, art. 25(b) PILS uses "final" as a synonym for "conclusive." To be final under the PILS, the foreign judgment must not be subject to ordinary appeal.

141. It is not the role of the first court to foresee the result of a future enforcement in a foreign country of the judgment it will render at the end of the trial. It would have very limited means, if any, to know the conditions of enforcement that the foreign law attach to the jurisdiction of the first court. This role pertains to the parties, and first to the plaintiff who must undertake the necessary research to check that the jurisdiction of the particular United States court complies with the provisions of indirect jurisdiction of the State likely to enforce any future judgment. Second, the defendant must also look for grounds that might deny jurisdiction of the first court, and therefore the enforcement of a judgment against him. This is, however, not the approach adopted by the Restatement (Third) of Foreign Relations Law of the United States (hereafter cited as "Restatement") §482(1)(b) (1987) which provides that a United States court may not recognize a foreign judgment if the court that rendered it did not have jurisdiction over the defendant in accordance *with the law of the rendering state* and the rules in § 421 (emphasis added). Even if the rendering court had jurisdiction under the laws of its own state, a court in the United States asked to recognize a foreign judgment should scrutinize the basis for asserting jurisdiction in the light of international concepts of jurisdiction to adjudicate. *See Id.* at cmt. c. In contrast, the 1962 Uniform Foreign Money-Judgments Recognition Act, 13 U.L.A. 261, 272 § 5 (1986) (hereinafter "1962 Uniform Act") describes in detail the conditions of recognition of the foreign court jurisdiction. In comparison, Key v. Wise, 629 F.2d 1049 (5th Cir. 1980), states, under the provisions of 28 U.S.C. § 1738 (1948), that the determination by a state court that it has jurisdiction of the case presented to it is generally conclusive, at least when the jurisdictional question is fully litigated. Note that the Full Faith and Credit Clause of art. IV, § 1 of the U.S. Constitution does not apply to foreign nation judgments. Brand, *supra* note 121, at 195.

142. Article 26 PILS provides that: "Jurisdiction lies with a foreign authority, (a) if a

special part of the PILS.[143] The previous section described in detail the grounds for jurisdiction.

Article 26(c) PILS is particularly important because an implied choice of forum exists when the parties have pleaded the case on the merits in the first court without any party raising a lack of jurisdiction plea. The Swiss court will examine the conditions of article 26(c) PILS only if no other provision of the PILS provides for the indirect jurisdiction of the first court.[144] In the case of recognition and enforcement of a U.S. money judgment, a Swiss court will consider that jurisdiction validly lies with the U.S. court if the defendant appeared and acted before the U.S. court without formally objecting to its jurisdiction. The consequence is that even if the first court in the U.S. finds it has proper jurisdiction, the defendant must object to the court's jurisdiction solely for the purpose of blocking

---

provision of this Statute so provides or, if there is no such provision, if the defendant had his domicile in the country where the decision was rendered; (b) if, in disputes of financial interest, the parties by an agreement valid under this Statute subjected themselves to the jurisdiction of the authority that rendered the decision; (c) if in a dispute of financial interest the defendant entered an unconditional appearance, or (d) if, in the case of a counterclaim, the authority that rendered the decision had jurisdiction over the principal claim, and the two claims are materially connected."

143. *See* PILS arts. 45 (marriage), 58 (marital property), 65 (divorce), 84 (parent-child relationship), 96 (estate), 108 (real and movable property), 111 (intellectual property), 149 (obligations), 165 (company law).

144. The direct jurisdiction, a question decided by the first court, even if considered *res judicata* in the first country, does not bar a new examination of the indirect jurisdiction of the first court by the enforcing Swiss court, and the enforcing court will apply its own law. ATF 116 II 622 (Fed. Trib. 1990). One must not confuse the review of the jurisdiction of the first court with a review of the merits of the case, which is res judicata under article 27(3) PILS. To determine if the first court had proper jurisdiction under Swiss law, the Swiss court will first look for a provision in the special part of the PILS like article 149 in the law of obligations. *See supra* section IV(B)(3). If no special provision applies, it will then examine alternative factors described in article 26. Article 26(c) normally finds application when the defendant has a domicile in Switzerland, but it could also apply to cases where the defendant has a domicile outside of the country whose court rendered the judgment. For instance, a U.S. money judgment creditor who sued a company located in country X, in a U.S. court for breach of a contract that was to be performed in that country, could attach the Swiss assets of the debtor to create jurisdiction in Switzerland. The plaintiff would use the U.S. judgment to secure the attachment and collect upon the assets, but only if the contract had no choice of forum clause and the U.S. judgment was not rendered in the country of the defendant's domicile or seat (art. 149(1)(a)) or in the country of performance of the obligation (art. 149(2)(a)). Under art. 26(c), the Swiss court would nevertheless recognize it if the judgment debtor had not contested the jurisdiction of the U.S. court.

future enforcement in Switzerland. Only then could he raise the defense that the first court had no proper jurisdiction under the PILS.[145]

2. Finality of Foreign Judgment

Swiss law recognizes a foreign judgment if no ordinary appeal is available, or if it has become final.[146] Essentially, a decision is final for

---

145. The Federal Tribunal uses the concept of "unconditional appearance." Case law of the Federal Tribunal specifies that the defendant need not follow the local procedure to raise a valid objection to the local court's jurisdiction; he need only inform the local foreign court, preferably on record, whether by letter or at a court hearing, of the fact that he will oppose the enforcement of the judgment in Switzerland. The defendant must voice his objection even if the jurisdiction of the foreign court is granted under local law. ATF 96 I 594 (Fed. Trib. 1970). He does not have to appeal the decision of the first judge who rejects the defense of lack of jurisdiction. ATF 111 II 175 (Fed. Trib. 1985). If the foreign court has no jurisdiction over the defendant, he can choose to remain passive and not to proceed on the merits without losing the possibility to raise a defense of lack of jurisdiction of the first court before the Swiss court. Revue Valaisanne de Jurisprudence 1991 at 254. Art. 26(c) PILS finds no application in case the first court has proper indirect jurisdiction over the defendant but he remains passive, because it means that another ground for indirect jurisdiction applies to the case. *See also infra* section VI(C)(3), the *Rostuca* case wherein the defendant did not appear in court to challenge the jurisdiction of the U.S. court and did not proceed on the merits. However, he had his domicile at the place where the judgment was rendered, which was enough to create valid indirect jurisdiction under art. 149(1) or 26(a) PILS. Swiss procedural codes, such as art. 197ss LPC in Geneva and art. 111 ZPO in Zurich, usually provide that jurisdictional objections must be raised in the answer brief or they are deemed waived. Although, under other procedural regimes, a basis for raising jurisdictional exceptions later in a procedure may exist, the prudent Swiss defendant should raise them at the earliest occasion before the foreign court. *See* the example narrated by Bernet and Ulmer, *supra* note 85, at 323, of a Swiss defendant who made a late objection to a California state court judgment. Note that the Swiss defendant who objects to the jurisdiction of the foreign court and then proceeds to defend on the merits is not deemed to have submitted unconditionally to foreign jurisdiction. *Id.*

146. Art. 25(b) PILS, *supra* note 137. *See* § 2 of the 1962 Uniform Act ("This Act applies to any foreign judgment that is final and conclusive and enforceable where rendered even though an appeal therefrom is pending or it is subject to appeal") and § 481(1) of the Restatement, *supra* note 138. Under the 1962 Uniform Act, a final judgment is one that is not subject to additional proceedings in the rendering court other than execution. That a judgment is subject to appeal or to modification in light of changed circumstances does not deprive it of its character as a final judgment. *Id.* at cmt. e. In contrast, a judgment subject to appeal is not, under article 25(b) PILS, final or "*définitif*." However, a judgment which is not appealable but only subject to modification in light of changed circumstances or "*fait nouveau*" is final or "*définitif*" under article 25(b) PILS because Swiss law considers such modification as an *extraordinary* reexamination of the judgment. *See supra* note 137 and *infra* note 148. To make the distinction even more difficult to understand, a "*jugement*

Swiss enforcement purposes when the period for bringing an appeal or another judicial remedy has expired without such appeal being filed, or when no appeal or other remedy is available.[147] Thus, any period during which the enforceability is suspended in the first country would preclude finality for purposes of Swiss enforcement.[148] Moreover, no ordinary means of appeal must exist against the foreign judgment under the law of the country where it was rendered.[149] The Federal Tribunal and commentators define ordinary appeal as a means of appeal that gives the right to an automatic stay of execution.[150] The possibility of reopening the case under

---

final" is exactly a final judgment that is not subject to additional proceedings in the rendering court other than execution, but this judgment is not "*définitif*" in general or under article 25(b) of the PILS because it is subject to appeal. This explanation shows that the translators of the PILS should have used a word other than "final" to translate "*définitif*" because "final judgment" and "*jugement final*" mean the same, except in the particular case of enforcement where Swiss law requires a non-appealable judgment but not the 1962 Uniform Act. "Conclusive" could help but §2 of the 1962 Uniform Act, *supra* note 138, uses this word jointly with "final" without making any substantive distinction.

147. Bernet & Ulmer, *supra* note 83, at 324. In Abdel Moniem M. v. Hoirs de feu S. and Cour de Justice du canton de Genève, ATF 118 Ia 118 (Fed. Trib. 1992) [hereinafter Abdel Moniem], the Federal Tribunal required the foreign judgment to no longer be challengeable and enforceable under the law of the country where it was rendered. Swiss scholars and the Federal Tribunal speak of "*force de la chose jugée*" (*res judicata*) and of "*force exécutoire.*" *Id.* at 153. "Enforceable" seems to be the best translation because it affects the defendant in a constraining or compulsory manner and states that the judgment can be put into execution against him. "Executory" means that the judgment remains to be carried into effect. "Binding" means that the judgment affects the defendant in a constraining or compulsory manner or that it imposes duties or obligations upon him but it does affect the carrying out of the judgment. A judgment is not enforceable before the time period to file an ordinary appeal has expired because ordinary appeals carry an automatic stay of execution. *See infra* note 148. The stay of execution is not automatic in the case of extraordinary appeals, which means that the judgment is enforceable although the defendant can still challenge it. Thus, the claimant can pursue its enforcement even if the defendant files an extraordinary appeal. *See infra* note 149. It may also happen that a judgment is not enforceable although the defendant cannot challenge it any more. This is the case when the last court makes the execution of the judgment depend on the fulfilment of a particular condition. *See* ATF 82 I 246 (Fed. Trib. 1956).

