

Recognition and Enforcement of Foreign Civil Judgments in Switzerland

The Federal Private International Law Act¹ (Act or PIL Act) codified and clarified Swiss law pertaining to the recognition and enforcement of foreign civil judgments, conflicts of law, and a number of other matters. The Act, which came into force on January 1, 1989, goes significantly beyond previous codifications of private international law, such as those undertaken in Germany or Austria, by attempting a comprehensive codification of Swiss private international law practice.² Prior to the enactment of the PIL Act, Swiss private international law was a confusing patchwork of federal acts, some dating back to 1891, together with cantonal law, certain provisions of the Code of Obligations, case law, and treaties.³

While the Act was designed to codify Swiss international practice rather than alter it, the Act will, in practice, facilitate the recognition and enforcement of foreign judgments; indeed, the philosophy of the Act towards foreign decisions is one of *favor recognitionis*.⁴ A review of cases decided since the Act came into

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1. Bundesgesetz über das Internationale Privatrecht/Loi fédérale sur le droit international privé/Legge fédérale sul diritto internazionale privato of 18 December 1987, SR 291 [hereinafter PIL Act].

2. Adam Samuel, *The New Swiss Private International Law Act*, 37 INT'L & COMP. L.Q. 681, 682 (1988).

3. Jones, Day, Comment, *Recent Developments in Swiss International Practice: Insider Trading, Bank Secrecy, Private International Law and Arbitration*, CORP. COUNS. INT'L ADVISOR, Nov. 1989, at 54; accord Felix Thomann, Introduction to Swiss Federal Act on International Private Law (Swiss-American Chamber of Commerce Publication 1989); see also Peter Hafer & Urs Rohner, *Switzerland*, in ENFORCING FOREIGN JUDGMENTS IN THE UNITED STATES AND UNITED STATES JUDGMENTS ABROAD 182 (ABA Section of International Law and Practice, 1992).

4. Botschaft des Bundesrates vom 10. November 1982 zum Bundesgesetz über das internationale Privatrecht (IPR-Gesetz), BBl 1983 Bd. 1 S. 263-519 (report of the Swiss Federal government to the parliament on the PIL Act) at 217.1 327 [hereinafter Botschaft]. In particular, the Act simplifies or

force indicates that Swiss courts are carrying out this legislative intent. The Swiss framework for recognition and enforcement of foreign civil decisions is now coherently set forth in section 5, articles 25 to 32 of the general provisions of the Act. The authors' English translation of this section is appended to this article.

This article focuses on the enforcement of foreign money judgments obtained in commercial matters against Swiss defendants or Swiss-based assets. Particular emphasis is placed on judgments emanating from the United States, and to a lesser degree California.⁵ The analysis of the apposite articles of the PIL Act is, however, applicable to any foreign judgment whose recognition or enforcement is sought in Switzerland, where the judgment is rendered in a country with whom Switzerland has no bilateral or multilateral judgments treaty.⁶ The analysis of articles 25 to 32 of the Act is followed by a summary of Swiss attachment procedures. In practice, foreign judgments are often enforced against Swiss bank accounts that have been previously blocked by means of a civil attachment. The final section of this article contains a brief exposé of the Lugano Convention to which Switzer-

eliminates a number of existing rules and reciprocity requirements. The procedural-type dispositions of the Act were the subject of controversy since Switzerland is a very decentralized country where matters of civil procedure are, as a matter of constitutional law, reserved for the individual cantons, each of which has its own civil procedure code. *See id.* at 288 *et seq.* These constitutional issues are no longer of concern now as Swiss courts do not have a "constitutional review" power to invalidate a statute passed by the federal parliament. Bundesverfassung, Constitution fédérale, Costituzione federale [Constitution] art. 113(3); *accord* Samuel, *supra* note 2, at 682.

5. For a helpful analysis in the other direction, *i.e.* enforcing a foreign judgment in California, see Donald E. McKnight, *Enforcement of Foreign Money Judgment in California*, 1 THE CALIFORNIA INTERNATIONAL PRACTITIONER 1-6 (1989-90); *see also* Werner Ebke & Mary Parker, *Foreign Country Money-Judgments and Arbitral Awards and the Restatement (Third) of the Foreign Relations Law of the United States: A Conventional Approach*, 24 INT'L LAW. 21 (1990); Robert Rendell, *Enforcing Foreign Judgments*, INT'L FIN. L. REV., Feb. 1991, at 48-49; *cf.* Julien V. Larson, 25 Cal. App. 3d 325, 101 Cal. Rptr. 796 (1972) (enforcement of Swiss judgment in California refused in large part due to improper service of complaint in German only which did not result in personal jurisdiction over Defendant).

6. In addition to the "Lugano Convention," *supra* note 7 and *infra* part VI, Switzerland is bound by such judgment treaties with Austria, Belgium, Czechoslovakia, Germany, France, Italy, Liechtenstein, and Spain. *See generally* DROIT INTERNATIONAL PRIVÉ, LOI FÉDÉRALE ET CONVENTIONS INTERNATIONALES (Andreas Bucher ed., 1988) [hereinafter CONVENTIONS INTERNATIONALES]. However, these bilateral treaties may be superseded, in whole or in part, when the Lugano Convention comes into force as between the two countries. *See* FRANÇOIS KNOEPFLER & PHILIPPE SCHWEIZER, PRÉCIS DE DROIT INTERNATIONAL PRIVÉ SUISSE 225 (1990). Other than the Lugano Convention the sole multilateral treaty to which Switzerland is a party which is potentially relevant here is Convention de la Haye relative à la procédure civile, conclue le 1er mars 1954 entered into force for Switzerland July 5, 1957, SR 0.274.12, CONVENTIONS INTERNATIONALES, *supra* at 123 [hereinafter 1954 Hague Convention]. The parties to the French-language 1954 Hague Convention are almost all European countries, and the United States is not a party. Switzerland has signed, but has not ratified, the 1965 Hague Convention on the Service abroad of Judicial and Extrajudicial documents on civil or commercial matters, opened for signature Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638, 658 U.N.T.S. 163 [hereinafter Hague Service Convention] as well as the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters opened for signature Mar. 18, 1970 [1972] 23 U.S.T. 2555, T.I.A.S. No. 7444, 847 U.N.T.S. 231. For a convenient source for these latter two Conventions, see International Law, 1992 MARTINDALE-HUBBELL LAW DIGESTS at IC-1, IC-15.

land has recently adhered,⁷ and which will soon govern the enforcement of judgments from all Western European countries in Switzerland.

Requirements for Recognition under the Act

The basic requirements for recognition of foreign judgments are set forth in article 25 of the PIL Act, which provides that a foreign decision⁸ shall be recognized in Switzerland if: (1) the foreign court rendering the decision had jurisdiction; (2) the decision is final; and (3) nothing under article 27 of the Act serves as a basis to refuse recognition. The first two requirements are examined in this part I. The third requirement is examined in part II.

A. JURISDICTION OF THE FOREIGN COURT

Article 59 of the Swiss Federal Constitution (Constitution) guarantees a Swiss defendant a home forum by providing that “the solvent debtor domiciled in Switzerland must be brought before the judge of his domicile.”⁹ Although the retention of article 59 beyond 1999 is uncertain,¹⁰ it is currently essential to an understanding of many Swiss jurisdictional issues.

Swiss case law has carved out a number of exceptions to the principle of article 59, and these exceptions have been embodied in article 26 of the PIL Act. Article 26 provides that a foreign court shall have jurisdiction if: (1) the PIL Act so provides, or the defendant was domiciled in the country where the decision was rendered; (2) the parties submitted by agreement to the jurisdiction of the foreign court; (3) the defendant did not object to jurisdiction; or (4) in the event of a factually connected counterclaim, the foreign court had jurisdiction over the original claim. 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

7. Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, done at Lugano September 16, 1988, SR 0.275.11 (Switz.) [hereinafter Lugano Convention]. See generally MICHAEL CARPENTER, MICHEL HAYMANN, TONY HUNTER-TILNEY & PAUL VOLKEN, THE LUGANO AND SAN SEBASTIAN CONVENTIONS (Butterworths, 1990) (English text of Lugano Convention and helpful articles). The Lugano Convention entered into force for Switzerland 18 October 1991.

