Enforcement of Foreign Judgments

Edited by Louis Garb and Julian D.M. Lew

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Enforcement of Foreign Judgments helps alleviate the time and costs of consulting foreign attorneys or government agencies for information regarding the specific procedures of individual nations and their policies towards enforcement of foreign judgments.

It addresses the most pertinent specifications, requirements, and legislation of each individual nation.

The following chapters have been reviewed and updated where necessary:

- **The Bahamas**
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- **Belarus**
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- **British Virgin Islands**
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Europe

Switzerland

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1. Uniformity of Law and Regulations

Switzerland has a federal system, dividing the legislative power between the federal level and the twenty-six cantons. Federal law and international conventions, notably the Lugano Convention (hereinafter 'LC'), regulate the prerequisites for recognition and enforcement of foreign judgments in civil and commercial matters.

Historically, procedural law was governed by cantonal law, with the effect that Switzerland had twenty-six different cantonal procedure codes as well as statutes governing the proceedings before the Federal Supreme Court. However, on 1 January 2011 the Federal Civil Procedure Code (hereinafter 'CPC') entered into force, marking a milestone in the Swiss litigation landscape. It not only uniformly regulates civil procedure throughout Switzerland, but also incorporates rules concerning the jurisdiction of the cantonal courts which were previously contained in the Federal Statute regarding Venue. Whilst the civil procedure law has been unified, court organization at the cantonal level remains the domain of the cantons.

The following is a description of the two major bodies of law that apply to the enforcement of foreign judgments in Switzerland, as well as of the relevant procedural rules.

1–1 / Europe

1.1. Applicable Law

The Private International Law Statute (PILS)

The Federal Statute on Private International Law (hereinafter 'PILS') contains not only choice of law rules, but also regulates in a comprehensive fashion for all private law matters the jurisdiction of the Swiss courts and administrative bodies, as well as the recognition and enforcement of foreign judgments and of bankruptcy and composition agreements. However, international treaties take precedence over the PILS (Article 1(2) PILS). As far as the enforcement of judgments from foreign countries is concerned, the PILS thus applies to all judgments rendered in non-European jurisdictions respectively in countries which are not bound by the LC. In addition, the PILS also applies to the enforcement of judgments rendered in contracting States of the LC on the following civil matters which are excluded from the scope of application of the LC (see Article 1(2) LC):

– status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession;
– bankruptcy, or proceedings related to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings;
– social security; and
– arbitration.

Under the provisions of the PILS, a foreign judgment will be recognized in Switzerland if all of the following three prerequisites (Article 25 lit. a – c PILS) are fulfilled:

– the court or authority of the State in which the judgment was rendered had *proper jurisdiction* (Article 25 lit. a and Article 26 PILS; see also paragraph 11 *infra*);
– *no further ordinary appeal* is possible against the judgment or the judgment is final (see Article 25 lit. b PILS and paragraph 2.1 *infra*); and
– there is *no ground for refusal* pursuant to Article 27 PILS (see Article 25 lit. c PILS); these grounds for refusal will be discussed in paragraph 10 *infra*.

The Lugano Convention

The LC on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 16 September 1988 first entered into force on 1 January 1992. It extended the principles of the Brussels Convention of the European Union to other European countries. A revised text of the 1988 LC was signed by Switzerland, the European Community, the Kingdom of Denmark, the Kingdom of Norway and the Republic of Iceland on 30 October 2007 in order to adapt the LC to the corresponding law of the European Union, i.e., to the Council Regulation No 44/2001, which had itself been revised several times. It entered

into force for Switzerland on 1 January 2011 and is currently applicable between Switzerland, Denmark, Iceland, Norway and the Member States of the European Union. However, since the (revised) LC entered into force in 2011, the law of the European Union was again revised: in January 2015, the Regulation No 1215/2012 entered into force and led to some major legal changes, *inter alia* with regard to the recognition and enforcement of foreign judgments. Thus, the current situation is that the LC and the corresponding law applicable in the European Union (Regulation No 1215/2012) are slightly different from each other.

With regard to enforcement, the scope of application of the LC is to judgments emanating from one of the countries bound by the LC (Articles 33 and 38 LC) if it is rendered in a civil or commercial matter not explicitly excluded by Article 1(2) LC.

The LC is intended to facilitate the recognition and enforcement process. Article 33(1) LC stipulates the general rule of the *ipso jure* recognition of foreign judgments without any special procedure. Any court can thus decide incidentally on the recognition of a judgment emanating from a contracting State should such question arise in court proceedings (Article 33(3) LC); separate recognition proceedings are not required. However, a party seeking to enforce a foreign judgment rendered in a contracting State may initiate separate proceedings if it wishes to do so (Article 33(2) LC). Further, according to Article 35(3) LC, the jurisdiction of the court issuing the judgment may, as a general rule, not be reviewed in enforcement proceedings (see, however paragraph 11 *infra*).

Another facilitation lies in the fact that the initial decision on the application for enforcement is made ex parte (Article 41 LC). If a foreign judgment is declared enforceable, protective measures such as a civil attachment may be taken against the property of the party against whom enforcement is sought (see Article 47 LC and paragraph 15 *infra*). The defendant party can make objections only in subsequent proceedings, i.e., by raising an appeal to the cantonal Court of Appeals (Articles 43–46 LC). The LC thus secures an element of surprise for the party applying for enforcement of a foreign judgment. Furthermore, because Article 41 LC provides that a foreign judgment shall be declared enforceable immediately on completion of the formalities provided for in Article 53 LC, the grounds for refusal may only be reviewed by the appeals court.

1.2. Procedural Rules

For Money Judgments

If the foreign judgment concerns a monetary claim or the provision of security, the enforcement procedure is governed by the Federal Law on Debt Collection and Bankruptcy (hereinafter 'LDCB'; Article 38(1) LDCB and Article 335(2) CPC). Although this statute provides a uniform framework for the proceedings, the cantons have retained the power to designate the competent authorities to act under the rules of the LDCB. It is therefore necessary to consult the court

organization code of the canton having jurisdiction over the defendant in order to find out which court or judge will have to be addressed.