148. Bernet & Ulmer, *supra* note 83, at 324.

149. Abdel Moniem, *supra* note 144.

150. *Id.* Swiss scholars and the Federal Tribunal speak of "*effet suspensif*" of the ordinary appeal. The Federal Tribunal explains that, in some legal systems such as the U.S., a party must first request, for some kinds of appeal, an authorization to appeal that does not entitle him to an automatic stay of execution. This does not mean that the judgment is immediately final because the Swiss judge must take into account that the foreign appellate court might grant such a stay. Therefore, the judgment is considered final under Swiss law, and thus enforceable, only after expiration of the period to appeal or to

specifically determined conditions does not amount to an ordinary appeal pursuant to article 25(b) PILS.[151] As a general rule in enforcement matters, Swiss courts disregard only those extraordinary remedies that need not be asserted during a specific statutory period.[152] While Swiss law defines "ordinary appeal" and "finality," one must consult the law of the country

---

request the authorization to appeal, or before, if the foreign court has refused or withdrawn the stay of execution. *Id.* Dorsaz, *supra* note 47, at 17, speaks of suspensive power or postponement of enforcement instead of stay of execution. Note that the Swiss system does not distinguish between appeal as of right (*e.g.* from U.S. trial court to intermediate appellate court) and appeal at the discretion of the appellate court (*e.g.* by writ of certiorari to the U.S. Supreme Court). Appeals are always as of right if the judgment meets specific statutory conditions. For instance, the losing party can always, in the 30 days following the delivery of the judgment from the state appellate court, appeal to the Federal Tribunal in money matters if the amount in dispute exceeds 8000 Swiss Francs (about U.S.$ 5400). Article 291 of the Geneva Law of Civil Procedure refers to the same monetary limit the purpose of differentiating between ordinary and extraordinary appeals. Thus, the party losing an extraordinary appeal to the Geneva appellate court cannot appeal to the Federal Tribunal except for violation of constitutional rights.

151. Vogt & Berti, *supra* note 121, at 215. Statutes make a difference between "ordinary" and "extraordinary" appeals. In the ordinary appeal, the appellate court reviews all questions of facts and law. In an extraordinary appeal, the court may never review the facts or evidence of the case, but only specific legal problems such as violation of the law, existence of two contradicting judgments from different courts on the same question and on the same legal ground or wrong composition of the court, or if the first judge did not follow the rules on the publicity of hearing or on the transcription of judgments, or for other grounds expressly mentioned by a statute such as art. 292 LPC. In opposition to ordinary appeals, extraordinary appeals never carry an automatic stay of execution but might allow the appellate court to grant it upon request. *See* arts. 302 and 305 LPC. Because it carries no automatic stay of execution, a petition for reconsideration (or "*demande de révision*") is considered to be an extraordinary means of appeal although it implies re-examination by the same entity which initially decided the case. Bertossa et al., *supra* note 47, at arts. 154, 169. A Geneva court would only grant such petition on very limited grounds such as existence of two contradicting judgments from the same court on the same question and on the same legal ground (art. 155), discovery of new material facts or decisive evidence (art. 157a), fraud by a witness or in general (art. 157c and d), if the judgment contains contradictory clauses (art. 154a), if the judge allocated to the claimant more or something else than what he asked for (art. 154b and c), or if the judge did not decide at all one claim raised by the plaintiff (art. 154d). *See infra* note 257. Accordingly, a motion to set aside the judgment will not preclude enforcement. Note that the distinction between ordinary and extraordinary appeal has nothing to do with an appeal as of right. *See supra* note 147.

152. TEDDY S. STOJAN, DIE ANERKENNUNG UND VOLLSTRECKUNG AUSLÄNDISCHER ZIVILURTEILE IN HANDELSSACHEN 116 (Zurich 1986). Accordingly, the possibility of a motion or writ to set aside, even if it is of an extraordinary character, may preclude enforcement in Switzerland if the specific period for the making of such motion has not lapsed. Bernet & Ulmer, *supra* note 83, at 325.

where the decision was rendered (lex fori) to determine whether the foreign judgment in each individual case meets these requirements.[153]

3. Swiss Public Policy: Substantive and Procedural Grounds

A foreign judgment can be contrary to Swiss public policy either by its substance or by the procedure followed by the first court.[154] Article 27(1) PILS deals with substantive public policy[155] and provides that "a foreign decision is not recognized in Switzerland if its recognition would be clearly[156] incompatible with Swiss public policy." The notion of public policy was shaped by case law.[157] According to the persistent language used by Swiss courts in their decisions, "public policy forbids the enforcement of a foreign judgment when this judgment conflicts in an intolerable manner with the sense of justice as it generally exists in Switzerland and when this judgment violates the fundamental rules of Swiss public policy."[158]

---

153. Some of the bilateral treaties require that the foreign judgment be 'absolute,' which means that neither an ordinary nor an extraordinary appeal may be brought against the foreign judgment. For example, article 2 of the treaty with Spain of November 19, 1896 regarding the reciprocal execution of judgments or decisions in civil or commercial matters contains such provision. *See* TRAITÉ ENTRE LA SUISSE ET L'ESPAGNE SUR L'EXÉCUTION RÉCIPROQUE DES JUGEMENTS OU ARRÊTS EN MATIÈRE CIVILE OU COMMERCIALE DU 19 NOVEMBRE 1896, RS 0.276.193.321. The Lugano Convention now applies instead of the treaty regarding money judgments. *See supra* note 70.

154. PILS art. 27(2). Public policy is sometimes also called "public order;" in French and German "*l'ordre public.*"

155. Also called "*ordre public matériel.*"

156. Also translated "manifestly" or "*manifestement*" (Fr.), "*offensichtlich*" (Ger.), "*manifestamente*" (It.).

157. Patocchi & Geisinger, *supra* note 122, at 160-166. The following examples of public policy principles are drawn from the case law of the Federal Tribunal: a judgment based on racial motives, the prohibition of marriage between two persons of the same sex or with a person already married, the Swiss rule prescribing that any decision regarding guardianship of a child must take into account his personal situation, the rule that demands the approval of the biological parents before adoption of their child; a contractual limitation to 30 days of the buyer's rights to sue the seller in case of defect violates Swiss public policy as well as a lawsuit to collect upon gambling debts. In order to apply the public policy principle, the Federal Tribunal demands that the facts of the case have a sufficient relationship ("*rapport suffisant,*" "*Binnenbeziehung*") with Switzerland, which depends on various factors such as the domicile and the nationality of the parties, the applicable law, as well as the place of execution of a contractual obligation. *Id.* The closer the connection with Switzerland, the greater the Swiss policy interest, and therefore the stricter is the standard applied. Bernet & Ulmer, *supra* note 83, at 326.

158. Dorsaz, *supra* note 47, at 22. The 1962 Uniform Act §(b)(3) and Restatement,

However, this principle implies some limitations. First, under no circumstances can it become a pretext for permitting the judge to reexamine the case on its merits.[159] Second, the Swiss judge must interpret the notion of incompatibility with Swiss public policy in a more narrow way in cases of enforcement of a foreign judgment than in the case of application of a foreign law.[160]

Article 27(2) PILS deals with procedural or formal public policy[161] and reads as follows:

> A foreign decision is also not recognized if a party proves:
> (a) that neither according to the law of its domicile nor according to the law of its habitual residence, was the party properly served with process, unless the party entered an unconditional appearance in the proceedings;
> (b) that the judgment was rendered in violation of essential principles of Swiss procedural law, especially, the party was denied the right to be heard;
> (c) that a lawsuit between the same parties concerning the same case was first commenced or decided in Switzerland, or was first decided in a third country, provided that the prerequisites for the recognition of that decision are met.[162]

---

supra note 139, §482(2)(d), mention notions of decency and justice. However, the fact that a particular cause of action does not exist or has been abolished in the state where the recognition is sought, such as suit for a breach of promise to marry, does not necessarily make enforcement contrary to public policy. *Id.*, at cmt. f.

159. PILS art. 27(3).

160. Dorsaz, *supra* note 47, at 23. In the cases Rostuca Holdings v. Cour de Justice du Canton de Genève, ATF 116 II 625 (Fed. Trib. 1990) and Abdel Moniem, the Federal Tribunal explains that Swiss courts have more freedom to reject for reason of public policy the application of a foreign law to a case they examine as first court than to reject the foreign judgment where another court has already decided factual and legal questions. A judge cannot use a public policy argument if the foreign judgment does not seriously conflict with the Swiss sense of law and morale. The Federal Tribunal adds that a simple discrepancy between the solution of a legal problem under Swiss and the foreign law referred to in the foreign judgment does not justify the applicability of the public policy exception. *See infra* notes 167 and 181, and the explanations to the two cases in the same section below.

161. Or "*ordre public procédural ou formel.*" The 1962 Uniform Act and the Restatement use the words "public policy" only as to its substantive meaning.

162. These various hypotheses are found, albeit worded differently, in § 4(a) and (b) of the 1962 Uniform Act and in § 482(1) and (2) of the Restatement.