8. It should be noted that the recognition framework of the PIL Act, including provisions in its specialized chapters, applies not only to foreign decisions or judgments for affirmative relief or damages, but also to declaratory judgments and to judgments establishing or altering a legal relationship which may require recognition and not execution. See Michel Hayman, *Switzerland*, in INTERNATIONAL COMMERCIAL LITIGATION 514 (Stephen Crombie ed., 1990). The provisions of articles 25 to 29 of the PIL Act also apply to court entered or approved settlements which have the status of a court decision in the country in which entered. PIL Act, *supra* note 1, art. 30.

9. Costituzione Federale [Constitution] art. 59; cf. Code Civil art. 15 (Fr.) (French person has right to French forum).

10. See discussion *infra* part V.

against a debtor domiciled in Switzerland, provided that the defendant did not plead on the merits without reservation.

1. *Jurisdiction Based on Defendant's Domicile or a Specific Provision of the PIL Act*

The Act sets forth a general and residual rule that courts of the defendant's domicile are presumed to have jurisdiction over the defendant.¹¹ An individual's domicile is the country where that individual is living with the intention of staying permanently. If an individual has no domicile, the Act looks to the individual's habitual residence, that is, the country where the individual is living for a certain period of time, even if the period is limited from the outset.¹² A corporation's registered corporate seat is deemed to be its domicile. If the corporate seat is not designated in the corporation articles or charter documents, it is deemed to be where the affairs of the corporation are in fact administered.¹³ Consequently, foreign decisions relating to claims arising from contract or tort law (*droit des obligations* or *Obligationen-recht*) are recognized in Switzerland if rendered in the country that is the defendant's domicile or habitual residence. However, in the latter case the claim must relate to activity conducted at the habitual residence.¹⁴ The jurisdiction of the foreign court is also accepted if certain provisions of the PIL Act so provide.¹⁵ The Act specifies, for instance, the situations in which the Swiss court will recognize a foreign court's jurisdiction over a divorce proceeding¹⁶ or a disputed succession.¹⁷

In addition, article 149(2) of the Act provides for Swiss recognition of certain foreign money judgments against non-Swiss domiciled debtors, including: those arising out of a contract and rendered in the state of performance;¹⁸ those arising from an employment agreement and rendered at the place of work or business;¹⁹ decisions pertaining to unjust enrichment rendered at the place of the act or the effects thereof;²⁰ and decisions arising from tort and rendered at the place of the tortious act or the effects thereof.²¹

The PIL Act does not necessarily have the same jurisdictional rules for Swiss

11. PIL Act, *supra* note 1, arts. 2 & 26(a); *accord* Samuel, *supra* note 2, at 683.

12. PIL Act, *supra* note 1, art. 20.

13. *Id.*

14. *Id.* art. 149(1). The domicile principle of the Act is essentially common to both domestic and foreign jurisdiction. Samuel, *supra* note 2, at 683.

15. PIL Act, *supra* note 1, art. 26(a). The Act also defines the jurisdiction of the Swiss courts in private international law matters. *See generally* Paul Volken, *Conflits de juridictions, entraide judiciaire, reconnaissance et exécution des jugements étrangers*, in *LE NOUVEAU DROIT INTERNATIONAL PRIVÉ SUISSE* 233-56, 247-48 (1988).

16. PIL Act, *supra* note 1, art. 65; *see also* Volken, *supra* note 15, at 247.

17. Volken, *supra* note 15, at 247; PIL Act, *supra* note 1, art. 96.

18. PIL Act, *supra* note 1, art. 149(2)(a); *see also id.* art. 149(2)(b) (rule on consumer contracts).

19. *Id.* art. 149(2)(c).

20. *Id.* art. 149(2)(e).

21. *Id.* art. 149(2)(f).

courts as those applied in recognizing foreign judgments. The Act, therefore, abandons the precise mirror-image (*Spiegelbildlichkeit*) parallelism still to be found in German and other law and instead defines specific jurisdictional bases for recognition.²² This legislative technique also permits the Act to avoid the reciprocity requirement previously contained in a number of cantonal procedural codes.

2. Jurisdiction Based on an Agreed Forum

If the parties to a litigation submitted to the competence of a foreign court, that court would be deemed to have jurisdiction for purposes of the enforcement of its decision in Switzerland. The Act restricts this general rule in two ways. First, the election of forum must be validly effected pursuant to the Act. Second, it must be *en matière patrimoniale*, that is, it must involve a claim for money damages or other pecuniary rights.²³

a. Valid Election of Forum

The Act states the general principle that the selection of a forum is void if it abusively denies a party a place of jurisdiction provided by Swiss law.²⁴ Specific prohibitions are set forth in the specific chapters of the Act. Thus, for example, consumers benefit from special protection because “the consumer may not waive in advance the jurisdiction at his domicile or his habitual residence.”²⁵ Exclusive Swiss jurisdiction for litigation involving employment relationships in Switzerland is not, however, clear from a simple reading of the Act and has been subject to conflicting interpretations.²⁶ An intriguing question is whether heavy-handed forum selection clauses sometimes found in international contracts (such as those requiring that the distributor bring all actions at the principal’s place of business, but allowing the principal a choice of forums) would be upheld under the Act, particularly given the spectre cast by article 59 of the Constitution. While there does not appear to be any recent case law on the issue, the possibility exists that such an exorbitant and nonreciprocal forum selection clause in any given case could, under Swiss principles, be considered abusive, and hence void.²⁷ Finally, the parties have wide latitude to select their forum freely after the dispute has arisen, although this rarely occurs in practice.

22. Volken, *supra* note 15, at 248; Samuel, *supra* note 2, at 683.

23. PIL Act, *supra* note 1, art. 26(b); cf. *Medoil Corp. v. Citicorp*, 729 F. Supp. 1456 (S.D.N.Y. 1990) (U.S. district court enforces a bank account agreement with a clause providing for a Swiss forum).

24. PIL Act, *supra* note 1, art. 5(2).

25. *Id.* art. 114(2).

26. Compare CHRISTIANE BRUNNER, JEAN-MICHEL BÜHLER & JEAN-BERNARD WAEBER, *COMMENTAIRE DU CONTRAT DE TRAVAIL* 232 (1989) (forums provided by art. 343 of Code of Obligations are imperative and exclusive) with ANTON K. SCHNYDER, *DAS NEUE IPR-GESETZ* 96 (1988) (the employee can waive his Swiss forum).

27. See generally HANS REISER, *GERICHTSSTANDSVEREINBARUNGEN NACH DEM IPR-GESETZ* 133 (1989).

In contexts other than those described above, Swiss law will respect and give effect to forum selection clauses. Furthermore, formal validity requirements in the forum selection agreement are quite liberal under Swiss law. All forms of writing or modern communication, including telefax, that allow the agreement to be evidenced by a text are permitted.²⁸ Unless stipulated otherwise, the contractual choice of forum will be deemed exclusive.²⁹

b. *De Nature Patrimoniale*

Contractual selections of forums are only valid for matters *de nature patrimoniale*,³⁰ that is, matters or claims involving property or pecuniary interest, which includes commercial breach of contract claims, as opposed to matters involving personal rights, such as divorce or child custody actions, which cannot be valued in money terms. However, a valid selection of forum may apparently be made in litigation concerning the financial consequences of a marriage regime or a succession matter,³¹ even though one could not, under Swiss law, validly stipulate the forum for future divorce or child custody action.

3. *Jurisdiction by Waiver*

The Act provides that jurisdiction of a foreign court shall be recognized if, in a matter that can be valued in monetary terms, the defendant proceeded to the merits without objecting to jurisdiction.³² The underlying principle, which significantly predates the Act,³³ is simple: a defendant who acquiesces to or litigates a proceeding without reservation should not be able to object to jurisdiction at the enforcement stage. In practice, however, this principle can be more complex.

In determining whether or not a Swiss defendant has objected to jurisdiction, Swiss courts have applied the Swiss concept of unconditional appearance.³⁴ According to language used repeatedly by the Swiss Federal Supreme Court, an unconditional appearance has been made "if the defendant unambiguously expressed his intention to proceed on the merits without reservation."³⁵ The term "unambiguously" should not be interpreted as requiring an intentional or express

28. PIL Act, *supra* note 1, art. 5(1); *cf. id.* art. 178(1) (analogous requirements for an arbitration clause).

29. *Id.* art.5(1).