According to the rules of the LDCB, the judgment creditor initiates proceedings by an application to the debt collection office (so-called *Betreibungsbegehren*) at the place of enforcement (Articles 46 and 67 LDCB). Thereby, the enforcement procedure is already initiated before the foreign judgment has been declared enforceable. The application must contain the names and addresses of the creditor, the debtor and their representatives, the sum of the claim, and an indication of the nature of the claim (Article 67(1) LDCB). The debt collection office then serves a payment order (so-called *Zahlungsbefehl*) on the debtor, summoning him to pay within twenty days or to state his/her objection against the claim (so-called *Rechtsvorschlag*) within ten days (Articles 69, 71 and 74 et seq. LDCB). If the debtor does neither, the creditor can apply that distraint be levied on the debtor's goods (Articles 88 et seqq. LDCB). If the debtor files an objection, the creditor must then apply for the objection to be set aside in summary proceedings (so-called *Rechtsöffnungsverfahren*). It is in the context of these proceedings that the substantive prerequisites for recognition and enforcement are examined (Article 81(3) LDCB). Within the scope of application of the LC, this constitutes an exception to the rule that the grounds for refusal of recognition can only be examined by the court at which the appeal against the declaration of enforceability is lodged (Articles 41 and 45 LC, see below).

The above-described procedure is the customary way to enforce money judgments in Switzerland. In the alternative, the judgment creditor may file an independent application to the competent cantonal court for a declaration of enforceability of the foreign judgment (Articles 28 et seq. PILS respectively Articles 38 et seq. LC). If the declaration of enforceability is sought under the LC, the declaration is granted immediately on completion of the formalities in Article 53 without any review under Articles 34 and 35 LC (Article 41 LC). A review of the grounds for refusal will only be made upon appeal (Articles 43 et seqq. LC).

If the applicant chooses this procedure and successfully obtains the declaration of enforceability, he will afterwards still have to initiate debt collection proceedings under the LDCB to enforce the judgment. However, since the judgment has already been declared enforceable in court proceedings, possible grounds for refusal of a recognition of the judgment are no longer reviewed in ensuing summary proceedings (*Rechtsöffnungsverfahren*) if the judgment debtor opposes the enforcement.

For Other Judgments

If the judgment does not concern a money claim or a claim for the payment for the purposes of securing a claim (e.g., a judgment ordering specific performance), the procedure does not fall under the ambit of the LDCB as just described, but rather under Articles 335 et seqq. CPC regarding the enforcement of non-money judgments. These federal provisions uniformly regulate the

recognition and enforcement procedure throughout Switzerland. The only domain left to cantonal law is the designation of the competent courts and the court organization. Provisions in international treaties and the PILS take precedence over the rules set out in the CPC (Article 335(3) CPC).

The judgment creditor always needs to obtain a declaration of enforceability from the competent cantonal court first; the direct enforcement of foreign non-money judgments, which is available for national judgments (Article 337(1) CPC), is not possible, even if the foreign court has ordered the direct enforcement of its judgment.

It depends on the enforcement instrument (see paragraph 17(c) *infra*) chosen to determine the competent authority for enforcement. For example, whereas a sole judge of the Court of First Instance would be generally competent to impose procedural fines, the public prosecutor would be competent to impose monetary fines for contempt of the court. If the judgment does not provide for an enforcement instrument, the judgment creditor has to submit an application for enforcement to the competent court which thereupon decides on the appropriate enforcement instrument (Articles 338(1) and 343 CPC).

Means of Appeal

Enforcement proceedings are regularly summary proceedings before a sole judge of the local district court where enforcement is sought. The decision of the Court of First Instance can be appealed to the Court of Appeals of the respective canton. Finally, there is the possibility of filing a complaint to the Swiss Federal Supreme Court (Article 72(2)(b)(1) Federal Court Statute (hereinafter 'FCS') and Article 44 in conjunction with Appendix IV LC). The Federal Supreme Court examines whether federal and international law were correctly applied. It generally does not review the establishment of the relevant facts by the cantonal courts and can and will intervene only in cases where the facts as established by the lower courts are obviously incorrect or where they are based on an infringement of rights under federal law, international law, or cantonal constitutional law (and certain other cantonal provisions), and if the correction of the defect is potentially decisive for the outcome of the proceedings (Article 97(1) FCS). With regard to interim measures, the Federal Supreme Court can only examine whether the attacked decision violates constitutional rights (Article 98 FCS).

2. JUDGMENTS

2.1. Definition

The term 'foreign judgment' is neither defined in the LDCB nor the PILS, but since the PILS refers in Article 25(1) to 'decisions' of foreign 'courts' or 'authorities', it is apparent that the scope of application of the PILS is not

limited to judgments rendered by courts, but that its provisions may also be applied if a civil matter was decided by a competent administrative authority. Pursuant to Article 30 PILS court settlements having the same status as court decisions in the States in which they were entered are equivalent to foreign judgments. A foreign judgment will be recognized and enforced provided that, *inter alia*, no ordinary appeal is available against the foreign judgment or if the foreign judgment is final (Article 25(b) PILS). An ordinary appeal is an appeal which has suspensive effect. A judgment is considered final, on the other hand, if such appeal is not admissible and the judgment becomes immediately effective with its handing down. In order to determine whether a judgment is final, recourse must be taken to the applicable *lex fori*.

In contrast to the PILS, the term 'judgment' is explicitly defined in the LC: Article 32 LC provides that 'judgment' means any judgment given by a court or tribunal of a State bound by the LC, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court. Under the LC, the expression 'court' includes any authorities designated by a State bound by the convention or having jurisdiction in the matter falling within the scope of application of the convention (Article 62 LC). As a consequence – as under the PILS – decisions must not emanate from a court in the strict sense in order to be enforceable under the LC. In addition, public deeds which have been formally drawn up or registered as authentic instruments as well as court settlements are deemed enforceable if they meet the requirements necessary to establish their authenticity in their State of origin and if they are enforceable there (Article 57(1) and (3) LC). Further, arrangements relating to maintenance obligations concluded with administrative authorities or authenticated by them are also regarded as authentic instruments which are enforceable (Article 57(2) in conjunction with Article 57(1) LC).