The Swiss Federal Tribunal released important decisions on the public policy issues of article 27 PILS. In *Rostuca Holdings v. Cour de Justice du Canton de Genève*,[163] the Federal Tribunal reviewed a judgment by the Appellate Court of the Canton of Geneva that had refused to recognize a U.S. District Court default judgment on the ground that it contained no reasoning on the merits.[164] Also, the Geneva Appellate Court had not condemned the fact that the defendant had not been served with the default judgment, but the defendant challenged this again on appeal.[165] First, the Federal Tribunal noted that because Switzerland and the United States had no treaty on recognition and enforcement of judgments in civil matters, articles 25 *et seq.* PILS governed. Second, the Federal Tribunal mentioned as fundamental principles of procedural law, a lawful service of process, a fair progression of the procedure, the right of the defendant to be heard, and the absence of an identical procedure pending simultaneously in Switzerland or of a final judgment already rendered in the same matter.[166] The Tribunal explained further that judges must interpret the public policy principle narrowly, especially in cases of enforcement of foreign judgments because a court has already decided the legal situation abroad.[167] The

---

163. Rostuca Holdings v. Cour de Justice du Canton de Genève, ATF 116 II 625 (Fed. Trib. 1990).

164. Neither the 1962 Uniform Act nor the Restatement contains such a ground for review.

165. The defendant did not challenge the validity of the service of process. Note that, in Switzerland, service by means of international mail, registered post, courier, or an agent within Switzerland is illegal. *See* Bernet & Ulmer, *supra* note 83, at 329 and art. 271 of the Swiss penal code. Switzerland is now a party to the 1965 Hague Service Convention, *supra* note 65.

166. ATF 116 II 625 (Fed. Trib. 1990). The Federal Tribunal has also twice stated in two separate dicta that a judgment could not be enforced if the forum was selected for purposes of escaping the application of Swiss public policy. ATF 97 I 159 (Fed. Trib. 197); ATF 94 I 247 (Fed. Trib. 1968). Bernet & Ulmer, *supra* note 83, at 331.

167. Bernet & Ulmer, *supra* note 83, at 331. The Federal Tribunal has, for example, held that English summary proceedings pursuant to English Order 14, and lack of a notification of the defendant of a right to appeal were compatible with Swiss public policy but not court appearance by an unauthorized agent or lack of independence of an unspecified Arab country's judiciary system from the ruling family. Bernet & Ulmer, *supra* note 83, at 331-332. These authors mention the interesting but unsolved question of whether art. 27(2)(b) PILS would bar the enforcement of a U.S. judgment in a case for which extensive pretrial discovery, such as depositions, had been carried out in Switzerland in violation of Swiss sovereignty. *Id.* Note that §4(a)(1) of the 1962 Uniform Act, *supra* note 138, provides that a foreign judgment is not conclusive if it "was rendered under a system which does not provide impartial tribunals or procedures compatible with the requirements of due process of law."

Federal Tribunal added that recognition of the foreign judgment is a principle that a court can dispose of only for essential reasons. To refuse recognition would create legal uncertainty; therefore, the public policy exception applies only when the foreign judgment conflicts with the sense of justice in an intolerable manner.[168] Citing legal scholars, the Federal Tribunal spoke of the lessened effects of public policy in recognition of foreign judgments cases.[169]

The burden of proving incompatibility with Swiss public policy rests with the party opposing the recognition.[170] In examining the conditions of recognition of the U.S. default judgment, the Federal Tribunal considered that the absence of notification did not violate Swiss public policy because the law of the defendant's residence[171] provides for the notification of the judgment only to the non-defaulting party.[172] The Federal Tribunal noted that the defendant did not challenge the jurisdiction of the U.S. court or the applicability of the local procedural rules, and therefore had refused to defend himself although he knew this would lead to a default judgment. The defendant should and could have taken steps to safeguard his procedural rights with regard to notification of the judgment.[173] This case gives a clear reminder to lawyers that if a properly served defendant in a U.S. court chooses deliberately not to defend himself and, consequently faces a default judgment of which he is not notified because U.S. procedural rules do not require notification, he will not be able to plead a violation of Swiss public policy to deny enforcement of the U.S. judgment in Switzerland.[174]

---

168. Bernet & Ulmer, *supra* note 83, at 331.

169. *Id.* at 186. The Federal Tribunal uses the words of "*ordre public atténué de la reconnaissance*" or "*effet atténué de l'ordre public.*"

170. *Id.*

171. *Id.* This law, in casu, U.S. federal law, is mentioned in art. 27(2)(a) PILS.

172. *Id.* The Federal Tribunal cited FED. R. CIV. PRO. 77(d).

173. *Id.* The summons serviced on the defendant notified him that failure to appear and defend would result in a judgment by default against him for the relief demanded in the complaint. The District Court had also unsuccessfully invited the defendant to designate a counsel who would be entitled to receive the official communications of the Court. *Id.* at 186-187.

174. A Swiss court may have to examine a public policy question only after finding that the foreign court had proper indirect jurisdiction over the defendant. No proper jurisdiction exists under art. 149 PILS if the defendant had his domicile in Switzerland and if none of art. 26 PILS alternatives are fulfilled. *See supra* section IV(B)(3) and *supra* note 141. In *Rostuc*a, the defendant was a U.S. citizen domiciled in the U. S. whose creditors attached his assets in Switzerland in order to secure jurisdiction and collect payment upon the U.S. judgment.

On the argument that the U.S. judgment contained no reasoning on the merits, the Federal Tribunal reversed the Geneva court's decision because case law showed that a default judgment that did not contain any summary of the facts or legal reasoning on the merits would not violate Swiss public policy.[175] The Court upheld its jurisprudence at least in the cases where a judge had unsuccessfully invited the defaulting party to take appropriate measures to protect its procedural rights. Under the Swiss Constitution, the judge must explain his reasons for arriving at his holding so that the parties can understand the scope of the decision and appeal it with full knowledge of the grounds. A defendant aware of the consequences of his non-appearance in court need not know the reasons of the judgment because he understands that the court would base the case on the plaintiff's arguments and that the U.S. Federal Rules of Civil Procedure do not demand the notification of a judgment to the defaulting party.[176] Therefore, the Federal Tribunal reversed the Geneva decision and granted recognition to the U.S. default judgment.

In *Abdel Moniem M. v. Hoirs de feu S. and Cour de Justice du canton de Genève*, the Federal Tribunal examined a United Kingdom judgment where the defendant could not attend a court hearing in London because he was held on bail in Egypt.[177] The Federal Tribunal denied any violation of public policy due to the fact that the English judge had rendered a judgment against the defendant because of his refusal to post the bond required to postpone the hearing. The Federal Tribunal noted that the right to be heard guarantees the defendant the opportunity to explain his position in the trial but does not imply the right to express himself orally and concluded that the defendant could have defended himself adequately with the help of his lawyers in London.[178]

In *G. v. B. Laboratories, X. and Y. Corporation*, the Federal Tribunal recalled the principle that a judgment of a foreign country has no greater effect in Switzerland than in the country that rendered the judgment.[179]

---

175. JT 1992 II 187 and citations to scholars and to I.S. Bertel gegen Deutsche Bau-Bodenbank AG und Obergericht des Kantons Zurich, ATF 103 Ia 199 (Fed. Trib. 1977) (German Code of Civil Procedure providing for such default judgment). *See* Vogt, *supra* note 109, at 12.

176. JT 1992 II 188, 189. For the same reasons, the Federal Tribunal also rejected the argument that the defendant had no opportunity to appeal the default judgment. *Id.*

177. Abdel Moniem M. v. Hoirs de feu S. and Cour de Justice du canton de Genève, ATF 118 Ia 118 (Fed. Trib. 1992).

178. *Id.*

179. G. v. B. Laboratories, X.and Y. Corporation, ATF 120 II 83 (Fed. Trib. 1994). Similarly, a foreign country judgment has no greater effect in the U. S. than in the country

Thus, Switzerland would not enforce a decision pronounced in a country that would consider it null.[180] But it also added that even if U.S. law[181] would allow a party to raise a defense of nullity against enforcement of a judgment *at any time*, this does not correspond to the Swiss concept of procedural law because the losing party who has not challenged the validity of a judgment by a timely appeal cannot challenge it in a later procedure.[182] Thus, a Swiss court must recognize a U.S. judgment although its execution could face a defense of nullity in the U.S.[183] Because of art. 27(3) PILS,

---

that rendered the judgment. *See* RESTATEMENT, *supra* note 138, § 481, cmt. c.

180. *G. v. B. Laboratories*, ATF 120 II, at 83.

181. *Id.* The defendant based his defense on the nullity of the summons to the final hearing, which is a defense under California law to deny the enforcement of a judgment, at any time during the enforcement procedure. The Federal Tribunal explained that article 27(2)(a) of the PILS applied only to the first summons, not to the subsequent ones or to the notification of the judgment. The debtor was a U.S. citizen who moved from California to Switzerland during the trial before the California state court. *Id.*

182. *Id.* This approach finds no parallel in U.S. law. However, both the 1962 Uniform Act § 4(b)(2) and the Restatement § 482(2)(c) admit, as well as the Federal Tribunal, that a defense exists against a foreign judgment obtained by fraud or abuse. The Federal Tribunal adds the case when the plaintiff eludes the application of Swiss law or procedure by the creation of an artificial forum in a jurisdiction abroad with the purpose of favoring a particular result ("*forum shopping*"). ATF 98 Ia 527, 534 (Fed. Trib. 1972); ATF 97 I 151, 159 (Fed. Trib. 1971).