30. *Id.* art. 5(1); *accord id.* art. 26(b). In German: *vermögens-rechtliche Ansprüche*. The same *patrimoniale* limitation on forum selection also applies to the arbitrability of international agreements in Switzerland. *See id.* art. 177(1).

31. Botschaft, *supra* note 4, at 300-01.

32. PIL Act, *supra* note 1, art. 26(c).

33. *See, e.g.*, Judgment of Mar. 1, 1961, BGE 87 I 58; *see also* ANTOINE FAVRE, DROIT CONSTITUTIONNEL SUISSE § 61(7)(a) (1970).

34. *See* TEDDY S. STOJAN, DIE ANERKENNUNG UND VOLLSTRECKUNG AUSLÄNDISCHER ZIVILURTEILE IN HANDELSACHEN 116 (1986).

35. In German: *wenn der Beklagte dem Gericht gegenüber unzweideutig den Willen bekundet hat, vorbehaltlos zur Hauptsache zu verhandeln*, Judgment of June 13, 1972, BGE 98 Ia 318; Judgment of Mar. 1, 1961, BGE 87 I 58.

submission to jurisdiction, but rather as clear compliance with all procedural steps required for an appearance on the merits without objection (even if such compliance is caused by ignorance of the procedural rules governing objection). The procedural rules of the foreign court may, therefore, be pertinent to establish that an intention to proceed on the merits without reservation has been unambiguously expressed.

For example, in an ongoing case known to the authors and involving the enforcement of a California state court judgment in Zürich, the Swiss defendant made a late-blooming objection to California jurisdiction. However, the mere reading of the defendant's California answer, even translated into German, should readily be seen by the Zürich judge as going to the merits. Furthermore, the answer does not contain any objection to jurisdiction, although California procedure provides for such objections to be raised in the first responsive pleading. The defendant's argument is all the weaker as Zürich procedure, with which the enforcement judge will be intimately familiar, also provides that jurisdictional objections must be raised in the answer or they are deemed waived.³⁶ Although, under other procedural regimes, a basis for raising jurisdictional exceptions later in a proceeding may exist, the prudent Swiss defendant should raise them at the earliest occasion.

The Swiss defendant who does object to jurisdiction early on in the proceeding, and then nevertheless proceeds to defend on the merits in the foreign courts, presents the plaintiff with a problem. The defendant will not, under Swiss principles, be deemed to have submitted to foreign jurisdiction.³⁷ Therefore, unless jurisdiction has another basis under the Act, or the Swiss defendant has assets outside of Switzerland, the plaintiff in such a situation may obtain a judgment after protracted proceedings only to find that the judgment cannot be enforced.

4. *Jurisdiction Through a Connected Counterclaim*

The Act also provides that a foreign court will be deemed to have jurisdiction over a counterclaim if the court had jurisdiction (under Swiss principles) over the principal claim, and the principal claim and counterclaim are factually connected. Such a connection is described in the PIL Act as *ein sachlicher Zusammenhang* or *connexité*.³⁸ This exception to the principle of article 59 of the Constitution originated in case law that predates the PIL Act.

The Swiss Federal Supreme Court has explained the counterclaim exception as follows: "The counterclaim defendant may not avail itself of the guarantee of the forum of its domicile when the two actions are based on the same legal

36. ZIVILPROZESS ORDNUNG [ZÜRICH CIVIL PROCEDURE CODE] § 111; cf. CAL. CIV. PROC. CODE § 418.10 (West 1992) (motion to quash for lack of personal jurisdiction).

37. See Judgment of Mar. 8, 1972, and June 13, 1972, BGE 98 Ia 312, 318; STOJAN, *supra* note 34, at 117-18.

38. PIL Act, *supra* note 1, art. 26(d).

relationships and the decision of one claim also requires a decision as to the fate of the other."³⁹ Thus, if a Swiss plaintiff begins an action in a court of the defendant's foreign domicile, and the defendant makes a related counterclaim, the courts of the defendant's domicile would have jurisdiction under Swiss principles. The courts of the defendant's domicile would also, as a result of the counterclaim exception, be deemed to have jurisdiction over any counterclaims, provided the counterclaims and the claim-in-chief have *connexité*.

While the full range of possible connections with a principal claim that would permit a counterclaim to fall within this rule cannot be precisely defined, such *connexité* is generally held to exist when the claim and counterclaim are based on the same contractual relationship. *Connexité* has been found, for instance, between an initial claim for a reduction of the purchase price of allegedly defective goods and a counterclaim for damages and interest to compensate for losses incurred as a result of delay in payment of that purchase price.⁴⁰

One of the authors was faced with the principal ramifications of the counterclaim exception when he was called upon to advise a Texas company that had been sued by its former Swiss distributor in federal court in Texas. The Texas company had a serious claim of its own against the Swiss plaintiff and would for tactical and strategic reasons have preferred to assert this claim directly in state court. The author determined that the claim against the Swiss distributor would most likely be found by a Swiss court to be connected with the distributor's claim in federal court. Consequently, the Texas party was advised that, notwithstanding its strategic preference for a separate action, it should file a counterclaim in the proceedings initiated by the Swiss distributor since a judgment on a Texas state court claim would, absent the Swiss party's agreement to or waiver of jurisdiction, likely be unenforceable in Switzerland. Although this matter arose prior to the Act's coming into force, the advice would be the same today unless the PIL Act provided an alternative basis for foreign jurisdiction over the Swiss party.

B. FINALITY

To be enforceable in Switzerland, the foreign decision must be "no longer subject to ordinary judicial remedy" or be final. Essentially, a decision is final for Swiss enforcement purposes when the period for bringing an appeal or another judicial remedy has expired without such appeal or other remedy being lodged or when no appeal or other remedy is permissible. Further, any period that was suspensive of the decision's enforceability in the place where it was issued would certainly preclude finality for purposes of Swiss enforcement.

The Act only provides that the decision either no longer be subject to ordinary judicial remedy (*recours ordinaire* or *ordentliches Rechtsmittel*) or be final in order

39. Judgment of May 12, 1954, BGE 80 I 200; see also FAVRE, *supra* note 33, at 61(4).

40. Judgment of May 12, 1954, BGE 93 I 549.

to be eligible for enforcement in Switzerland.⁴¹ Accordingly, the possibility of extraordinary remedies, such as motions to set aside the judgment, will not generally preclude enforcement provided, of course, they are not actually pending. A potential problem can, however, arise where the foreign procedural law provides a specific limited period in which such remedies must be executed. As a general rule in enforcement matters, Swiss courts disregard only those extraordinary remedies that need not be asserted during a specific statutory period.⁴² 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. The petition for the recognition or enforcement of a foreign decision in Switzerland must be accompanied by a document attesting that it is "no longer subject to ordinary judicial remedy, or that it is final."⁴³

In a number of Swiss cases, defendants sought to prevent recognition of a foreign judgment on the grounds that they had not been properly served with notice of judgment. Essentially, their argument was that without proper service of judgment the time period for filing an ordinary judicial remedy could not start running, and, therefore, the judgment was not final. This argument may be foreclosed by a recent decision of the Swiss Federal Supreme Court applying the PIL Act, which held that lack of service of the judgment does not bar enforcement, provided a party proves that the *lex fori* at the place of adjudication did not require service of judgment. That decision was rendered in a case where a U.S. judgment had not been served upon the defendant in application of rule 77(d) of the Federal Rules of Civil Procedure.⁴⁴

II. Grounds for Refusal of Recognition

A. GENERAL

Once established that the foreign court had jurisdiction and that its decision is either no longer subject to ordinary judicial remedy or is final, the PIL Act provides for recognition unless a ground exists for nonrecognition under article 27 of the Act. Article 27(1) expresses the so-called substantive public policy reservation, in that it provides that a foreign judgment must not be recognized if its substance clearly violates Swiss public policy.⁴⁵ Under article 27(2) recognition may be refused if: the defendant was not properly served, due process was not

41. PIL Act, *supra* note 1, art. 25(b).

42. STOJAN, *supra* note 34, at 82.

43. PIL Act, *supra* note 1, art. 29(1)(b).

44. Judgment of Dec. 18, 1990, BGE 116 II 625, 630–31. The lack of service of judgment is a defense based on procedural public policy; accordingly, the decision was rendered in application of article 27(2)(b) PIL Act, *supra* note 1; see *infra* text accompanying notes 68–76. See also Judgment of Mar. 13, 1985, BGE 111 Ia 15 and earlier decisions cited therein as well as STOJAN, *supra* note 34, at 87.