In the scope of application of the LC it suffices to show that the judgment is enforceable in the State of its origin (Article 38(1) LC), that is, the LC does not require a judgment to be final in order to be enforceable. However, upon appeal against the declaration of enforceability and a respective application of the judgment debtor, the Court of Appeals may stay the enforcement proceedings if an appeal has been lodged against the decision in the State of origin (Article 46(1) LC; see also Article 37(1) LC regarding the discretion to stay recognition proceedings).

2.2. Categories

The following types of judgments are enforceable in Switzerland, if the requirements mentioned and discussed hereinafter are fulfilled:

(a) Foreign judgments concerning *monetary claims* or concerning claims for the provision of security are enforceable in Switzerland both under the PILS and the LC. As mentioned, the actual enforcement proceedings for money judgments are governed by the LDCB.

(b) Foreign judgments *for specific* performance are enforceable both under the PILS as well as under the LC. The enforcement procedure as such is governed by the provisions of the CPC regarding the enforcement of non-money judgments (Articles 335 et seqq. CPC), whereby special provisions of the LC (or other international conventions) or the PILS take precedence over the provisions of the CPC (Article 335(3) CPC).

(c) There is still no conclusive authority within the scope of application of the PILS as to what extent *injunctions and similar orders* of foreign courts may be recognized and enforced in Switzerland. There are certain provisions that provide for the recognition of interim measures, but only with regard to specific legal areas. Fleeting mention of interim measures is made in Article 50 PILS, which provides for the recognition of foreign judgments and all measures relating to matrimonial rights and duties (see also Article 65d PILS regarding the recognition of foreign judgments and measures relating to registered partnerships). Article 96(3) PILS provides that precautionary measures ordered in countries in which property of the *de cujus* is situated are recognized in Switzerland. According to the general provision of Article 25(a) PILS, foreign decisions may be recognized and enforced in Switzerland only if they are final respectively not contestable with ordinary legal remedies. According to the prevailing opinion, injunctions and preliminary orders of foreign courts are decisions in the meaning of Article 25 PILS. However, an enforcement will often not be possible because the requirement of finality respectively uncontestability with ordinary legal remedies will be lacking. With regard to the recognition and enforcement of so-called freezing injunctions or freezing orders (also known as 'Mareva injunctions'), the prevailing opinion is that they should not be recognized and enforced by Swiss courts *under the PILS* because they do not constitute judgments in civil matters.

Within the scope of application of the LC, it is generally uncontroversial that *injunctions and similar orders* constitute judgments within the meaning of Article 32 LC. Therefore, a judgment rendered in a contracting State of the LC and enforceable in that State shall be enforced in another contracting State when, upon application of an interested party, it has been declared enforceable there (Article 38(1) LC). Judgments in the meaning of this article are – with certain limits – also injunctions like freezing (Mareva) injunctions (see, *inter alia*, BGE 127 III 626, consideration 5.3). Interim measures are, in principle, enforceable if the documentary requirements set out in Article 41 LC – provision of a copy of the foreign judgment satisfying the conditions necessary to establish its authenticity (Article 53(1) LC) and of a certification of its enforceability from the State of origin (Article 53(2) in conjunction with Articles 54 et seq. LC; see also Appendix V LC) – are fulfilled (see paragraph 4 *infra*).

Pursuant to the previous practice of the European Court of Justice to the Brussels Convention of 27 September 1968 (to which the LC of 16 September 1988 was a parallel convention), if the defendant party was not duly summoned or did not have the opportunity to make himself heard in the proceedings leading to the order, injunctions were not recognized and not enforced. Ex parte orders

were in other words not deemed enforceable. The Swiss Federal Supreme Court relativized this restriction of the ECJ by deciding that it was sufficient if the defendant party was given the opportunity to make himself heard at any point before the recognition and enforcement was sought in another LC State (see BGE 129 III 626, consideration 5.3 as well as decision of the Federal Supreme Court of 1 March 2006, 4P.331/2005, consideration 7.4). According to these decisions, ex parte orders can be enforced in Switzerland, provided that the defendant had the opportunity to be heard in the foreign proceedings after the order was issued and that this opportunity existed before the enforcement in Switzerland was sought. It is unclear whether the courts will continue this practice under the revised texts of Council Regulation (EC) No. 1215/2012, which has replaced the Council Regulation (EC) No. 44/2001, and under the revised LC (Article 34(2) LC). What is clear is that the court declaring a judgment enforceable may not review the judgment under Articles 34 and 35 LC. A review may take place only during appeal proceedings (Articles 41 et seq. LC).

Further, injunctions can only be enforced pursuant to the PILS or the LC if they can be regarded as a civil or commercial matter, but not if they emanate from public law (e.g., a penal sanction or an enforcement measure. Enforcement of such orders would have to be sought by way of international legal assistance). Also, injunctions will not be enforced if they are deemed to violate Swiss *ordre public*, for example, by unduly infringing fundamental rights such as the freedom of movement.

Finally, it should be noted that both under the PILS and the LC Swiss courts have jurisdiction to issue a preliminary injunction or grant interim relief even if they have no jurisdiction under the PILS or the LC to render a decision on the merits (Article 10 PILS, Article 31 LC). Such interim orders according to Swiss law may be granted ex parte, provided the respective prerequisites are fulfilled. See with regard to measures of interim nature also *infra*, paragraph (h).

(d) The recognition and enforcement of *foreign arbitral awards* in Switzerland is governed by the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards of 1958 (hereinafter 'New York Convention').

In addition, prior to the signing of the New York Convention, Switzerland had already been a signatory State to the Geneva Protocol of 1923 on Arbitration Clauses and the Geneva Convention of 1927 on the Execution of Foreign Arbitral Awards. Since all signatory States of the Geneva Convention on the Execution of Foreign Arbitral Awards have in the meantime signed the New York Convention, the Geneva Convention was repealed as per 20 March 2007 (see Article VII section 2 of the New York Convention). Switzerland has also concluded bilateral treaties with Austria (1960), Belgium (1959), Czechoslovakia (1926), Germany (1929), Italy (1933), Liechtenstein (1968), Spain (1896) and Sweden (1936). A party may avail itself of the provisions of such treaties if the requirements for enforcement thereunder are less strict than under the New York Convention (see Article VII(1) of the New York Convention).