183. *Id.* Thus, Switzerland gives more effect to the U.S. judgment than California would. Swiss scholars and case law have always considered that a party can oppose at any time the nullity of a *contract* as if it had never taken place because it has absolutely no legal force or effect. Code des Obligations, *supra* note 77, arts. 19-20 But this is not the case for judgments. If the losing party does not challenge a judgment by a timely appeal, Swiss procedural law considers it as valid and enforceable. HABSCHEID, *supra* note 35, at 339, differentiates between so-called defective judgments (*jugements viciés*) and null judgments. The defective judgments are not null but can be nullified by a timely appeal. If the losing party does not appeal them, they remain valid and enforceable. It is the case of a judgment rendered by a court incorrectly constituted or incompetent, or in case of defect in the publication of the judgment. *See* art. 292 LPC. Habscheid further mentions as a cause of nullity the absence of filing of a complaint and the retractation of the complaint before the rendering of the judgment. VOGT & HOCHSTRASSER, *supra* note 70, at 10 (commenting that allegations of fraud could lead to a refusal of enforcement only if the defendant could demonstrate to the Swiss court that fraudulent behavior of the plaintiff had deprived the defendant of an adequate opportunity to present its case to the foreign court because such a fact would be considered a violation of the defendant's right to be heard under article 27(2)(b) PILS). If the alleged fraud concerns an issue upon which the foreign court had to decide, such as the veracity of testimony or the authenticity of documents submitted to the foreign court, the defense would not succeed, because the Swiss court would consider this to be a review of the merits of the case. *Id.* Similarly, "null and void" under U.S. law means that which binds no one or is incapable of giving

a Swiss judge can rely on the declaration of the foreign judge as to the enforceability of the judgment.[184] This decision by the Federal Tribunal creates a strong presumption of validity of a foreign, in particular U.S. judgment, in Switzerland, and goes beyond the practice of many States.[185]

In *L. v. dame B.*, ATF 117 Ib 347 (Fed. Trib. 1991), the Federal Tribunal explained that a defendant domiciled in Switzerland served with process the Friday preceding a foreign court hearing set for the following Tuesday, violated article 27(2)(a) and (b) PILS because it did not give the defendant enough time to verify the validity of the service or to prepare his defense.[186]

In *E. A G. v. K. Int. Ltd. et Tribunal arbitral Z*, ATF 116 II 634 (Fed. Trib. 1990), the Federal Tribunal mentioned as other fundamental rules of Swiss public policy, the principle of *pacta sunt servanda*,[187] the obligation to act in good faith, the prohibition of taking without compensation, the interdiction of discriminatory measures, and the protection of persons who lack capacity to act. The Federal Tribunal declared that a poorly drafted arbitral award, or one based on wrong or absurd reasons, or one that violated a clear-cut rule of law or a well established fact, does not transgress Swiss public policy. A court need only consider whether the result would be incompatible with Swiss public policy.[188]

---

rise to any rights or obligations under any circumstances, or that which is of no effect. Zogby v. State, 279 N.Y.S.2d 665, 668 (Ct. Cl. 1967). However, U.S. law, or at least California law, admits a defense of nullity not only against contracts but also against judgments. Although not mentioned by the Federal Tribunal, this decision illustrates the principle of the lessened effects of public policy. *See supra* text accompanying notes 157 and 166.

184. Article 27(3) PILS forbids the review of the foreign decision on the merits. The Federal Tribunal considers that this provision also forbids the Swiss court to review the very existence of the foreign decision. *See supra* note 134. Note that both the 1962 Uniform Act and the Restatement allow a U.S. court to deny enforcement if the first court did not have jurisdiction of the subject matter of the action. 1962 Uniform Act, *supra* note 138, at § 4(a)(3); RESTATEMENT, *supra* note 138,at § 482(2)(a). It is unclear whether this decision by the Federal Tribunal would also have the effect to preclude a review of the subject matter jurisdiction of the first court by the enforcing court. The Swiss judge will normally rely on the declaration of the foreign judge as to the subject matter jurisdiction of the first court in application of article 27(3) PILS.

185. RESTATEMENT, *supra* note 138, at §482(2)(c), cmt. e.

186. Despite the text of article 27(2)(a) PILS, the Federal Tribunal adds that the defendant may raise this defense even if he appeared at the hearing because he must have had time to inform himself about the regularity of the service before he could validly waive the defense of improper service of process. *L v. dame B.*, ATF 117 Ib 347.

187. This principle commands the parties to a contract to abide by it.

188. JT 1992 II 63, 64 (Fed. Trib. 1990).

At this point, it might be recalled that one purpose of the PILS was to codify the case law of the Federal Tribunal rather than modify it. The drafters of the PILS also facilitated the recognition and enforcement of foreign judgments by removing the traditional reciprocity requirement. They also set forth three basic conditions for such recognition: (a) indirect jurisdiction under a provision of the PILS; (b) final judgment without the availability of an ordinary appeal; (c) no exception under article 27 PILS.

D. Recognition of American Punitive Damage Awards in Switzerland

Treble, punitive or exemplary damages do not exist as such under Swiss law.[189] From time to time, Swiss courts have to handle the recognition of U.S. judgments that award punitive damages to a party. Some provisions in the PILS are built-in protection against the foreign laws that provide for these types of damages.[190] The substantive public policy clause of article 27(1) PILS sets the standards under which a Swiss court will examine the recognition of punitive damages awarded by a foreign court or jury. A ground for refusal exists if a jury awards clearly exaggerated damages.[191] The following principles apply:[192]

1) A foreign judgment condemning a debtor domiciled in Switzerland is not enforceable in Switzerland because of article 149 PILS, which reflects the content of article 59 of the Federal Constitution, unless the defendant entered an unconditional appearance before the U.S. court.[193]

2) Because punitive damages do not depend on actual harm caused to a plaintiff, but instead have the purpose of punishing the defendant

---

189. Christian Lenz, *Amerikanische Punitive Damages vor dem Schweizer Richter*, 77 ETUDES SUISSES DE DROIT INTERNATIONAL 87 (1992).

190. PILS, *translated in* KARRER & ARNOLD, *supra* note 5, arts. 135(2), 137(2) (a Swiss court cannot award damages in product liability and restraint of trade claims beyond those that would be awarded under Swiss law. However, the statute contains no similar provision that would expressly limit the recognition of a foreign judgment award to an amount matching Swiss practice. Thus, the public policy principle applies when the Swiss court examines the recognition of a foreign punitive damage award). *Id.*

191. Francois Rayroux, *Amerikanisches Civil Jury Trial und Antitrust-, Products Liability- und Derivative Suits: vergleichende Aspekte*, 87 ETUDES SUISSES DE DROIT INTERNATIONAL 138 (1994).

192. Lenz, *supra* note 189, at 176.

193. *Id.*

and deterring future wrongdoing, they bear some resemblance to penal law. Commentators debated whether the penal component of punitive damages would be enforceable before a non-criminal judge.[194] In *T.C.S. S.A. v. S.F. Inc.*, the Federal Tribunal affirmed the decision of the first judge who had declared this particular part of a punitive damage award enforceable because of the existence of similar institutions in the Swiss Code of Obligations.[195] In this case, T.C.S., a Swiss transportation corporation headquartered in Basle, had entered into a contract to transport containers on behalf of S.F. Inc., a California corporation. The latter fell behind in the payment for services performed by T.C.S., which began litigation in California. S.F., Inc. counterclaimed and sued T.C.S. for damages alleging that T.C.S. had fraudulently appropriated and sold some of its cargo containers or used them for profit in deals with other clients. The California judge, applying English law because of a choice of law clause in the contract, denied T.C.S. the right to retain, use, and sell the containers. First, the court awarded $70,800 to T.C.S. for unpaid services. Second, S.F., Inc. was awarded $120,600 in compensatory damages for the loss of the containers, and $50,000 in punitive damages to S.F., Inc. to offset the profits made by T.C.S. in selling and using the containers.[196] S.F., Inc. then began litigation in Basle, Switzerland, to collect upon the balance of the judgment remaining. The judge in Basle recognized the U.S. judgment in full.[197] The Appellate Court and the Federal Tribunal affirmed the justification of

---

194. *Id.* at 141.

195. T.C.S. SA. v. S.F., Inc., ATF 116 II 376 (Fed. Trib. 1990). Swiss Federal Code of Obligations articles 336(a) and 337(c) allocate an indemnity worth up to 6 monthly salaries to the employee in cases of dismissal for improper cause; article 160 authorizes parties to stipulate in their contract a penal clause for non-performance or bad performance (*"clause pénale ou peine conventionnelle"*, *"Konventionalstrafe"*). *See also infra* text accompanying note 196 (for agency without a mandate under article 423).

196. T.C.S., S.A. v. S.F., Inc. ATF 116 II 376 (Fed. Trib. 1990). It is not clear whether the contract between the parties contained a clause designating the California court as the proper jurisdiction for the resolution of disputes between the parties. However, because the judgment in favor of S.F., Inc was the result of a counterclaim in connection with the main action, article 26(d) of the PILS recognises the jurisdiction of the California court despite the Swiss domicile of T.C.S. SA.

197. *See* Bernet & Ulmer, *supra* note 83, at 328. The court held that the punitive damages awarded by the district court were clearly of a civil nature because they had been awarded through application of English private law; because their primary purpose had been to compensate the plaintiff for the unjust profit realized by the defendant; and because punishment of the defendant had been of only secondary importance.

the California court, which had assessed punitive damages to offset the profits T.C.S. made from the use and sale of the containers and to prevent the enrichment of T.C.S. as a result of its unjustified behaviour.[198] The Swiss court compared this situation with the Swiss concept of agency without a mandate and acknowledged that it could apply to the same facts.[199] The court reached such a result because the offset of the unjust enrichment played the main role in the case and not the willingness to punish or deter, two factors that find no parallel in Swiss law.[200]

3) The prohibition of enrichment of the damaged party is a public policy principle under article 27 PILS, which the Swiss judge must follow.[201] Excepted are the cases where the punitive damages awarded aim at the restitution of illegally obtained advantages, such as in *T.C.S.*[202]

4) As already mentioned, recognition of the foreign judgment is the principle that a court can dispose of only for essential reasons.[203] A

---

198. Lenz, *supra* note 189, at 84, 147. However, the Federal Tribunal rejected the appeal on procedural grounds. Consequently, there is still no definite authority on the status of United States multiple damage judgments under Swiss law. VOGT, *supra* note 109, at 11. Bernet & Ulmer, *supra* note 83, at 327, 328.