45. See Botschaft, *supra* note 4, at 328–29.

respected, or the decision contradicts the principles of *lis alibi pendens* or of *res judicata*. The specific grounds for nonrecognition set forth in article 27(2) are considered the codification of well-established law regarding the Swiss procedural public policy reservation, according to which recognition must be refused if the procedure leading to the foreign decision did not meet the basic Swiss requirements for a fair treatment of a party.⁴⁶

Both learned doctrine and numerous cases decided by the Swiss Federal Supreme Court indicate that the public policy exception to recognition and enforcement is to be very narrowly construed.⁴⁷ Furthermore, the Swiss Federal Government, in its report to the parliament on the Act, stressed that the overriding principle of the Act is the *favor recognitionis*.⁴⁸

Swiss courts have recognized that the concept of public policy defies strict definition. Consequently, Swiss courts determine on a case-by-case basis whether to refuse recognition on public policy grounds. A consequence of this approach is the concept of *Binnenbeziehung* (literally translated, "domestic relationship") whereby the degree of scrutiny in reviewing whether a foreign decision is compatible with Swiss public policy depends on how closely connected the case is with Switzerland. The closer the connection with Switzerland, whether in terms of, for example, the nationality and residence of the parties, applicable law, or issues in controversy, the greater the Swiss policy interest, and therefore the stricter the standard applied.⁴⁹

It should again be noted that lack of reciprocity is not a ground for nonrecognition.⁵⁰ The grounds for nonrecognition set forth in article 27 of the Act are intended to be exclusive both as to factual and legal issues, a point underscored by article 27(3), which provides that a foreign decision may not otherwise be reviewed on the merits.

B. SWISS SUBSTANTIVE PUBLIC POLICY

Article 27(1) of the Act essentially requires the Swiss judge to make a *sua sponte* examination of whether the recognition in Switzerland of the foreign judgment (as opposed to the judgment *per se*) would be "manifestly incompatible

46. See Judgment of Dec. 19, 1990, BGE 116 II 629; Botschaft, *supra* note 4, at 329.

47. See Judgment of Dec. 19, 1990, BGE 116 II 630. According to language repeatedly used by the Swiss Federal Supreme Court, Swiss public policy comes into play "when recognition and enforcement of a foreign judgment violates domestic legal concepts in an intolerable manner because the judgment disregards fundamental principles of the Swiss legal order." See, e.g., Judgment of Mar. 13, 1985, BGE 111 Ia 14; Judgment of May 20, 1981, BGE 107 Ia 199; Judgment of Feb. 9, 1977, and Oct. 26, 1977, BGE 103 Ia 204 and 532.

48. See Botschaft, *supra* note 4, at 327.

49. See STOJAN, *supra* note 34, at 149; Judgment of May 13, 1952, BGE 78 II 249-51; Judgment of Feb. 1, 1989, BJM 34 (1991). The mere presence of a bank account in Switzerland would be unlikely by itself to constitute a Swiss *Binnenbeziehung*.

50. See HANS ULRICH WALDER, *EINFÜHRUNG IN DAS INTERNATIONALE ZIVILPROZESSRECHT DER SCHWEIZ* 150 (1989).

with Swiss public policy.”⁵¹ The very wording of this phrase reflects the *favor recognitionis* legislative intent.

In view of the very narrow construction of the public policy exception followed by the Swiss courts, the substantive public policy defense is rarely successful in commercial matters.⁵² The substantive public policy reservation has, however, been discussed in two recent cases in the context of U.S. judgments awarding punitive damages, a form of damages unavailable under Swiss law.⁵³

In the first case, the plaintiffs sought enforcement of a Texas state district court judgment against one of the defendants, a Swiss resident of German nationality. The Texas judgment awarded the plaintiffs exemplary damages of three times the amount of the actual damages on the basis of the defendant's misrepresentation in the sale of real estate in Texas. In a decision rendered in 1982, the court of first instance of Sargans, Canton of St. Gall, denied enforcement. Apparently, this decision was not appealed. The court held that the Texas judgment violated Swiss substantive public policy because it disregarded the fundamental principle of Swiss law (*Bereicherungsverbot*, or prohibition against unjust enrichment) that damages must not put the plaintiff in a better financial position than he would have been had the damage or loss not occurred. 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 like an ordinary civil judgment.⁵⁴

The second case was decided in 1989 by the court of first instance of Basel and confirmed upon appeal by the appeals court of Basel that same year. In 1990, the Swiss Federal Supreme Court refused to hear a further appeal because of defects in the form of the petition of appeal. The plaintiff, a California corporation, sought enforcement of a judgment rendered by the U.S. District Court for the Northern District of California awarding the plaintiff actual damages of U.S. \$120,060 and punitive damages of U.S. \$50,000. Applying English substantive law, the U.S. district court had awarded the plaintiff compensatory and punitive damages on the basis of the defendant's fraudulent misappropriation of cargo containers. The Basel court recognized the judgment, holding 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

51. PIL Act, *supra* note 1, art. 27(1); Volken, *supra* note 15, at 247; Knoepfler & Schweizer, *supra* note 6, § 727 at 226.

52. See Gabrielle Kaufmann-Kohler, *Enforcement of United States Judgments in Switzerland*, 1983 WIRTSCHAFT UND RECHT 211, 231.

53. See WALDER, *supra* note 50, at 142, n.170; Jens Drolshammer & Heinz Schärer, *Die Verletzung des materiellen ordre public als Verweigerungsgrund bei der Vollstreckung eines US-amerikanischen "punitive damages-Urteils"* (Urteilsanmerkung), 1986 SCHWEIZERISCHE JURISTENZEITUNG 309; Kaufmann-Kohler, *supra* note 52, at 242-44; CHRISTIAN LENZ, AMERIKANISCHE PUNITIVE DAMAGES VOR DEM SCHWEIZER RICHTER (1992).

54. See Drolshammer & Schärer, *supra* note 53, at 310-11. The exact amount of the exemplary damages in this case is not reported.

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 court also rejected the assertion that enforcing the judgment would violate Swiss substantive public policy. The case had no connection to Switzerland apart from the defendant's domicile there. Therefore, the public policy exception was to be applied with great restraint. The Basel court held that given the particular features of the punitive damages awarded in this case, a fundamental principle of Swiss law had not been intolerably violated. The fact that the punitive damages had been awarded in addition to the compensatory damages, and apparently bore no relation to the unlawful profit realized by the defendant, was also not held to be a violation of public policy, particularly since the defendant had not demonstrated the amount of the punitive damages to be completely unreasonable.⁵⁵

The case-by-case approach adopted by the courts and the Swiss Federal Supreme Court's failure to review the above cases make it difficult to discern a clear Swiss public policy regarding the enforcement of punitive damages. Nevertheless, a few conclusions can be drawn.

The traditional view that U.S. judgments awarding a party punitive damages are not enforceable in Switzerland can no longer be upheld as an absolute rule. Instead, each case must be analyzed. The foreign judgment, including punitive damages, will stand a reasonable chance of recognition and enforcement in Switzerland if it meets the following tests:

(1) The purpose of the punitive damages awarded is predominantly the compensation (*Ausgleich*) of the plaintiff for profit unjustly realized by the defendant. If the punitive damages are primarily intended to punish a party or to deter it from repeating a certain behavior then the risk is substantial that the Swiss enforcement judge will determine that the judgment lacks civil character and will refuse recognition on this ground. Treble damages awarded in antitrust cases and the like will generally be qualified as penal or administrative rather than civil.⁵⁶

(2) The amount of the punitive damages must be in reasonable relation to, if not equal to, the damage or loss actually suffered, or the profit unjustly realized by a party. If the judgment does not respect this requirement, its enforcement is likely to be seen as a violation of Swiss substantive public policy. Again, treble damages are unlikely to meet this test.⁵⁷

As a practical matter, the likelihood of recognition in Switzerland can be

55. See [1991] BJM 31, 38.

56. See STOJAN, *supra* note 34, at 74-75, 151, and Kaufmann-Kohler, *supra* note 52, at 242-44, with regard to antitrust and product liability cases. Note that the requirement of "civil" character of the judgment is not a public policy issue but relates to the scope of application of the rules of the PIL Act. LENZ, *supra* note 53, at 140, expresses the opinion that all U.S. judgments awarding punitive damages are to be qualified as "civil" judgments. In his view, the mere fact that the punitive damages may be intended to punish a party does not call for a refusal of enforcement. *Id.* at 149.