(e) The PILS contains special jurisdictional rules governing the recognition of foreign judgments regarding *personal status*; they are described *infra*, paragraph 11(a)(c).

(f) There is still no definite authority on the status of *multiple/punitive damages judgments* under Swiss law. Authors who focus on punishment and deterrence as (main) purposes of punitive damages qualify judgments awarding such damages as belonging to public law, reasoning that punishment and deterrence are domains of criminal law. In accordance with the principle of territoriality, foreign judgments based on foreign public law are generally not enforceable in Switzerland and do not come within the scope of application of the PILS or the LC. Accordingly, a Court of First Instance in the canton of St. Gall held in 1982 that the recognition of a United States treble damages judgment was contrary to Swiss public policy reasoning that penal elements are foreign to Swiss civil law (see SJZ 1986, 313 et seq.).

However, the Court of Appeals of Basle took a more lenient view a few years later and upheld a judgment which included punitive damages. The court came to the conclusion that a judgment of the US District Court Northern District of California awarding USD 50,000 in punitive damages (counterclaim) based on English law was a judgment based on private law. The court reasoned that monetary punishment was not limited to criminal law, but that penalties with a punitive element existed also in (Swiss) private law. Such private law penalties had the purpose of securing and enforcing private law claims. The court held that in the instant case the punitive damages had not only the purpose of deterrence, but also the purpose to sanction the injuring party's wilful conduct with which it had reaped a profit that well surpassed the actual damages of the injured party. The punitive damages were thus held to cancel out the unjust enrichment of the injuring party. The Basle court consequently held that the American court had awarded the plaintiff punitive damages not in order to pursue the government's interest to prosecute criminal behaviour (see BJM 1991, 31 et seq.). The Swiss Federal Supreme Court dismissed an appeal against the mentioned judgment for procedural reasons. It did, however, confirm the Basle court's view that the judgment awarding punitive damages was under Swiss legal concepts a private law judgment. The Federal Supreme Court reasoned that only fines and decisions regarding costs which are to be paid to the government can be qualified as criminal law sentences (BGE 116 II 378). The Federal Supreme Court's decision that judgments awarding punitive damages should not be qualified as criminal law judgments is now also reflected by Swiss legal doctrine.

With regard to substantive public policy, the rule that damages awards may not lead to an enrichment of the party awarded the damages is at the centre of the controversy. The rule that actual damages constitute a limit to any damages payment is regarded as a fundamental principle of Swiss tort law, the violation of which is generally regarded as amounting to a breach of substantive *ordre public*. In the aforementioned case, the Basle Court of Appeals came to the conclusion that the enforcement of the US judgment awarding punitive damages did not violate Swiss public policy. It pointed out that in enforcement

proceedings the public policy clause of the PILS (Article 27(1) PILS) has to be applied restrictively (*ordre public atténué*). It further pointed out that claimant could have appropriated the profits resulting from the injuring party's actions also under Swiss law. The fact that the US court had only estimated the injured party's claim for appropriation of the profits did not amount to a violation of Swiss public policy since the injuring party could not make a showing that the sum was wholly inappropriate. In addition, the penal function was not held to amount to a violation of Swiss public policy in the instant case. The court thus declared the US judgment enforceable in Switzerland (see BJM 1991, 36 et seq.).

Based on the aforementioned precedents, it appears that (both under the PILS and the LC) foreign judgments awarding multiple/punitive damages would probably be recognized and enforced in Switzerland only insofar as the amount awarded in excess of the actual or estimated damages can be justified as an appropriation of (actual or estimated) illicit profits. Thus, foreign multiple/punitive damages judgments are not incompatible with Swiss public policy (Article 27(1) PILS respectively Article 34(1) LC) per se, but Swiss courts need to examine such judgments on a case-by-case basis. It should also be pointed out that sanctions with a punitive character are not wholly unknown in Swiss private law: pursuant to Article 336(a) CO, the employer who abusively terminates an employment agreement must pay the employee an 'indemnity' up to the amount of six months' salary. Damages are explicitly reserved by Article 336(a) CO and may be demanded in addition to such 'indemnity'. The latter thus serves the sole purpose of sanctioning the employer's violation of the law with a fine that is payable to the employee.

(g) A *judgment which is in itself the recognition of a previous foreign judgment* may be enforced if it complies with the rules of recognition mentioned above.

(h) As was illustrated above (see *supra*, paragraph (c)), the PILS does not contain any specific provision regarding the enforcement of injunctions and similar orders issued by foreign courts and authorities. Therefore, such measures fall within the ambit of Articles 25 et seqq. PILS, the general provisions regarding the recognition of foreign judgments. Fleeting mention of *interim measures* is made in Article 50 PILS which provides for the recognition of foreign judgments and all measures relating to matrimonial rights and duties if they are rendered at the domicile or place of habitual residence of one of the marriage partners. As to the question to what extent interim injunctions and similar orders of foreign courts and authorities are generally enforceable under the PILS, it is an open one. There is as yet no conclusive court authority. Some authors regard interim measures as unenforceable because of lack of finality (see *supra*, paragraph (c)). From Article 27(1)(a) and (b) PILS it can be concluded that foreign interim measures are not enforceable if the defendant party was not duly summoned or did not have the opportunity to make itself heard in the proceedings leading to the order.

Switzerland is a signatory State of the Hague Convention on the Recognition and Enforcement of Decisions relating to Maintenance Obligations of 2 October 1973. This Convention applies to decisions rendered by a judicial or administrative authority in a contracting State in respect of a *maintenance obligation* arising from a family relationship, parentage, marriage or affinity. According to Article 4 of this Convention, provisionally enforceable decisions and provisional measures shall, although subject to ordinary forms of review, be recognized or enforced in the State addressed if similar decisions may be rendered and enforced in that State.