199. Lenz, *supra* note 189, at 84, 147. (Swiss Federal Code of Obligations article 423 obliges the agent who acted without authority to remit his profits up to the amount of his own enrichment.)

200. *Id.* at 148 (quoting the judgment of the first judge in Basle from Basler Juristische Mitteilungen). The judge drew a comparison between the facts in the T.C.S. suit and various U.S. judgments in product liability and antitrust cases where, in his words, the penal function of the damages dominates. This comment seems to indicate that punitive damages in U.S. product liability and antitrust judgments would violate Swiss public policy. Therefore, a Swiss court would not recognize such judgments, at least not in full. *Id.*

201. *Id.* at 176. In the case published a Swiss state court in the canton of St. Gall refused to recognize an unpublished judgment from a Texas district court that imposed exemplary damages on the defendant amounting to triple of the effective loss suffered by the claimant. The Swiss court did not approve of the penal content of such damages or the fact that the damages were not based on the loss actually suffered by the damaged party. The court also clearly implied that some features of the exemplary damages (punishment, teaching, and deterrence) showed a lack of civil character, and the judgment could therefore not be enforced following the rules applicable to civil judgments. *See* Bernet & Ulmer, *supra* note 83, at 327.

202. Bernet & Ulmer, *supra* note 83, at 327.

203. *Id. See also supra* text accompanying notes 157, 166.

court may use the Swiss public policy exception only when the parties or the legal relationship between them present a sufficient connection to Switzerland. The looser this relationship is, the more tolerant the Swiss judge must be with the punitive damages award.[204]

5) Swiss law seems to allow partial recognition of a judgment that partly violates Swiss public policy because commentators view a full rejection of such a judgment as an excessive interference with a foreign law regime and a contradiction to international comity and *res judicata* principles.[205] The Swiss judge may reduce the foreign money judgment to a permissible amount while taking into account the prohibition upon enrichment of the damaged party.[206]

In conclusion, the traditional view that Swiss courts do not ever enforce U.S. punitive damages awards is questionable. However, it is hard to find a tendency concerning the enforcement of such awards because Swiss courts adopt a case-by-case approach and the Federal Tribunal never ruled on the issue. If the plaintiff can take into account the above

---

204. Lenz, *supra* note 189, at 177. *See also supra* note 154 and accompanying text. The court in Basle emphasized that the case had no connection to Switzerland apart from the defendant's domicile, therefore the public policy exception was to be applied with great restraint. This is another example of the lessened effects of public policy in the area of recognition of foreign judgments. Swiss courts have more freedom to reject for reason of public policy the application of a foreign law to a case they examine as first court than to reject the foreign judgment where another court has already decided factual and legal questions. *See supra* text accompanying notes 157, 166. Similarly, Swiss courts will give even less support to the public policy exception if the parties, especially the one pleading it, have no or only a loose relationship to Switzerland. This is the case, for instance, if no party is domiciled in Switzerland or if their contract's place of performance was not Switzerland. The analysis performed by the Swiss judge resembles the one involving a choice of law question for the resolution of which courts use, among others, such principles as center of gravity, grouping-of-contacts and place of most significant relationship. However, in analyzing whether the public policy exception should apply to deny the recognition of a foreign judgment, the judge should not forget that, whatever relationship exists between the parties and Switzerland, the foreign judgment must conflict in an intolerable manner with the sense of justice. *See supra* section V(C)(3) of this article.

205. Lenz, *supra* note 189, at 171. *See also* Rayroux, *supra* note 188, at 138. However, this question is still controversial. *See* Bernet & Ulmer, *supra* note 83, at 329.

206. Lenz, *supra* note 189, at 174. However, the judge must show some flexibility with regard to the mitigated effects of the *ordre public* as contemplated in article 27(1) of the PILS. That article envisions situations manifestly incompatible with public policy. For example, the Swiss judge should recognize in full a judgment in which punitive damages would consist of a 10% premium over compensatory damages. *Id.*

mentioned considerations, he would certainly improve his chances before the enforcing Swiss court.

VI. PROCEDURE OF RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS

A. Formal Requirements: Article 29 PILS

Article 29(1) PILS provides that the judgment creditor must direct his petition for recognition to the competent authority of the canton in which he needs to enforce the foreign decision. He must enclose a duly authenticated copy of the foreign decision[207] along with a certificate establishing that the decision can no longer be challenged by an ordinary appeal or that it is final.[208] In case of a decision by default, the petitioner must provide a document[209] establishing that the losing party was properly and timely served with process, and had a reasonable opportunity to defend itself.[210] Article 29(2) PILS states that the Swiss court must hear the defendant and that he may present evidence. The cantons must take this federal procedural rule into consideration in their own codes of civil

---

207. PILS art. 29(1)(a). Switzerland does not recognize the institution of cession of judgments, but only the assignment of claims under article 164 *et seq.* of the Swiss Federal Code of Obligations. Vogt & Hochstrasser, *supra* note 70, at 15.

208. PILS art. 29(1)(b). However, the absence of this certificate does not harm the petitioner if the court records show that the foreign judgment is undoubtedly final or if the finality is not contested by the respondent. Abdel Moniem, IT 1994 II 155. Cantonal procedural laws apply with respect to the question of security for costs. In general, a Swiss court may impose such security on a foreign plaintiff who does not have a domicile in Switzerland or in a country which has ratified the Hague Convention on Civil Procedure of 1954. Therefore, a Swiss court could require the U.S. plaintiff to post such security for costs. *See* Vogt & Hochstrasser, *supra* note 70, at 17. In I. Inc. v. N. AG et Commission de justice du Tribunal supérieur du canton de Zoug, ATF 121 I 108 (Fed. Trib. 1995), the Federal Tribunal confirms that article I of the Convention of Friendship, Commerce and Extradition between the United States and Switzerland does not prevent a Swiss court from constraining a person or a corporation domiciled in the USA to post such security because the Convention only guarantees access to the courts of the other country but does not shift the rule that the plaintiff must bear the costs of the trial.

209. This translation follows the German and Italian texts. The French text specifies 'official' document, but in many countries of common law origin, service of process is done privately, and not officially by the court. KARRER ET AL, *supra* note 5, at 56.

210. PILS art. 29(1)(c). Another translation; "was summoned in due form and early enough to have had an opportunity to defend himself."

procedure.[211] In addition, all cantonal laws of civil procedure contain the obligation to translate the foreign documents.[212]

B. Judgment Debtor Domiciled in Switzerland

The judgment creditor obtains jurisdiction in the enforcement action through the domicile in Switzerland of the judgment debtor, whether the creditor is a Swiss citizen or not.[213] Enforcement proceedings of foreign money judgments form part of the procedure for the collection of money set by the Federal Debt Collection and Bankruptcy Statute.[214]

The procedure commences with the judgment creditor initiating proceedings by filing a request with the Debt Collection Office of the judgment debtor's domicile (hereinafter "the Office").[215] The Office serves upon the debtor an order to pay[216] summoning him to pay within twenty days or file an opposition[217] with the Office within ten days.[218] In the absence of such an opposition, the Office continues the debt collection with seizure of the debtor's assets or with a threat of bankruptcy.[219] If the Office receives such an opposition within the deadline, the judgment creditor must

---

211. It is the case also where the codes of civil procedure apply the rules of summary proceedings. For Geneva, *see* LPC arts. 353, 472A and Bertossa et. al., *supra* note 47.

212. The PILS does not preempt the cantonal legislations in that respect because the obligation to translate in the language of the court to which the petition is submitted is considered as a general condition. Dorsaz, *supra* note 47, at 14 and LPC art. 472A(1) is an example, but it allows the judge to exempt the petitioner from submitting a translation if this does not create any procedural inconvenience. *Id*; *See also* Bertossa et al., *supra* note 47, LPC art. 472A, and Vogt & Hochstrasser, *supra* note 70, at 9.

213. Dorsaz, *supra* note 47, at 15.

214. *Id.* at 12. *See supra* note 33. For historical reasons, non-money judgments, *e.g.* orders to deliver chattel, transfer property, or to refrain from certain acts, are enforced pursuant to cantonal law only. Vogt, *supra* note 109, at 14.

215. *Id. See also* Vogt & Hochstrasser, *supra* note 70, at 4 and Vogt & Berti, *supra* note 121, at 219. The Office is a state-run entity. Under art. 46 DCBS, enforcement must be sought at the Swiss domicile of the debtor. the request is called the "requisition de poursuite."

216. Also translated order of or for payment, "*commandement de payer; Zahlungsbefehl.*" Art. 69 DCBS. The order to pay plays the same role as a notice of assignment that a private collection agency would send to the debtor.

217. In French and German, this is called "*l'opposition; der Rechtsvorschlag.*" Art. 74 DCBS.

218. A letter indicating the debtor's objection is sufficient; no grounds need to be raised at this stage. Art. 75 DCBS.

219. Dorsaz, *supra* note 47, at 12.

file a request to invalidate this opposition with the court of the debtor's domicile within a year.[220] The rules of summary procedure apply.[221] The court that decides the dismissal of the opposition also has jurisdiction to examine the enforceability of the foreign judgment under the conditions set by the PILS without the need for preliminary and separate proceedings on the question.[222] In the summary procedure governed by the DCBS, the petitioner's presence is not necessary because the judge decides the case on the basis of the documents received from the petitioner.[223] Some have also mentioned the possibility to initiate legal proceedings by filing a petition for enforcement[224] with the Court of First Instance without or before resorting to the debt collection procedure. This possibility is not available when the court must examine the recognition of a foreign money judgment under the provisions of a treaty.[225] The Geneva courts also apply the rules of summary procedure.[226] An ordinary appeal *de novo* is available in which the appellate court enjoys broad authority to review the factual and legal grounds,[227] provided the amount in dispute exceeds 8,000 Swiss Francs.[228]

---

220. This request is called "*demande de mainlevée d'opposition définitive; Rechtsöffnungsverfahren.*" Art. 80 DCBS.

221. Art. 472A(2) LPC. The purpose of providing for the use of summary procedure is to speed up the recognition of the foreign judgment and limit the defense against it. *See supra* note 47; *see also* Cadmus Shipping Co. v. Lakeview Trading Co., *supra* note 42.