57. See STOJAN, *supra* note 34, at 151; Kaufmann-Kohler, *supra* note 52, at 243-44; Drolshammer & Schäfer, *supra* note 53, at 318; LENZ, *supra* note 53, at 148-50. Note that in cases where foreign antitrust or product liability law is applicable in proceedings in Swiss courts, the PIL Act prohibits the

improved if the above requirements are taken into consideration before the U.S. judgment is rendered. Where a party has the possibility of drawing up the form of judgment or influencing how the judgment is framed (for example, separate recital of actual and punitive damage, separation of RICO or other treble damage counts, or breakdown of the various components of the damages awarded), the chances of enforcement in Switzerland can likely be enhanced.⁵⁸

C. SPECIFIC BASES FOR REFUSAL

The specific grounds for nonrecognition provided in article 27(2) of the Act may only be taken into account upon motion and proof by the defendant in the recognition proceedings.

1. *Improper Service of Process*

The PIL Act states clearly that recognition of a foreign decision must be refused if a party establishes that it was not properly served with process pursuant to the law of its domicile or its habitual residence, unless it waived this objection by proceeding to the merits without objection.⁵⁹ This provision is of potentially critical interest to the litigant serving a defendant domiciled or habitually residing in Switzerland with process for a suit outside of Switzerland. Service must occur and be carried out in accordance with Swiss law. What this means in practice is that service must be carried out by the judicial authorities of the canton where the Swiss defendant is located. Service by means of international airmail, registered post, courier, or an agent within Switzerland is not only improper, it is illegal. Service of process on Swiss soil is an official act that must be carried out by the pertinent judicial authorities. Service of process by any other means is considered a violation of Swiss sovereignty and, specifically, of article 271 of the Swiss penal code.⁶⁰

Swiss judge from awarding damages which exceed the damages that would be permissible under Swiss law in such matters. PIL Act, *supra* note 1, arts. 135(2) and 137(2). LENZ, *supra* note 53, at 163, favors the application of PIL Act arts. 135(2) and 137(2) to enforcement matters.

58. For example, in the case of a default judgment it is helpful to have the various damage components (actual, punitive, interest) set forth separately and distinctly. The authors recently had occasion to advise on just such a matter arising from a default judgment in California State courts against a Swiss defendant. It is controversial whether the Swiss judge has the power to recognize a foreign judgment awarding punitive damages only *partially*, i.e., in the amount compatible with Swiss substantive public policy. While some authors admit this possibility, Drolshammer & Schärer, *supra* note 53, at 318; German learned doctrine cited by WALDER, *supra* note 50, at 143, n.170; STOJAN, *supra* note 34, at 180; LENZ, *supra* note 53, at 177, others reject it on the grounds that the judge would be required to review the judgment on the merits so as to determine the amount acceptable under Swiss public policy standards, Kaufmann-Kohler, *supra* note 52, at 244. We feel that there should be no such concerns if the judgment clearly sets forth the different components of a damages award.

59. PIL Act, *supra* note 1, art. 27(2)(a).

60. Schweizerische Strafgesetzbuch, Code pénal suisse, Codice penale svizzero art. 271; accord Hayman, *supra* note 8, at 421–22; Hafter & Rohner, *supra* note 3, at 184. For a now classic early study of these Swiss sovereignty rules as they relate to both service of process and discovery from the United States, see Arthur R. Miller, *International Cooperation in Litigation Between the United States and Switzerland: Unilateral Procedural Accommodation in a Test Tube*, 49 MINN. L. REV. 1069, 1132 (1965).

Switzerland is not presently a party to the Hague Service Convention and, absent another applicable treaty,⁶¹ the service of process or other official documents must be requested by traditional letters rogatory.⁶² This letter rogatory procedure for service within Switzerland, although often resented by common law lawyers, is not as burdensome as it initially appears. The drafting and issuance of a proper letter rogatory and translation of the appropriate documentation can, if planned in advance, be handled reasonably expeditiously. Furthermore, the letter rogatory, once in the hands of the Swiss authorities, is generally handled quite efficiently.⁶³

The PIL Act on its face only requires that the initial summons and complaint on a Swiss defendant be served by means of a letter rogatory addressed to the competent Swiss authorities. Subsequent documents need not generally be served by means of such international judicial cooperation, although case authority exists that notice of a trial hearing against a defaulting party may not be served by mail.⁶⁴

Due to repeated diplomatic notes and other filings by the Swiss Federal Government complaining of infringement of Swiss sovereignty by U.S. lawyers, the Administrative Office of the United States Courts issued a memorandum in 1980 requesting that United States district court clerks refrain from sending summonses and complaints to Switzerland and other countries that were objecting to service by international mail.⁶⁵ Largely as a consequence, complaints in at least two U.S. federal cases were dismissed because service by mail did not constitute proper service under Swiss law.⁶⁶

61. The 1954 Hague Convention, *supra* note 6, is applied by the Swiss Federal authorities in processing international judicial cooperation requests from Member States; it is unofficially applied by analogy to requests from countries which are not parties to that Convention, such as the United States. See generally Hayman, *supra* note 8, at 422-23; LIONEL FREI, L'ENTRAIDE JUDICIAIRE INTERNATIONALE EN MATIÈRE CIVILE (publication 922.2-f of the Office fédéral de la police 10.3.1985).

62. A letter rogatory is a medium whereby one country, through one of its courts, requests another country, acting through its courts to assist in the administration of justice in the former country. Tiedmann v. The Signe, 37 F. Supp. 819, 820 (E.D. La. 1941); "[A]s to the letter rogatory, the procedure is under the control of the foreign tribunal whose assistance is sought," Volkswagenwerk Aktiengesellschaft v. Superior Court, 33 Cal. App. 3d 503, 507, 109 Cal. Rptr. 219, 221 (1973).

63. See FREI, *supra* note 61, at 7-12; in one urgent and important case in which a great deal of resources were deployed, proper service was effected in the Canton of Tessin and returned to the U.S. Federal District Court where the case was pending in less than twenty days. Six weeks might be a more typical time period assuming a party proceeds with careful dispatch.

64. See Judgment of May 4, 1979, BGE 105 Ia 311-14 (case decided under cantonal law before the enactment of the PIL Act).

65. See Lawrence W. Newman & Michael Burrows, *Service of Process in Switzerland*, N.Y.L.J., Oct. 17, 1991, at 3. See generally Kenneth B. Reisenfeld, *Service of Process Abroad: A Practical Guide to Service under the Hague Convention and the Federal Rules of Civil Procedure*, 24 INT'L LAW. 55, 60 (1990); Gary Horlick, *A Practical Guide to Service of the United States Process Abroad*, 14 INT'L LAW. 637, 641 (1980).

66. Aries Ventures Limited v. Axa Finance S.A., No. 86CW4442, 1990 WL 37814 (S.D.N.Y. 1990); R.M.B. Electrostat, Inc. v. Lectra Trading, AG No. 82-1844, 1983 WL 13711 (E.D. Pa. 1983); see also Hudson v. Capital Management International Inc. (N.D. Cal. 1982) Fed. Sec. L. Rep. (CCH) ¶ 99,221 (June 15, 1983); F.T.C. v. Compagnie de Saint Gobain, Pont-à-Mousson, 636 F.2d 1300 (D.C. Cir. 1980). *But cf.* Umbenhauer v. Woog, 969 F.2d 25 (3d Cir. 1992) (clerk of court

If enforcement of a foreign judgment is likely to be sought in Switzerland, the only prudent course is to ensure, *ab initio*, that a defendant domiciled or habitually residing in Switzerland is served in accordance with the requirements of Swiss law. Furthermore, if the enforcement of a default judgment in Switzerland is sought, the motion must be accompanied by an attestation establishing that the defaulting defendant had been served in a proper and timely manner.⁶⁷

2. Violation of Due Process

Pursuant to article 27(2)(b) of the PIL Act recognition is denied if a party establishes that the judgment was rendered in violation of a fundamental principle of Swiss procedural law, especially the right to be heard. This provision constitutes the procedural public policy exception. In line with many preenactment cases the wording of article 27(2)(b) makes it clear that only the violation of a rule at the heart of Swiss procedural law can give rise to a public policy defense. The mere violation of, for example, a procedural rule mandatory in domestic cases is insufficient.⁶⁸

Unlike violations of substantive public policy, violations of procedural public policy are frequently invoked as a defense in commercial matters. Most cases deal with improper service of process and with *lis pendens* and *res judicata*. In view of their importance the Act deals with these two issues separately.⁶⁹ The remaining preenactment cases, which would today come under article 27(2)(b) of the PIL Act, concern essentially service of judgment,⁷⁰ forum shopping,⁷¹ fraudulent conduct,⁷² and denial of the right to be heard.