The LC does not contain any special rules for the enforcement of relief pendente lite or interim orders for maintenance and custody, so in general reference can be made to the comments made in paragraph 2.2(c) *supra*. As mentioned, interim measures are in principle enforceable under the LC if the general prerequisites for enforcement, namely the documentary requirements mentioned in Article 41 LC (in conjunction with Articles 53–55 LC), are fulfilled (see paragraph 4 *infra*). However, as mentioned, ex parte orders are in principle neither enforceable under the PILS nor under the LC (Article 34(2) LC).

(i) The enforcement of *judgments against the local State or any of its organs* is guided by the general principles of public international law and hence not subject to civil enforcement procedures. Public or State-controlled corporations, however, may not claim sovereign immunity provided that they have a legal personality separate from the State.

(j) Apart from judgments which are against public policy (Article 27(1) PILS respectively Article 34(1) LC) and subject to paragraphs 10 and 11 *infra*, there are no final foreign judgments in civil matters which are not enforceable provided that they were based on proper jurisdiction. Default judgments may be difficult or impossible to enforce if the Swiss courts are not in a position where they can review the compliance of the foreign judgment with certain mandatory provisions of the PILS or the LC (see paragraph 10 *infra*). Foreign fiscal judgments (taxes and customs duties) are not enforceable in Switzerland. As decisions based on public law they do not fall within the scope of application of the PILS or the LC.

2.3. Reciprocity

The previously prevailing reciprocity criterion has been abolished by the PILS and the LC. An exception is made in Article 166(1) lit. c PILS, where it is stated that the recognition of foreign judgments regarding the bankruptcy of a debtor requires reciprocity.

3. Currency Regulations and Restrictions

(a) Switzerland does not have any exchange control regulations or restrictions which would prevent free transfer of any amount which may be recovered as a result of the enforcement of a foreign judgment.

(b) Article 67(1)(3) LDCB provides that the application to the debt collection office (*Betreibungsbegehren*) must include the claim amount or the amount for which security is sought in the legal currency of Switzerland. Therefore, monetary claims are to be expressed in Swiss francs for the purposes of enforcement in bankruptcy or debt collection proceedings. If the foreign judgment orders payment in a currency other than in Swiss francs, the amount of foreign currency awarded will be converted into Swiss francs as per the day the payment order (so-called *Zahlungsbefehl*) is made. The creditor has the possibility to apply for a new conversion when the debtor's assets are distrained (Article 88(4) LDCB).

4. Documentary Requirements

The application for recognition or enforcement must be filed with the competent cantonal authority (Article 29(1) PILS respectively Article 39(1) LC in conjunction with Annex II LC) and must be accompanied by certain documents. Within the scope of the PILS, the documentary requirements are listed in Article 29(1) lit. a-c; under the provisions of the LC, the documents that must be attached to an application are laid down in Article 40(3) in conjunction with Articles 53–55 LC. In general, the following documents need to be attached to the application for recognition or enforcement:

- a complete original or a certified transcript of the judgment which enables the judge to establish the authenticity of the judgment (Article 29(1) lit. a PILS; Article 53 LC). Under the LC, it is controversial whether a copy of the foreign judgment (certified by another foreign official body than the foreign court itself) would be sufficient or not;
- under the scope of application of the PILS, a confirmation from the foreign court or authority that no ordinary (i.e., suspensive) appeal lies against the judgment or that the latter is final (certificate of indefeasibility; see Article 29(1) lit. b PILS); there are no specific rules in the PILS as to the form of such confirmation, the decision on which is therefore within the discretion of the competent court. Under the scope of application of the LC, a party must produce a similar certificate which proves the enforceability of the foreign judgment (Article 53(2) in conjunction with Article 54 LC). Contrary to the PILS, the LC provides in its Article 54 that a standard form pursuant to Appendix V LC must be submitted;
- in the case of a default judgment, an official document showing that the defendant was duly served with the complaint and granted sufficient time to conduct its defence, or the enforcing party faces the risk that the judgment

debtor may successfully raise a defence under Article 27(2)(a) PILS. Under the LC such proof is not required since pursuant to Article 41 LC a judgment is declared enforceable without any review under Articles 34 and 35 LC and without any possibilities for the defendant to raise objections against the enforcement at first (see paragraph 10.2 *infra*). The judgment debtor is entitled to raise these defences only by means of an appeal to the Court of Appeal of the respective canton against the declaration of enforceability (Article 43(1) LC in conjunction with Article 327a(1) CPC; see also Article 45(1) LC) which for the first time reviews these substantive prerequisites for recognition of the judgment.

(a) No special requirements apply for companies. A certified extract from the commercial register of the country of domicile of the company is helpful in cases where the power of the representatives to act is disputed by the opposing party and has to be proven to the court.

(b) Unlike the provisions in the PILS, pursuant to which the party opposing the application must be heard and may submit evidence, under the revised provisions of the LC the initial decision on the application for enforcement is made ex parte and the defendant is not entitled to make a statement or submit evidence during this first procedural stage (Article 41 LC). Objections can only be raised after it by means of an appeal.

The recognition and enforcement procedure takes place before a sole judge of the Court of First Instance (usually called District Courts). The judge decides in summary proceedings, the essential feature of which is that – due to the narrow scope of the issues to be decided – the parties have only limited rights to file evidence. Although there usually is a hearing before the deciding judge, the latter's inquiry is usually limited to an examination of the documents submitted by claimant and – in case the judgment debtor (defendant) must already be heard at this stage of the proceedings (which is the case under the provisions of the PILS, but not always under the provisions of the LC) – the arguments of defendant that can be proven immediately. A party seeking enforcement of a foreign judgment is therefore well advised to make sure that all required documents, translations and legalizations are filed with the initial request for enforcement. This also includes, in cases of default judgments, evidence with regard to proper notification of the defendant.

(c) Although it is preferred that originals of documents are filed, it is sufficient to submit certified copies. As to the form of the certification, it might be advisable to have an apostille affixed thereto.