222. Entreprise Générale Transshipping SA v. Norddeutsche Oelmuehlenwerke Gmbh, ATF 61 I 277, SJ 1959 168 (Fed. Trib. 1958). *See* Dorsaz, *supra* note 47, at 12. In Geneva, the Tribunal of First Instance has jurisdiction for simultaneously ordering the dismissal of the opposition to the order to pay and the enforcement of the foreign judgment since both actions are governed by the rules of summary procedure. *Id.*

223. *See* Bertossa, et al., *supra* note 47; *see also* Cadmus Shipping Co. v. Lakeview Trading Co., *supra* note 42. Art. 80 DCBS and art. 472A(2) LPC. Petitioner may file a request, accompanied by the necessary documents, and take no further action affecting chances of success. It is advisable however, to attend the hearing in order to contest possible last minute defenses raised by the defendant. *Id.*

224. The request is the "*demande d'exequatur.*"

225. *See* Baytur SA v. Sodechanges SA, JT 1993 II 123, SJ 1991 611 (Federal Tribunal 1991). In cases where a treaty applies, whether bilateral or multilateral, the creditor must follow the procedure explained in this section in order to enforce a pecuniary claim. The creditor may request enforcement independently from the debt collection procedure in cases, however rare, where the creditor has a legal interest to ensure that a foreign judgment validly and legally affects his relationship with the judgment debtor but he does not wish to collect upon the judgment at the present stage. *See also* Josua M. v. G. Ltd, Jehuda L. et le Tribunal supérieur du canton de Zurich, JT 1992 II 115 (Fed. Trib. 1990).

226. *See* discussion *supra* note 47.

227. An ordinary appeal on any grounds, accompanied by an automatic stay, for amounts in excess of 8,000 Swiss Francs is available under art. 291 LPC. This is the same

C. *Judgment Debtor Not Domiciled in Switzerland*

The judgment creditor obtains jurisdiction in the enforcement action over the judgment debtor not domiciled in Switzerland through his ownership of assets in Switzerland (*quasi in rem* jurisdiction).[229] Under article 271(1)(4) DCBS, assets[230] located in Switzerland and owned by debtors who do not have a domicile in Switzerland are subject to attachments,[231] including receivables from Swiss debtors such as bank accounts in Swiss banks.[232] The domicile of the creditor, whether Swiss or foreign, is not taken into account. The creditor seeking an attachment must

---

in Zurich. *See* Bernet & Ulmer, *supra* note 83, at 334. In Geneva, there is also a more limited extraordinary appeal, without automatic stay of execution, for amounts under 8,000 Swiss Francs under article 292 LPC. *See* discussion *supra* note 148; *see also* Vogt, *supra* note 109, at 17 and Bernet & Ulmer, *supra* note 83, at 334 (describing the Zurich appellate procedure). A motion for judicial review to the Federal Tribunal, or "*recours de droit public; Staatsrechtliche Beschwerde; ricorso di diritto costituzionale*," is the only federal means of appeal against a cantonal judgment in a matter concerning the recognition and enforcement of a foreign judgment. The appelant may only raise the limited issue that the cantonal judge applied the PILS in an arbitrary manner. *See* Vogt *supra* note 109, at 18 and Bernet & Ulmer, *supra* note 83 at 335.

228. Approximately $ 5,400 in the U.S.

229. Dorsaz, *supra* note 47, at 15 (an attachment in Switzerland is possible irrespective of any pending procedure). Under Swiss and U.S. laws, *quasi in rem* jurisdiction is based on a person's interest in property located within the jurisdiction of the court. It refers to proceedings that are brought against the defendant, with the defendant's interest in property serving as the basis for jurisdiction. Shaffer v. Heitner, 433 U.S. 186 (1977). Under U.S. law, there must be a connection involving minimum contact between the property and the subject matter of the action for a state to exercise *quasi in rem* jurisdiction. *Id.* Swiss law traditionally did not require minimum contacts, but new art. 271(1)(4) DCBS, requires a "sufficient link" or "*lien suffisant*" with Switzerland. A final and binding judgment is deemed a "sufficient link." The first draft of the new DCBS was more stringent, demanding a "close connection" or "*rapport étroit*" with Switzerland but that language was dropped in the final bill. Such close connection exists if the contract was executed or must be performed in Switzerland, or if the debtor lives in Switzerland, but not if only assets owned by the debtor are present in Switzerland. Provided there is such sufficient link, a U.S. creditor who is not yet in possession of a judgment, may still attach the Swiss assets of his debtor not domiciled in Switzerland and subsequently, under art. 4 PILS and file suit before a Swiss court to collect upon debtor's assets, thus avoiding litigation in two countries. Note that art. 3(2) of the Lugano Convention excludes such possibility. *Supra* note 67.

230. Claims secured by mortgage or by a pledge cannot be attached. Pestalozzi et al., *supra* note 126, at 553.

231. "*Séquestre; Arrest.*"

232. Pestalozzi et al., *supra* note 126, at 533.

send a request to the court[233] in which district the property is located.[234] He must list the assets to be attached. If the targeted assets are not in the debtor's direct possession, the creditor must also indicate in the request for attachment the name of whom holds them, usually a bank. Fishing expeditions are not allowed.[235] The court issues an order of attachment in summary, *ex parte* proceedings.[236]

After execution of the attachment by the local Office, the debtor, who learns of the attachment by surprise, may petition for relief of the order.[237] He may also sue the creditor for damages caused by an unjustified attachment.[238] After the attachment of the debtor's assets, the creditor must ask the competent Office to notify the debtor of the order to pay within ten days. Under art. 66(3) DCBS, when the debtor is domiciled outside Switzerland, notification must be carried out through the authorities of his country of residence, or by the national postal service if the required State does not object.[239] If not, the Office must follow the diplomatic channels and ask the Swiss Department of Foreign Affairs to forward the order to pay to the appropriate authorities provided no other treaty commands otherwise.[240] If, for any reason, the Swiss or foreign authorities do not

---

233. It is usually heard by a single judge; in Geneva, it is sent to the President of the Tribunal de Première Instance. *Id.* at 553.

234. In case of bank account, one must know which branch of which bank the account is maintained though not the account number. *Id.* at 533

235. "Fishing expedition" attachments sought at any bank of one particular jurisdiction. Because banks are often named, an unofficial practice has developed in Geneva allowing the creditor to name up to six banks. If and when these banks reply that they hold none of the debtor's assets, the creditor may file another request for attachment naming six additional banks, and so on, until assets are finally found. Thus, Geneva authorizes limited "fishing expeditions." *See also* FED. R. CIV. P. 26(c) (permitting courts to restrict by protective orders the scope of discovery sought on general, loose, and vague allegations, or on suspicion, surmise, or vague guesses).

236. *See* Bernet & Ulmer, *supra* note 83, at 336.

237. Art. 278 DCBS and Pestalozzi et al., *supra* note 126, at 553. The debtor has 10 days to file an opposition to the attachment with the same judge who authorized it. The judge's decision on the opposition is appealable to the cantonal Court of Appeals.

238. Pestalozzi et al., *supra* note 126, at 553; Art. 273 DCBS.

239. Service can also be effected to the Swiss lawyer of the foreign debtor. Art. 66(3) DCBS.

240. In Banque Commerciale Arabe SA, ATF 103 III 1, JT 1979 II 48 (Federal Tribunal 1977)(explaining that notification of an order to pay, like any judicial act, was an act of state, i.e. an act done by the sovereign power of a country). The notification is done under the laws of the requested country, as in the case of Algerian Republic. Thus it demands notification of the order to pay through the established and formal communications and acknowledgment between Switzerland and the country of debtor's

forward the "order to pay" to the debtor, the Office will accept public notification through publication in the local journal of official communications[241] in the following cases:

1) The debtor has no known domicile;[242]

2) The debtor continuously tries to avoid the notification of the order;[243]

3) The creditor has his domicile in Switzerland; or

4) The creditor has his domicile outside of Switzerland but holds a Swiss judgment or any other binding foreign decision equivalent to a Swiss judgment.[244]

5) The debtor is not domiciled in Switzerland and a source is not available within a reasonable time.[245]

In order to avoid unreasonably delaying the petitioner from pursuing the proceedings in Switzerland, the Office usually accepts a service by publication if the creditor proves that he reasonably attempted to locate the debtor or that the foreign authorities will not act upon the request.

---

domicile, except if a treaty between the two countries alleviates the requirements. No such treaty exists between the U.S. and Switzerland. One might try to apply the Hague Convention on the Service Abroad of Judicial and Extra-judicial Documents in Civil or Commercial Matters of November 15, 1965. However, the Federal Tribunal has always considered the debt collection procedure to be a matter of administrative law. Even without the existence of a treaty between the two countries, the California court in the *Martin Julen* case did not object to the service of process by mail upon a defendant domiciled in the U.S. *See infra* note 264. Similarly, a U.S. court adopting the same liberal approach would probably not object to the service of the order to pay upon a U.S. debtor.

241. In the canton of Geneva, the "*Feuille d'Avis Officielle*" is published daily, except on public holidays.

242. This case is based upon art. 66(4)(1) DCBS, which provides that notification to the debtor of all acts relating to the debt collection procedure is done through publication if the debtor has no known domicile. *Supra* note 34.