Generally, public policy has been held to be violated only in extreme cases. Even a major divergence from Swiss procedure does not necessarily imply a violation of procedural public policy. The Swiss Federal Supreme Court has, for example, held that English summary proceedings pursuant to English Order 14,⁷³ lack of a written court opinion in default judgments (provided that the defendant was properly served with process),⁷⁴ and lack of a notification of the defendant

had no authority to refuse to transmit summons to Switzerland); *E. Walters & Co. Inc. v. Interstra S.A.*, 67 F.R.D. 410, 410 (N.D. Ill. 1975) (service of process on Swiss company by registered mail is proper, but is ineffective if there is no jurisdiction over defendant under state long-arm statute).

67. PIL Act, *supra* note 1, art. 29(1)(c).

68. Judgment of Oct. 26, 1977, BGE 103 Ia 531-32.

69. PIL Act, *supra* note 1, arts. 27(2)(a) and 27(2)(b).

70. See *supra* text accompanying note 44.

71. The Swiss Federal Supreme Court has twice stated in dicta that a judgment could not be enforced if the forum has been selected for purposes of escaping the application of Swiss Public Policy. Judgment of Feb. 3, 1971, BGE 97 I 159-60; Judgment of Feb. 8, 1968, 94 I 247-48.

72. See Judgment of Oct. 26, 1977, BGE 103 Ia 536 (mentions fraudulent conduct in dicta); Judgment of Sept. 20, 1972, BGE 98 Ia 534 (same).

73. Judgment of May 20, 1981, BGE 107 Ia 198-201.

74. Judgment of Feb. 9, 1977, BGE 103 Ia 204; this decision was recently confirmed in one of the first postenactment decisions of the Swiss Federal Supreme Court, Judgment of Oct. 19, 1990, BGE 116 II 625, 632. The case concerned an action brought by a client against an asset manager and resulted in a judgment of the U.S. District Court for the Southern District of New York awarding the plaintiff U.S. \$61 million. In its decision, the Swiss Federal Supreme Court explicitly refused

of a right to appeal⁷⁵ were all compatible with Swiss public policy. Court appearance by an unauthorized agent, on the other hand, was held to violate Swiss public policy.⁷⁶ In a recent decision, the Superior Court of the Canton of Lucerne refused the enforcement of a judgment rendered in an (unspecified) Arab country because of the apparent lack of independence of that country's judiciary from the ruling family.⁷⁷

An interesting question, which to the authors' knowledge has never been tested in a Swiss court, is whether article 27(2)(b) of the PIL Act 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 article 271 of the Swiss penal code and Swiss sovereignty.⁷⁸

3. *Lis Pendens* and *Res Judicata*

Article 27(2)(c) of the PIL Act codifies the preenactment case law regarding *lis pendens* and *res judicata*.⁷⁹ It provides that recognition of a foreign judgment will be denied on the basis of the *res judicata* exception if a party demonstrates that the judgment conflicts with an existing Swiss decision involving the same parties and the same subject matter. Recognition will also be denied if the dispute between the parties was first decided in a third country, provided that the conditions for the recognition in Switzerland of that decision are satisfied.

Lis pendens, on the other hand, is a defense against recognition only if an action involving the same parties and the same subject matter is pending in Switzerland, and only if the Swiss action was brought first. If the foreign action was brought first, then the judgment will be enforced.⁸⁰ Pursuant to article 9(1) of the PIL Act the Swiss court must stay the Swiss proceedings if the foreign court is likely, within a reasonable time, to render a judgment recognizable in Switzerland.

III. Procedures for Recognition and Enforcement

A. GENERAL

The procedures for recognition and enforcement of foreign judgments are examples of the intricate interplay between federal and cantonal law typical of

to decide the question of whether the enforcement of a default judgment not containing a written opinion presupposes that the defendant had a judicial remedy against it, as the defendant had not raised this issue.

75. Judgment of Oct. 28, 1970, BGE 96 I 399.

76. Judgment of Jan. 21, 1959, BGE 85 I 49.

77. Judgment of Feb. 2, 1992, SJ 340-42.

78. See WALDER, *supra* note 50, at 143 n.172a. See generally Nicolas Ulmer, *Discovery Abroad for Domestic Suits*, CAL. LAW., Nov. 1987, at 64, 67.

79. See STOJAN, *supra* note 34, at 160.

80. Kaufmann-Kohler, *supra* note 52, at 232; cf. *Victrix S.S. Co., S.A. v. Salen Dry Cargo AB*, 825 F.2d 709 (2d Cir. 1987) (court recognized Swiss bankruptcy proceeding, refusing enforcement of conflicting British judgment apparently obtained in frustration of Swiss proceedings).

many areas of Swiss law. The authors' comments are, therefore, limited to a general description of the legal framework of the procedures, followed by a brief analysis of the proceedings (including appellate proceedings) for the enforcement of a foreign money judgment as they typically evolve in the canton of Zürich, which is used as an example here.

Federal law, that is, the PIL Act, sets forth the framework. Apart from defining the substantive prerequisites for recognition (articles 25 to 27), the Act contains the following basic procedural rules:

- Article 29(1) lists the documents that a party seeking recognition or enforcement, or both, must produce: (a) a complete and certified exemplar of the decision; (b) an attestation that the decision is no longer subject to ordinary judicial remedy or that it is final; and (c) in case of a default judgment an official document establishing that the losing party was properly and timely served with process so that it had the opportunity to present its case.⁸¹ All these documents must, as a matter of cantonal procedural law, normally be accompanied by a certified translation into the official language (German, French, or Italian) of the canton concerned.
- The Act provides that the party opposing recognition or enforcement must be heard and must be given the opportunity to present its case.⁸²
- Article 28 makes it clear that any interested party has the right to request that a decision recognized pursuant to articles 25 through 27 be declared enforceable. In accordance with preenactment law the PIL Act thereby incorporates the so-called *exequatur* procedure, a separate procedure to obtain a declaration from the competent cantonal court of the enforceability of a foreign decision. The Act also provides, again in line with preenactment law, that a foreign decision may also be invoked as a preliminary question in the course of another action.⁸³ Examples would include an *exequatur* question raised preliminarily in proceedings for the execution of money debts or a *res judicata* defense on the basis of a foreign decision in another action.

Within this framework, the proceedings take place before cantonal judges and officers and pursuant to the cantonal rules of civil procedure. Proceedings for the enforcement of money judgments have an additional federal ingredient because the Federal Debt Collection and Bankruptcy Act (Debt Collection Act) generally comes into play. Although designed to bring about speedy enforcement of final judgments, the whole procedure in reality often takes months, or even years, if all possible appeals are exhausted.⁸⁴

81. PIL Act, *supra* note 1, art. 29(1).

82. *Id.* art. 29(2).

83. *Id.* art. 29(3).

84. The exact amount of time necessary is difficult to forecast and depends on the circumstances of the individual case. It took only ten months from the attachment of the defendant's Swiss assets until confirmation by the Swiss Federal Supreme Court in 1990 of the enforceability of the U.S. judgment in the case cited in note 44 *supra*. On the other hand, roughly four years elapsed between

B. PROCEDURE FOR THE ENFORCEMENT OF MONEY JUDGMENTS
(WITH REFERENCE TO ZÜRICH PROCEDURE)

Unless preceded by the attachment of the defendant's assets, the creditor's first step is to request the competent debt collection office to issue an official summons demanding payment of the amount due (*commandement de payer* or *Zahlungsbe-fehl*). Typically, the debt collection office of the Swiss domicile of the defendant or of the place where assets of a foreign debtor have been attached is competent. The request for the payment summons must indicate the amount due in Swiss francs. The debt collection office serves the payment summons on the debtor. However, in the case of a foreign debtor not represented by a Swiss lawyer, service must be effected by letters rogatory submitted through diplomatic channels. If the defendant cannot be located, service by publication is also available.