5. Conventions

As of spring 2016, Switzerland is a signatory in particular to the following The Hague Conventions, some of which directly govern the enforcement of foreign

judgments in the pertinent field or contain provisions that are important for the enforceability of foreign judgments:

- The Hague Convention on Civil Procedure of 1 March 1954;
- The Hague Convention of the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters of 15 November 1965;
- The Hague Convention on the Law Applicable to Maintenance Obligations of 2 October 1973;
- The Hague Convention concerning the Recognition and Enforcement of Decisions relating to Maintenance Obligations of 2 October 1973;
- The Hague Convention on Jurisdiction, the Law Applicable, the Recognition, the Enforcement and the Cooperation in respect of Parental Custody and Protection Measures for Children of 19 October 1996 (became effective on 1 July 2009);
- The Hague Convention concerning the international Protection of Adults of 13 June 2000 (became effective on 1 July 2009);
- The Hague Convention on the Recognition and Enforcement of Divorces and Legal Separations of 1 June 1970;
- The Hague Convention on the Civil Aspects of International Child Abduction of 25 October 1980.

6. Authentication of Documents

There is no specific regulation regarding the authentication of documents. However, as has been shown above, both the PILS and the LC contain certain provisions regarding the authentication of documents (Article 29 (1) lit. a PILS and Article 40(3) LC in conjunction with Articles 53–55 LC). As a general guideline, local courts will consider whether the foreign person who authenticated a document was authorized under his own local laws to do so. This, however, can only be determined on a case-by-case basis. It is therefore advisable for foreign parties to consider having the documents authenticated with an apostille before seeking enforcement of the foreign judgment in Switzerland (see also paragraph 4, *supra*).

7. Translation of Documents

The question of recognition and acceptance of documents in foreign languages is governed by the procedural laws of the canton where enforcement is sought. Each canton has one or two official languages (German, French or Italian, that is, the languages spoken in Switzerland).

Generally, the enforcement of judgments in one of the official languages will not require a translation. In all other cases, a translation of the judgment into the official language of the canton of enforcement may be required (Article 55(2) LC and Article 129 CPC). As far as English is concerned, a judge might be willing to waive the translation requirement if the content of the judgment is clear. As to the certification of the translation, the decision on what certification

is sufficient is regularly considered to lie within the discretion of the competent judge. Article 55(2) LC requires that a translation (if required) be certified by a person qualified to do so in one of the contracting States.

8. Reopening or Review of Judgments

(a) According to Article 27(3) PILS as well as Article 36 LC, a foreign judgment may, as a rule, not be re-examined with regard to its merits. If a foreign judgment meets the jurisdictional requirements of the applicable body of law (Article 25 lit. a in conjunction with Article 26 PILS respectively Article 35(1) LC), and if there are no grounds for refusal (Article 27 PILS respectively Article 34 LC), the local court will thus enforce the foreign judgment without review of the merits.

(b) The only exception to that rule is the public policy defence listed in both the PILS and the LC (Article 27(1) and (2) PILS respectively Article 34 LC). According to the practice developed by the Swiss Federal Supreme Court, there are two forms of violations of public policy. The first is the one aimed at by Article 27(1) PILS respectively Article 34(1) LC, that is, a violation of public policy caused by the substantive result of the judgment (*substantive ordre public*). The second is a manifest violation of Swiss public policy by the manner in which the foreign proceedings were conducted (*procedural ordre public*; Article 27(2) lit. b PILS respectively Article 34(1) LC). In both cases, however, the Swiss Federal Supreme Court has repeatedly emphasized that the concept of public policy, especially the concept of *substantive ordre public*, must be interpreted in a restrictive manner, and should not be used as a means to undermine the obligation assumed by Switzerland to recognize judgments emanating from other countries (so-called *ordre public atténué de la reconnaissance*).

(c) Allegations of fraud could lead to a refusal of enforcement only if the defendant could demonstrate to the Swiss court that fraudulent behaviour of plaintiff had deprived defendant of an adequate opportunity to present its case to the foreign court. Such a fact would be considered a violation of the defendant's right to be heard and, therefore, a violation of the *procedural ordre public* (Article 27(2) lit. b PILS respectively Article 34(1) LC). If, on the other hand, 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 allegation of fraud would not be a successful defence because the Swiss court would consider this to be a review of the merits of the case.

9. Pending Proceedings

(a) If a lawsuit concerning the same subject matter that is the topic of the suit filed in Switzerland has already been filed between the same parties abroad prior to the filing in Switzerland, the Swiss court shall stay the proceedings, if it can be assumed that the foreign court will, within a reasonable time, render a judgment which Swiss law would recognize (Article 9(1) PILS). A lawsuit is deemed filed in Switzerland at the point in time when the first procedural step necessary for the filing is taken (Article 9(2) PILS). The first step is made by the initiation of conciliation proceedings, as pursuant to the CPC such conciliation proceedings are in most cases mandatory before the lawsuit can be brought to court. The Swiss court will dismiss the lawsuit, which has been stayed during the time the foreign court took for its decision, as soon as the judgment rendered by the foreign court is submitted to the Swiss court, provided the foreign judgment is capable of recognition in Switzerland (Article 9(3) PILS).

If, on the other hand, a lawsuit pending in another country concerning the same subject matter and between the same parties was filed later than the lawsuit before the Swiss court, the Swiss court will continue its proceedings, if the defending party cannot successfully raise a defence of lack of jurisdiction (Article 9(1) PILS). The judgment in a foreign proceeding which was initiated after proceedings in Switzerland will not be recognized in Switzerland (see Article 27(2)(c) PILS). Further, if the Swiss courts have already decided a proceeding at the time when recognition of a foreign judgment concerning the same subject matter and between the same parties is sought, the Swiss courts will also deny recognition and enforcement of the foreign judgment in Switzerland (Article 27(2) lit. c PILS).

The effect of proceedings pending in another country (i.e., a third State) on the recognition and enforcement of a foreign judgment in Switzerland is also governed by Article 27(2) lit. c PILS. If there are pending proceedings in another country at the time when recognition of a foreign judgment is sought in Switzerland, this does not constitute a ground for refusal of recognition of the foreign judgment (Article 27(2) lit. c PILS *e contrario*). Swiss courts must only refuse recognition and enforcement of a foreign judgment in Switzerland if the dispute has already been decided in another country at the time when recognition and enforcement of the foreign judgment is sought (Article 27(2) lit. c PILS).