243. Art. 66(4)(2) DCBS.

244. The last two cases are based on the decision Banque Commerciale Arabe SA, *supra* note 238.

245. Art. 66(4)(3) DCBS. The meaning of "reasonable time" is left to the Office to decide.

Publication would give the debtor at least thirty days to file an obligation to the "order to pay" to the Office.[246] The procedure then follows the description explained above in section VI(B).

D. A Step-by-Step Guide to Enforcement in Switzerland

Based on the foregoing, a judgment creditor who needs to pursue the recognition and enforcement of a foreign money judgment in Switzerland should consider the following steps:

1) If the judgment debtor has no domicile in Switzerland, the creditor should attach the debtor's assets located in Switzerland in order to secure jurisdiction for enforcement purposes at the location of the assets. An attachment is not available if the judgment debtor has a domicile in Switzerland.

2) The creditor must ask the Debt Collection Office of the debtor's domicile, or of the place where the debtor's assets were attached, to serve upon the debtor an official "order to pay" the amount due.

3) The creditor must file an application for recognition and enforcement with the competent court of the debtor's domicile, or at the place where the debtor's assets were attached. This application must contain the request to lift the opposition filed by the debtor against the order to pay. The applicant must include a complete and certified copy of the judgment, a confirmation that no ordinary appeal lies against the judgment or that it is final, and, in case of a default judgment, a certificate proving that the debtor was duly served with the claim.

4) The Swiss court will examine the conditions of recognition of the foreign judgment under the provisions of the PILS if the judgment emanates from a country for which the Lugano Convention does not apply, such as the United States.

---

246. To his detriment, the debtor, who lives outside Switzerland, rarely (unless he has a lawyer in the canton of publication) notes the existence of such published notification before the expiration of the deadline, which allows the creditor to collect upon debtor's attached assets more rapidly than through the judicial proceedings required to invalidate the opposition to the order to pay. *See supra* section VI(B).

VII. SWISS JUDGMENTS BEFORE UNITED STATES COURTS

From time to time, in the U.S., state and federal courts have faced the question whether they should give effect to Swiss judgments. It appears that U.S. courts have proven receptive to recognition of such judgments despite the fact that the full faith and credit clause of the U.S. Constitution does not apply to foreign judgments.[247] One of the earliest opportunities for a court to discuss the validity of a Swiss judgment arose in an action to enforce a Swiss divorce decree including a money judgment for a debt against a citizen of the U.S. The federal court in *Gull v. Constam* agreed to enforce such a judgment and explained that "generally, as a matter of comity, the judgments of foreign courts are given conclusive effect and full faith and credit when sued upon in American courts, provided they are not tinged with fraud and the courts from which they emanated had jurisdiction over the subject matter and over the parties."[248]

The court then recalled the rule announced in *Hilton v. Guyot*, limiting the "doctrine of comity to the judicial decrees of those countries which award full force and effect to American judgments."[249] Thus, the court continued, the absence of reciprocity is a defense and judgments from countries in which American judicial proceedings are reviewable on the merits constitute only *prima facie* evidence of the matters adjudicated.[250] However, the *Gull* court did not even attempt to analyze if Swiss courts would grant such reciprocity to a U.S judgment and relied on Rule 9(e) of the F.R.C.P.[251] to deny defendant's motion to dismiss.[252]

---

247. Nor is the matter governed by treaty or federal statute, so that judgments enforcement in the United States remains a matter of state law following the decision in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938) rejecting the concept of a general federal common law. Brand, *supra* note 120, at 195-196.

248. Gull v. Constam, 105 F. Supp. 107, 108 (D. Colo. 1952).

249. *Id.* at 108, *citing* Hilton v. Guyot, 159 U.S. 113 (1895).

250. *Id.* at 108-09. *See* Starzl v. Starzl, 686 S.W.2d 203 (Tex. App. 1984). (Foreign judgments do not constitute hearsay). *See also* the exceptions to the hearsay rule in FED. R. EVID. 803-804.

251. FED. R. CIV. P. 9(e) as cited by the court states, in part, that: "In pleading a judgment ... of a domestic or foreign court, ... it is sufficient to aver the judgment or decision without setting forth matter showing jurisdiction to render it."

252. Gull, 105 F. Supp. at 109. While this rule does not control precisely the disposition of the instant controversy, it suggests by analogy that if it is unnecessary to aver the jurisdiction of the foreign court whose judgment is sued on in a court of the United States, then it is unequally unnecessary to plead the status that an American judgment might or might not enjoy were it attempted to be enforced in such foreign

Other decisions involve actions brought in the United States to recover unpaid alimony, arrearage or child support payments upon a Swiss judgment of divorce. These decisions have not normally caused trouble.[253] In *Mandel-Mantello v. Treves*, however, a New York court refused to enforce child support payments included in a Swiss divorce decree because the state law expressly prohibited the enforcement of such payments, but the decision was revised following plaintiff's appeal.[254]

In an early contract case, the court in *Aiutana Bankgenossenschaft v. Perren*, enforced a Swiss default judgment ordering the defendant to pay

---

jurisdiction. *Id.* Although the result reflects the receptiveness of the court to foreign decisions, it seems that it found a convenient way to avoid the analysis of foreign law as to its reciprocity requirement. Though the Supreme Court has not formally overruled the reciprocity analysis laid out, the great majority of state and federal courts in the United States do not follow it any more. *See* RESTATEMENT, *supra* note 189, § 481, cmt. d. *See also* Somportex Ltd. v. Philadelphia Chewing Gum Corp., 453 F.2d 435, 440 n.8 (3rd Cir. 1971), *cert. denied*, 405 U.S. 1017 (1972). Note that the 1962 Uniform Act, *supra* note 138, at § 4, does not mention reciprocity as a ground for non-recognition. However, the states of Georgia, Idaho, Massachusetts, Ohio and Texas have added a reciprocity requirement in their adoption of the Act. *See* Brand, *supra* note 120, at 200.

253. In Gunthardt v. Gunthardt, 223 N.Y.S.2d 420 (N.Y. Sup. Ct. 1961), the court granted a judgment for unpaid alimony under a Swiss judgment of divorce because under Swiss law, the judgment respecting the arrears was not subject to modification and was final. In Zarembka v. Zarembka, 438 N.Y.S.2d 420 (N.Y. App. Div. 1981), the court, in an action for breach of a separation agreement approved by and incorporated in a Swiss judgment of divorce, granted judgment to the plaintiff without even looking at the validity of the foreign decision and found that the separation agreement entitled plaintiff to receive monthly payments.

254. Mandel-Mantello v. Treves, 426 N.Y.S.2d 929, 930 (N.Y. Sup. Ct. 1980) rev'd 434 N.Y.S.2d 29 (N.Y. App. Div. 1980). Under Article 53, §5301(b) and 5302 of the New York Recognition of Foreign Country Money Judgments Act, N.Y.C.P.L.R. 5301-09 (Consol. 1978), foreign country money judgments which are final, conclusive and enforceable where rendered are entitled to recognition and judicial enforcement in New York, unless they provide for a sum of money representing support in matrimonial or family matters. Thus, it might well be said that New York state legislators, as well as the drafters of the 1962 Uniform Act, have considered matrimonial and family issues to be a matter of public policy. The first court did not analyze the case under a public policy argument but simply applied article 53 of the Act to deny enforcement of the Swiss decree. On remand, the Appellate Division revised the lower court decision because foreign matrimonial awards [and support provisions of a foreign country divorce decree] are accorded recognition in New York provided they are final and incapable of being modified by the rendering country. 434 N.Y.S.2d at 30. However, the court could not decide whether the Swiss decree was final because of an incomplete record. *Id.* Note that § 1(2) of the 1962 Uniform Act, *supra* note 138, adopted without changes by New York in 1970, also expressly excludes judgments for support in matrimonial or family matters. Unlike the 1962 Uniform Act, the Restatement, *supra* note 138, Introductory Note at 593 and §§484-486, addresses divorce, child custody, and support judgments.

upon a note he had drafted in Switzerland that provided for Swiss jurisdiction in case of nonpayment.[255] The court held that by his agreement, the defendant had submitted himself to the personal jurisdiction of the Swiss court.[256] In addition, the service of process followed by the Swiss court was in full compliance with its practice and procedure.[257] Therefore, the U.S. court declared it valid and enforceable.[258] Similarly, in *Indag SA and Jamiltrade SA v. Irridelco Corp.*, the court authorized the enforcement of a Swiss judgment for breach of contract.[259]

In *El Ajou v. First National Bank of Chicago,* the court relied on a prior final adjudication of a controversy between the same parties in Switzerland to grant the motion to dismiss plaintiff's action.[260] The court confirmed that principles of *res judicata* applied to judgments of the courts of foreign countries.[261] The plaintiff did not dispute that the two suits concerned the same parties and the same cause of action, but he contested the finality of the Swiss action because of his pending petition for reconsideration before the Federal Tribunal.[262] The court did not have to

---

255. Aiutana Bankgenossenschaft v. Perren, 141 A.2d 255, (Conn. Super. Ct. 1957). The defendant owned no property in Switzerland and was at the time a U.S. citizen domiciled in Connecticut. *Id.* at 256.

256. *Id.* at 257. The court emphasized that "Contracts made by mature men who are not wards of the court should, in the absence of potent objection, be enforced." *Id.* at 258.

257. *Id.* Service upon the defendant was made in Connecticut by registered mail pursuant to the Zurich Code of Civil Procedure. The Swiss court also sent a notice of the default judgment to the defendant. The defendant did not contest the validity of the service. *Id.* at 256.

258. *Id.* at 259. It is interesting to note that the defendant did not raise the question of reciprocity and that the court did not address it.

259. Indag SA v. Irridelco Corp., 658 F. Supp. 763 (S.D.N.Y. 1987). In that case, it was undisputed that the judgment was valid and entitled to enforcement under the law of New York. The only remaining issue involved the date of conversion of defendant's obligation from Swiss francs into U.S. dollars. *Id.* at 764.