Within ten days from service, the summons can be opposed by the debtor simply by a declaration (opposition) addressed to the debt collection office. For foreign debtors not represented in Switzerland the ten-day period is usually extended up to ninety days. In the absence of any opposition and if payment is not effected, the creditor may request the continuation of the execution procedures.⁸⁵ In most cases, however, the debtor does declare opposition, and the creditor must get the opposition lifted (*main levée* or *Rechtsöffnung*) before proceeding to execution measures.

A foreign judgment provides the creditor with a basis to initiate summary proceedings. In the canton of Zürich, such proceedings will take place before a single judge of the competent district court. The judge will decide two issues: the enforceability of the foreign judgment (this is the classic example where the *exequatur* question is "wrapped into" another procedure as the judge deciding on the lifting of the opposition deals with it as a preliminary point),⁸⁶ and the lifting of the opposition. *Exequatur* will be granted unless the debtor shows that the requirements of articles 25 to 27 of the PIL Act are not met. Once *exequatur* is granted and the judgment declared enforceable, the opposition will be removed unless the debtor produces documentary proof that the judgment has been satisfied, that the debtor was granted a grace period for payment, or that the statute of limitations has expired.⁸⁷

A distinction must be made regarding appeals against the decision of the district court judge. As far as the *exequatur* question is concerned, the decision is subject to an appeal to the Superior Court of the Canton of Zürich,⁸⁸ which has full power

the attachment and the decision, in 1979, by the Swiss Federal Supreme Court in an unreported case also involving a U.S. judgment. These time periods do not include any additional time required until the actual payment of the debt.

85. Three alternatives are available: (a) the seizure of specific assets of the debtor (*Pfändung*); (b) bankruptcy proceedings (*Konkurs*) (this is typically the only alternative available against Swiss companies and merchants); and (c) for debts secured by pledge or mortgage, realization of this security (*Pfandverwertung*).

86. See STOJAN, *supra* note 34, at 205-06.

87. Bundesgesetz über Schuldbetreibung und Konkurs vom 11. April 1889, art. 81 [hereinafter Debt Collection Act].

88. Provided the amount in controversy exceeds SFr. 8,000.

of review. The decision of the superior court is subject to a “cassation” appeal (*Nichtigkeitsbeschwerde*) to the Cassation Court (*Kassationsgericht*) of the Canton of Zürich. Seized with such an appeal, the cassation court has a very limited review power (essentially, violation by the superior court of due process or of basic principles of substantive law).⁸⁹ While the decision of the cassation court can be appealed to the Swiss Federal Supreme Court, the Swiss Supreme Court’s review is limited to arbitrariness: the Court will only overturn the cantonal judgment if it finds that the application by the cassation court of the provisions of the PIL Act was grossly erroneous.⁹⁰

As far as the lifting of the opposition is concerned, that is, the question of whether the debtor rightfully raised one of the defenses provided for by the Debt Collection Act, the decision of the district court judge is subject only to a *Nichtigkeitsbeschwerde* to the Superior Court of the Canton of Zürich. The scope of review of the superior court is subject to the same limitations that apply to the *Nichtigkeitsbeschwerde* to the cassation court referred to in the preceding paragraph. Accordingly, the rate of success of cassation appeals in enforcement of judgment matters is low. The decision of the superior court can be appealed to the Swiss Federal Supreme Court. Again, however, the power of review of the Supreme Court is limited to arbitrariness, that is, gross errors.

IV. A Note on Civil Attachments

An article on the enforcement of foreign judgments in Switzerland would not be complete without a few general remarks on civil attachments.⁹¹ In practice, civil attachments are frequently used to secure the enforcement of foreign judgments against Swiss-based assets, normally bank accounts of non-Swiss debtors.

An attachment against a non-Swiss debtor can be obtained with relative ease,⁹² which, in the authors’ experience, often surprises foreign attorneys. Essentially,

89. ZÜRICH CIVIL PROCEDURE CODE § 281.

90. See Judgment of July 12, 1990, BGE 116 II 377–78; Judgment of Dec. 19, 1990, BGE 116 II 627–28. In a decision rendered by the Swiss Federal Supreme Court examined the question of whether its power of review could be expanded but left it undecided. Judgment of Oct. 17, 1991, SJ 178–87 (1992).

91. For a helpful analysis of the Swiss civil attachment mechanism from an English point of view, see Paul Fallon, *Recovering Assets in Switzerland*, 6 BUTTERWORTHS JOURNAL OF INTERNATIONAL BANKING AND FINANCIAL LAW 529–32 (Nov. 1991); see also Markus H. Wirth, *Attachment of Swiss Bank Accounts: A Remedy for International Debt Collection*, 36 BUS. LAW. 1029 (1981); Hafter & Rohner, *supra* note 3, at 185. Mention should also be made of the possibilities for the blocking of funds through criminal assistance proceedings which can sometimes also benefit civil claimants in fraud cases and the like. See ENTRAIDE JUDICIAIRE INTERNATIONALE EN MATIÈRE PÉNALE (7th rev. ed. 1990) (publication 2001.1 of the Swiss office fédéral de la police, Division d’entraide internationale); see also Treaty between the United States of America and the Swiss Confederation on Mutual Assistance in Criminal Matters, May 25, 1973, 27 U.S.T. 2019, T.I.A.S. No. 8302.

92. We do not deal with attachments against debtors domiciled in Switzerland, which are considerably more difficult to obtain than attachments against non-Swiss debtors and are therefore of little importance in practice.

the creditor must make a prima facie evidentiary showing that: (1) he has a sustainable case against the debtor and that his claim is ripe (a requirement that will pose no problem to a creditor who has a foreign judgment against the debtor); (2) the debtor has no residence in Zürich;⁹³ (3) the amount claimed is unsecured; and (4) the assets to be attached belong to the debtor. Condition (4) requires a careful specification of the assets and their location; a general description such as "all accounts, deposits, and assets of the debtor deposited with banks X, Y, and Z" will not be accepted. If the assets are held in the name of a third party nominee, the court will generally only cut through the nominee relationship if the creditor produces prima facie evidence that the third party is used for the purpose of concealing the debtor as true owner of the assets.

Based on a petition setting forth that the above requirements are met, the attachment is granted in summary and ex parte proceedings. The judge (in the canton of Zürich, a single judge of the competent district court) has the power to, and frequently does, require the creditor to post a bond as a condition to the granting of the attachment.⁹⁴ The attachment order is transmitted to the debt collection office for execution (for example, in blocking of bank accounts, notification is sent to the parties holding the attached assets).

Within ten days after execution of the attachment order, the creditor must initiate legal proceedings in order to validate the attachment. This is normally done by the payment summons procedure. As described above,⁹⁵ a creditor who has an enforceable foreign judgment against the debtor can obtain the lifting of an opposition against the payment summons in summary proceedings. A creditor who is not in possession of a judgment or a written acknowledgment of a debt must, within ten days from receipt of the opposition to the payment summons, file a suit on the merits in order to have the opposition lifted. Such a suit may be filed before a foreign court having jurisdiction over the debtor, provided such proceedings will lead to a judgment enforceable in Switzerland or in an agreed arbitral forum. However, it can also be brought before the Swiss court at the place of the attachment that has quasi in rem jurisdiction.⁹⁶ This Swiss forum at the place of the attachment against a non-Swiss debtor may sometimes be an interesting

93. According to article 271(1) of the Debt Collection Act, *supra* note 87, there are other grounds for an attachment (as, e.g., an intention of the debtor to evade his obligations and to escape) but the foreign residence of the debtor is by far the most important one in practice.

94. The amount of the bond is essentially within the judge's discretion; not infrequently, however, it is fixed at 10 percent of the amount sought to be attached. Depending on local court practice, the attachment judge can also grant the attachment and set a time limit for posting a bond. If the bond is not posted in time, the attachment will not be upheld.

95. See *supra* part III.B.

96. PIL Act, *supra* note 1, art. 4; the "forum arresti" is available only in the absence of treaty provisions to the contrary; the most important treaty exception is article 3(2) of the Lugano Convention, *supra* note 7. Article 4 of the PIL Act provides a forum for the entire amount of the claim even if the assets attached cover only a small portion of the claim; see Judgment of Jan. 15, 1991, BGE 117 II 90-94; *accord* Volken, *supra* note 15, at 244.

alternative to litigation abroad and subsequent enforcement of the foreign judgment in Switzerland. With the entry into force of the Lugano Convention, this alternative has become even more attractive to defendants from non-Convention countries.