The rules under the LC are similar: pursuant to Article 27(1) LC, a court other than the court first seized shall of its own motion stay proceedings involving the same cause of action between the same parties until such time as the jurisdiction of the court first seized is established. Thereafter, any court other than the court first seized shall decline jurisdiction in favour of that court (Article 27(2) LC).

The recognition of a judgment shall be refused if it is irreconcilable with an earlier judgment given in another State bound by the LC or in a third State, provided that the earlier judgment fulfils the conditions necessary for its recognition in the State addressed (see Article 34(4) LC). If there are pending proceedings in another LC State or in a third State at the time when recognition of an LC State judgment is sought in Switzerland, this does not constitute a

ground for refusal of recognition of this judgment in Switzerland (Article 34(4) LC *e contrario*).

Pursuant to Article 34(3) LC, a judgment given in a LC State shall not be recognized if it is irreconcilable with a judgment rendered in the State in which recognition is sought. Compared to Article 34(4) LC, Article 34(3) LC is a much stronger ground for refusal of recognition because it allows for refusal of the foreign judgment even if the Swiss judgment was rendered after the LC State judgment. Moreover, it only requires the dispute to be between the same parties, but not concerning the same cause of action. However, similar to Article 34(4) LC, Article 34(3) LC does not provide for refusal of recognition and enforcement of a LC State judgment in Switzerland if there are pending proceedings in Switzerland at the time when recognition is sought: in other words, pending Swiss proceedings do not constitute a ground for refusal of recognition of a LC State judgment.

(b) As far as the effects of appeals in the foreign country are concerned, a distinction must be made as to whether the foreign judgment is challenged by an ordinary or extraordinary appeal under the *lex fori*. In case of an ordinary appeal, one of the prerequisites for recognition under the PILS – i.e., that the foreign judgment is no longer subject to any ordinary appeal or that it is final (Article 25 lit. b PILS) – would be lacking and an application for enforcement would consequently be rejected (see paragraph 2.1. *supra*). In case of an extraordinary appeal against the foreign judgment, it would seem that the domestic courts would only have the power to refuse enforcement:

– if a treaty provides that there must be neither an ordinary nor an extraordinary right of appeal available to challenge the foreign judgment under the *lex fori*; or
– if the debtor/defendant can prove that the appeal – even though it is an extraordinary appeal – was granted suspensive effect under the *lex fori*.

Under the LC, it suffices that the judgment is enforceable in the State of origin, that is, the judgment need not be final in order to be enforced in another State bound by the LC. However, enforcement may be stayed on appeal if an ordinary appeal has been lodged in the main proceeding (see Articles 38(1) and 46(1) LC and paragraph 2.1 *supra*).

10. Defences

The defendant may introduce any defences which are appropriate and within the limits of judicial review.

10.1. Defences under the PILS

Pursuant to Article 27(1) and (2) PILS, a foreign judgment will not be recognized in Switzerland:

- where such recognition would be manifestly incompatible with Swiss public policy; this defence is examined by the Swiss courts ex officio, i.e., irrespective of whether it is invoked by the defendant or not (see paragraph 8 *supra*);
- where a party can prove that it was not validly served with notice of the proceedings either under the law of its domicile or of its habitual residence unless such party submitted unconditionally to the proceedings (see paragraphs 12 and 13 *infra*);
- where a party can prove that the judgment was made in disregard of essential principles of Swiss procedural law, in particular where a party was denied its right to be heard; or
- where a party can prove that litigation between the same parties and with respect to the same subject matter has been initiated or decided first in Switzerland, or that the matter has already been decided at an earlier date in a third country, and that such judgment is capable of recognition in Switzerland (see paragraph 9(a) *supra*).

The list of grounds for refusal in Article 27(1) and (2) PILS is exhaustive. It is specifically held that a foreign judgment may not be examined with regard to its merits (Article 27(3) PILS).

10.2. Defences under the Lugano Convention

The grounds for refusal listed in the LC (Articles 34 and 35(1) LC) are more restrictive. They are examined ex officio, whereby the burden of proof for the existence of the prerequisites lies on the defendant. In addition, due to the intended surprise effect under the LC, these defences against enforcement may only be raised by way of an appeal to the cantonal Court of Appeals after the judgment has been declared enforceable in ex parte proceedings (Articles 41, 43 and 45 LC). The Court of Appeals will then decide on recognition or refusal of the judgment.

Pursuant to Article 34 LC, a judgment given in a State bound by the LC will not be recognized in Switzerland:

- if the recognition is manifestly contrary to Swiss public policy (Article 34(1) LC);
- where the judgment was given in default of appearance, if the defendant was not duly served with the document which instituted the proceedings or with an equivalent document in sufficient time and in a way as to enable him to arrange for his defence, unless the defendant failed to commence proceedings

to challenge the foreign judgment when it was possible for him to do so (Article 34(2) LC);
– if the foreign judgment is irreconcilable with a Swiss judgment rendered in a dispute between the same parties (Article 34(3) LC);
– if the judgment is irreconcilable with an earlier judgment given in another State bound by the LC or in a third State involving the same cause of action and between the same parties, provided that the earlier judgment fulfils the conditions necessary for its recognition in Switzerland (Article 34(4) LC).
– The grounds for refusal of recognition listed in Articles 34 and 35(1) LC are exhaustive. As under the PILS, the LC specifically states that a foreign judgment may under no circumstances be reviewed by Swiss courts with regard to its merits (Article 36 LC).

11. Jurisdiction

11.1. Under the PILS

(a–c) Under the PILS, the Swiss courts must examine ex officio whether the courts or authorities of the States in which the judgment was entered had proper jurisdiction from a Swiss perspective (so-called 'indirect' or 'recognized' jurisdiction, Article 25 lit. a in conjunction with Article 26 lit. a – d PILS). While the Swiss courts do not automatically accept that a foreign court or authority had jurisdiction and was properly seized of a matter, they will review the foreign jurisdiction only from an international perspective; the local jurisdiction, the subject-matter jurisdiction and the hierarchical competence of the foreign courts are not examined.

As a general rule, the jurisdiction of foreign authorities is recognized where such is provided for by specific provisions of the PILS (see, e.g., Article 50 or 58 PILS) or, failing this, where the defendant was domiciled in the country where the judgment was rendered (Article 26 lit. a PILS).