260. El Ajou v. First Nat'l Bank of Chicago, 1993 U.S. Dist. LEXIS 13865, at *7 (N.D.Ill. 1993).

261. *Id.* at *3.

262. *Id.* at *3-*4. The Federal Tribunal is the highest Swiss court. *See supra* note 3. Its decisions are not subject to appeal and have force of law from the time they are rendered (art. 38 Swiss Federal Judiciary Statute [hereinafter FJ]. The Federal Tribunal can grant a petition for reconsideration (or "*demande de révision*") only on very limited grounds such as learning of new material facts or decisive evidence (art. 136-137 FJ). Such petition carries no stay of execution but the petitioner can request it from the Tribunal (art. 142 FJ). Reconsideration implies re-examination, and possibly a different decision by the same entity which initially decided the case. Therefore, it is not an appeal to a superior court, even less an ordinary appeal. *See supra* note 148.

address this contention because the Federal Tribunal denied the petition soon after the filing of the U.S. action.[263] Second, the plaintiff complained that Swiss courts had denied him due process because Swiss procedure did not allow the same extent of discovery as that provided by the Federal Rules of Civil Procedure. The court dismissed that defense and noted that the Swiss courts are generally "a fair and reasonable forum for resolution of disputes,"[264] and that "the absence of liberal pre-trial discovery in a foreign court does not amount to a denial of due process."[265]

The Court of Appeals of California in *Julen v. Larson* refused recognition of a Swiss money judgment on the ground that the service of Swiss process was not "reasonably calculated" to give defendant notice of the action which resulted in the Swiss judgment.[266] Indeed, the defendant had only received judicial documents in German with two vague letters from the Swiss Consulate that did not give notice of the nature of the enclosures. The Swiss court claimed jurisdiction over defendant on the ground that he conducted business in Switzerland and had thereby subjected himself to the jurisdiction of the Swiss court.[267] However, the Swiss court could acquire jurisdiction only by effective service of process.[268] Although service of process by mail in a foreign country is no longer automatically objectionable and in appropriate instances may result in personal jurisdiction over a defendant, the process served must give the defendant sufficient notice of the pending foreign proceedings to satisfy the requirements of due process of law.[269] The court concluded that as the Swiss court had not provided any informative notice in English,[270] the

---

263. El Ajou, 1993 U.S. Dist. LEXIS at *4. The court added that not only the common law principles of res judicata barred the suit, but also the 1962 Uniform Act as implemented in the Illinois Uniform Money-Judgments Recognition Act. *Id.* at *8.

264. *Id.* at *7 (*citing* Medoil Corp. v. Citicorp, 729 F. Supp. 1456, 1460 (S.D.N.Y. 1990)).

265. *Id.* The court added that "there is no reason to believe that the Swiss system of civil jurisprudence will be unable to provide an adequate forum for the adjudication" *Id.* (citing Raskin SA v. Datasonic Corp., 1987 WL 8180, 8183, (N.D.Ill. 1987) (enforcing a contractual clause selecting a Swiss forum).

266. Julen v. Larson, 25 Cal. App. 3d 325, 326 (Cal. Ct. App. 1972) (*citing* Mullane v. Central Hanover Trust Co., 339 U.S. 306 (1950)).

267. A Swiss court would today apply art. 113 PILS (Swiss place of performance of a contract) to claim jurisdiction over defendant (not yet in force at the time of trial).

268. Julen, 25 Cal. App. 3d at 328.

269. *Id.* at 327-28.

270. The court added: "While we do not require documents in a foreign language to be translated into English in order to be validly served, we think at a minimum a defendant

documents and correspondence served on the defendant did not give him sufficient notice of the pending Swiss action and consequently the Swiss court never acquired valid personal jurisdiction over the defendant.[271]

With the exception of one case where the court dismissed enforcement because of improper service of process,[272] and another in which a statute barred enforcement,[273] it is fair to say that, in light of the decisions discussed above, the United States has been receptive to recognition of Swiss money judgments ever since American courts have had to deal with such judgments. The rare mention of a reciprocity requirement and the nonexistence of Swiss cases ruled to violate a state public policy[274] highlights the liberal approach of U.S. courts towards judgments from Switzerland.

VIII. CONCLUSION

The PILS represents an important improvement in the area of recognition and enforcement of foreign decisions in Switzerland. It provides for uniformity of conditions in the 26 cantons, dismissal of the reciprocity requirement, and recognizes judgments no longer open to appeal

---

should be informed in the language of the jurisdiction in which he is served that a legal action of a specific nature is pending against him at a particular time and place. Normally this information should include the location of the pending action, the amount involved, the date the defendant is required to respond, and the possible consequences of his failure to respond . . . . We emphasize that no great amount of formality is required for effective notice." The court held that the notice given in that case was inadequate even judged by these loose standards. *Id.* at 328.

271. *Id.* The court treats the lack of legally sufficient notice to impart knowledge of an impending action and to enable the respondent to defend himself as a question of jurisdiction over the defendant, and thus follows the rationale of the Restatement (Second) of Conflict of Laws § 25 (1971), which states: "A state may not exercise judicial jurisdiction over a person, although he is subject to its judicial jurisdiction, unless a reasonable method is employed to give him notice of the action and unless he is afforded a reasonable opportunity to be heard." The 1962 Uniform Act § 4(a)(2), 4(b)(1) and the Restatement § 482(1)(b), 482(2)(b), *supra* note 139, separate clearly the questions of jurisdiction of the notice not received in sufficient time to enable the respondent to defend. Here the issue was the latter, not the former.

272. *See Julen*, 25 Cal. App. 3d at 330. Improper service of process is also a ground for non recognition of a foreign judgment in Switzerland under art. 27(2)(a) PILS. *See supra* section V(C)(3).

273. *See* Mandel-Mantello, 426 N.Y.S.2d at 931.

274. The issue of public policy was not mentioned in Mandel-Mantello, 426 N.Y.S.2d at 930-31. The court applied a New York statute but did not refer to it as an indication of a voluntary act of public policy of the state. *Id.*

according to generally accepted rules. Because the U.S. courts had used liberal principles long before the PILS went into force, one would say it was about time for Switzerland to adopt a modern statute with more receptive rules towards recognition and enforcement of foreign decisions. Swiss case law also recently advanced to the point where the traditional view that U.S. judgments awarding punitive damages were not enforceable in Switzerland can no longer be held as an absolute rule.

However, the PILS still contains some provisions preventing recognition and enforcement in important matters because it follows, with some exceptions, the Swiss Constitution that prevents the enforcement in Switzerland of a judgment rendered abroad against a solvent person domiciled in Switzerland. To the detriment of the American judgment creditor, Swiss law does not normally recognize claims on obligations against debtors domiciled in Switzerland decided by U.S. courts on the basis of jurisdiction clauses that do not take into consideration the debtor's domicile such as the place of performance of the contractual obligation or the place where a tort occurred.[275] This constitutional problem raised difficulty in international negotiations, especially with regard to article 5(1) of the Lugano Convention which resulted in Switzerland negotiating a reservation.[276] According to this reservation, Switzerland will not recognize or enforce a judgment rendered in a contracting state at the place of performance of a contract against a Swiss defendant who did not submit to such jurisdiction.[277] Under the influence of the Lugano Convention and in order to conform its laws to the approach followed in other countries, the Swiss Federal Parliament should consider a modification to article 59 of the Constitution to adapt it to contemporary legislation. Such a constitutional modification would also directly favor U.S. judgment creditors who seek enforcement against a debtor domiciled in Switzerland and would remove additional hindrances to the international recognition of judgments in Swiss courts.

---

275. For the problems ensuing from art. 59 of the Swiss Constitution, and its consequences on the text of art. 149 PILS, *see supra* notes 11 and 109. Thus, a Swiss court will not enforce a U.S. judgment against a debtor domiciled in Switzerland even if the place of performance of the contract was in the United States. For the exceptions to this principle, *see supra* note 139 (article 26 PILS) as well as sections IV(B)(1) and V(C)(1).

276. Karrer, *supra* note 5, at 20; Overbeck, *supra* note 7, at 8.

277. Art. Ia of the Protocol No.1 On Certain Questions of Jurisdiction, Procedure and Enforcement attached to the Lugano Convention, *supra* note 67. *See* Karrer, *supra* note 5, at 225-26; Bernet, *supra* note 83, at 338. This reservation shall cease to have effect on 31 December 1999. Bernet, *supra* note 85, at 338.

The PILS, combined with the Lugano Convention where applicable, otherwise puts the foreign creditor in a strong position to enforce judgments in Switzerland. The Lugano Convention goes so far as to prevent the courts of the enforcing state from reviewing the jurisdiction of the rendering state, thus leaving only for examination the questions of finality and public policy.[278]

On the other side of the Atlantic, the United States is not a party to any judgment enforcement treaty, which means that whenever a U.S. judgment is taken abroad for recognition and enforcement, it is subject to local enforcement laws, such as the PILS.[279] The existence of fifty separate and different state laws, and the fact that five states have kept the reciprocity requirement, make matters difficult in explaining the law to a foreign court, in the cases when the U.S. judgment creditor is required to prove in a country requiring reciprocity, that a similar judgment from the enforcing court would be enforced in the originating state court. Given the incidence of a unified and simplified intra-european system of judgment enforcement, the United States may find it beneficial to adapt its law in this area based on the European, or even Swiss, example.[280] Such action would increase enforcement cooperation, clarify U.S. practice regarding the recognition and enforcement of foreign judgments, and provide a unified framework in the same manner realized by the PILS in Switzerland.

278. Art. 28(4) of the Convention, *supra* note 67.

279. Brand, *supra* note 120, at 195.

280. *Id.* at 209. Note that the United States has recently taken the initiative to negotiate a new multilateral judgments convention in the Hague Conference on Private International Law. *Id.*