V. A Note on the Lugano Convention

On September 16, 1988, the twelve Member States of the European Community (EC) and the six Member States (Iceland, Norway, Austria, Switzerland, Finland, and Sweden) of the European Free Trade Association (EFTA) adopted the Lugano Convention.⁹⁷ Its main purpose is to extend the rules of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters,⁹⁸ concluded by the EC Member States, to the EFTA countries. The Lugano Convention has already been ratified and is in effect among Switzerland, the Netherlands, France, Luxembourg, the United Kingdom, and Portugal. Ratification by the other contracting states is expected to follow soon. Thus, a truly uniform system of rules on jurisdiction, recognition, and enforcement of judgments in civil and commercial matters throughout Western Europe will come into existence in the very near future: the much heralded *espace juridique Européen*.

Regarding jurisdiction, the basic principle of the Lugano Convention is that persons domiciled in a contracting state must, whatever their nationality, be sued in the courts of that state.⁹⁹ In accordance with this principle the Lugano Convention states that the rules of so-called exorbitant jurisdiction of the contracting states cannot be invoked against defendants domiciled in a contracting state. This excludes the application of, for example, the jurisdiction of the U.K. courts over defendants on whom service of process was served during their temporary presence in the U.K. or of the Swiss *forum arresti* jurisdiction.¹⁰⁰

While defendants from contracting states are thus protected against exorbitant long-arm jurisdiction rules, the position of defendants from third countries has been negatively affected by the Lugano Convention. According to article 4(2) of the Lugano Convention, a person domiciled in a contracting state may, against a defendant domiciled in a third state, invoke all exorbitant jurisdiction bases. Thus, for example, a Japanese domiciled in Switzerland may sue a U.S. corporation domiciled in the United States at the Swiss *forum arresti*. What is even more dangerous to a third-country defendant is that a judgment rendered by a court of a contracting state on the basis of an exorbitant jurisdiction can be enforced in

97. Lugano Convention, *supra* note 7.

98. Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, done at Brussels on 27 September 1968, version as per the Convention on the accession of Greece. Note that the Brussels Convention has recently again been modified by the Convention on the accession of Spain and Portugal, done at San Sebastian on May 26, 1989; however, the San Sebastian Convention has, as of June 1992, not been ratified by all the EC Member States.

99. Lugano Convention, *supra* note 7, art. 2.

100. *Id.* art. 3(2).

all contracting states. Thus, in the example, if the U.S. corporation has assets in any contracting state other than Switzerland, they can be used to satisfy a Swiss judgment against such corporation.

In certain situations, the Lugano Convention permits a plaintiff to sue a defendant domiciled in a contracting state in certain alternative forums. One of the most important alternative forums for commercial disputes is the *forum contractus*; in matters relating to a contract the jurisdiction of the courts of the place of performance may be available.¹⁰¹ Since the application of this rule against Swiss defendants would violate article 59 of the Constitution,¹⁰² Switzerland made a reservation against it. 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. However, this reservation is only valid until the end of 1999.¹⁰³

Therefore, Switzerland will either have to amend the Federal Constitution to remove article 59 before that date or give notice of termination of the Lugano Convention. At present it appears that Switzerland will carry out the constitutional amendments necessary to permit it to withdraw its treaty reservation in time.¹⁰⁴

Regarding the enforcement of judgments rendered by the courts of a contracting state, the Lugano Convention contains a set of rules designed to ensure speedy enforcement according to a largely uniform procedure in all contracting states. The most important divergence from the PIL Act is that the Lugano Convention prevents the courts of the state where enforcement is sought from reviewing the jurisdiction of the court of the state where the judgment was rendered.¹⁰⁵

VI. Conclusion

The PIL Act codifies and clarifies Swiss practice regarding the recognition and enforcement of foreign judgments and provides a coherent enforcement framework. Proper attention to the remaining limited peculiarities of Swiss law and sovereignty, together with the remedies provided through civil attachment, will put the foreign judgment creditor in a strong position to enforce against Swiss assets. The Lugano Convention now places Swiss practice regarding jurisdiction and enforcement of judgments in a broader international context, with implications for Europeans and non-Europeans alike.

101. *Id.* art. 5(1); accord PIL Act, *supra* note 1, art. 113 (Swiss courts of place of execution competent).

102. *See supra* part I.A.

103. Lugano Convention, *supra* note 7, art. Ia of Protocol No. 1; *see* Joseph Voyame, *La Convention de Lugano sur la compétence et l'exécution des décisions en matière civile et commerciale*, in *LE NOUVEAU DROIT INTERNATIONAL PRIVÉ SUISSE* 257, 261 (Cedidac publication, Lausanne, 1988).

104. *Accord id.*

105. Lugano Convention, *supra* note 7, art. 28(4).

Fifth Section**Recognition and Enforcement of Foreign Decisions***Art. 25***I. Recognition**

A foreign decision shall be recognized in Switzerland:

1. Principle

- a) if the judicial or administrative authorities of the country in which the decision was rendered had jurisdiction;
- b) if the decision is no longer subject to ordinary judicial remedy or if it is final; and
- c) if there are no grounds to refuse recognition under article 27.

*Art. 26***2. Jurisdiction of foreign authorities**

The foreign authorities are held to have jurisdiction:

- a) if a provision of this Act so provides or, failing such provision, if the defendant was domiciled in the country in which the decision was rendered;
- b) if, in matters which can be valued in money terms, the parties, by an agreement valid under this Act, submitted to the jurisdiction of the authority that rendered the decision;
- c) if, in a matter which can be valued in money terms, the defendant proceeded to the merits without objecting to jurisdiction; or
- d) if, in the event of counterclaim, the authority which rendered the decision had jurisdiction to hear the principal claim and the principle claim and counterclaim are factually connected.

*Art. 27***3. Grounds for refusal**

- (1) The recognition of a foreign decision must be refused in Switzerland if it is manifestly incompatible with Swiss public policy.
- (2) The recognition of a foreign decision is also refused if a party establishes:

106. By the authors of this article.

- a) that it had not been properly served with process either pursuant to the law of its domicile or pursuant to the law of its habitual residence, unless it proceeded to the merits without objection to jurisdiction;
 - b) that the decision was rendered in violation of fundamental principles of Swiss procedural law, in particular that such party was denied the right to be heard;
 - c) that a lawsuit between the same parties and concerning the same subject matter has already been brought or decided in Switzerland, or has been prior decided in a third country, provided that this latter decision satisfies the conditions for recognition in Switzerland.
- (3) The foreign decision may not otherwise be reviewed on the merits.

Art. 28

II. Enforceability

A decision recognized by virtue of articles 25 to 27 is declared enforceable upon motion of the interested party.

Art. 29

III. Procedure

- (1) The motion for recognition or enforcement shall be made to the competent authority of the Canton where the foreign decision is invoked. The following must be submitted with the motion:
 - a) a complete and certified exemplar of the decision;
 - b) an attestation that the decision is no longer subject to ordinary judicial remedy, or that it is final; and
 - c) in the event of a default judgment, an official document establishing that the losing party was properly and timely served with process so that it had the opportunity to present its case.
- (2) The party opposing recognition or enforcement shall be heard; such party may set forth its case.
- (3) Where a foreign decision is invoked as a preliminary question the authority that has been seized may itself rule on recognition.

Art. 30

IV. Court Settlement

Articles 25 to 29 apply to a court-approved settlement which is assimilated to a court decision in the country in which the settlement was entered.

Art. 31

V. Noncontentious jurisdiction

Articles 25 to 29 apply by analogy to the recognition and enforcement of a decision or document from noncontentious proceedings.

Art. 32

VI. Entries into official registries concerning civil status

- (1) A foreign decision or document concerning civil status shall be entered into the registries concerning civil status pursuant to an order of the cantonal supervisory authority.
- (2) Such entry shall be authorized where the requirements of articles 25 to 27 are satisfied.
- (3) The interested persons shall be heard prior to the registration if it is not established that, in the foreign country where the decision was rendered, the procedural rights of the parties were adequately safeguarded.