In disputes involving monetary interests, foreign jurisdiction is generally recognized if the parties submitted to the jurisdiction of the foreign authority in an agreement valid under the PILS (Article 26 lit. b PILS). The forum agreement must be in writing - including telegram, telefax or any other form enabling the proof of the agreement in text -, and it must not abusively deprive a party of its Swiss forum provided under Swiss Law to protect that party (see Article 5(1) and (2) PILS). Certain jurisdictional provisions in the PILS are mandatory, however, rendering a differing jurisdictional clause invalid. This includes jurisdiction over foreign real property, if the foreign State in which the real property is located claims exclusive jurisdiction over such properties (Article 86(2) PILS and Article 96(2) PILS), jurisdiction over Swiss real property (Article 97 PILS), jurisdiction over disputes concerning the validity of intellectual property rights in Switzerland (Article 109 PILS in conjunction with Article 111(2) PILS), jurisdiction over contracts with consumers (Article 114(2) PILS in conjunction with Article 149(2) lit. b PILS), and jurisdiction over liability for issue prospectuses Article 151(3) PILS.

In disputes involving monetary interests, foreign jurisdiction is also recognized if the defendant party unilaterally submitted to the jurisdiction of the foreign authority by appearing in the proceeding and pleading on the merits without any reservation (Article 26 lit. c PILS). Finally, the foreign jurisdiction is recognized for counterclaims, where the jurisdiction for the main claim is recognized and there is a nexus between the main claim and the counterclaim (Article 26 lit. d PILS).

The PILS provides for a number of cases where it is sufficient for the recognition of the foreign judgment by Switzerland that the judgment, while not having been rendered in the country which Swiss law would consider to have jurisdiction, is recognized in that country. This is the case for judgments concerning matrimonial property, successions, and rights in rem in foreign real estate (see, *inter alia*, Article 43(2), Article 58(1), Article 65(1) and Article 96(1) lit. b PILS).

With regard to claims based on the law of obligations, Swiss law broadens the jurisdiction of foreign courts. In particular, a foreign judgment is recognized (Article 149 PILS):

- if it was rendered in the country where the defendant was domiciled (Article 149(1) lit. a PILS), or in the country in which the defendant was habitually resident provided the claims are connected with an activity carried out at that place (Article 149(1) lit. b PILS);
- where it relates to the performance under a contract, if it was rendered in the country in which such performance is to be effected, provided the defendant is not domiciled in Switzerland (Article 149(2) lit. a PILS);
- where it relates to claims arising from consumer contracts, if it was rendered at the consumer's domicile or habitual residence, and if the requirements provided in Article 120(1) PILS are met (Article 149(2) lit. b PILS);
- where it relates to claims arising from an employment contract, if it was rendered at the place where work was performed or at the place of the employer's business, always provided the employee was not domiciled in Switzerland (Article 149(2) lit. c PILS);
- where it relates to claims arising from the operation of a branch office, if it was rendered at the place of the branch office (Article 149(2) lit. d PILS);
- where it relates to claims arising from unjustified enrichment, if it was rendered at the place where the activity leading to the enrichment occurred or took effect, always provided the defendant was not domiciled in Switzerland (Article 149(2) lit. e PILS); or
- where it relates to claims arising from a tort, if it was rendered at the place where the tort was committed or where the damages occurred, always provided the defendant was not domiciled in Switzerland (Article 149(2) lit. f PILS).

Foreign judgments regarding the insolvency (bankruptcy) of a debtor are recognized in Switzerland, provided that they are enforceable in the State where they were rendered (Article 166(1) lit. a PILS), that there is no ground to refuse recognition within the meaning of Article 27 PILS (Article 166(1) lit. b PILS)

and that the reciprocity requirement is met (Articles 166(1) lit. c PILS). The liquidation of assets located in Switzerland and their transfer to the foreign bankrupt's estate can only be effected under certain safeguarding measures designed to protect creditors residing in Switzerland.

The PILS contains an extensive list of foreign jurisdictions that are recognized in the field of family and personal status law:

- foreign judgments or orders relating to matrimonial rights and duties of the spouses and matrimonial property (Article 43, Articles 46 et seq., Article 51 and Articles 65a et seq. PILS);
- foreign judgments relating to divorce and judicial separation (Articles 59 et seq. PILS);
- foreign judgments regarding the establishment or contest of the parental relationship, recognition of an acknowledgement of the paternity of a child or of a declaration of legitimacy made abroad, foreign adoptions and similar acts (Article 71 and Articles 75 et seq. PILS);
- foreign judgments regarding the relationship between parents and children and the protection of minors (Articles 66 et seq., Articles 79 et seq. and Article 85 PILS).

(b–c) A foreign judgment granted by default is only treated differently from any other kind of judgment if the facts that led to the default judgment are such that they are qualified as a ground for refusal under the generally applicable rules (see, *inter alia*, Article 27(2) lit. a and lit. b PILS; see also paragraph 2.1. *supra*). Swiss law does not provide any general criteria defining a possible default. Also, difficulties may occur if the Swiss court requested to enforce the foreign default judgment is not in a position to review whether certain prerequisites for enforcement, notably certain jurisdictional provisions, are fulfilled (see already paragraphs (a–c) *supra*).

(c–c) The Swiss court will determine the validity of a contractual choice of jurisdiction clause by applying Swiss law, irrespective of whether such clause is exclusive or not. If the Swiss court comes to the conclusion that the jurisdiction clause does not meet the requirements of Article 5 PILS, it will refuse enforcement for lack of jurisdiction of the foreign court (Article 26(1) lit. b PILS), unless foreign jurisdiction derives from another provision contained in the PILS.

(d–c) If enforcement of a judgment is sought against a defendant with no ties to Switzerland at all, the court might refuse to grant enforcement based on the consideration that the claimant does not have a legitimate legal interest in the recognition of the foreign judgment by Swiss courts. Apart from that, the PILS does not contain any provisions in this regard. Therefore, the only requirement for a foreign judgment to be enforced in Switzerland is usually that the defendant (judgment debtor) has assets there.

11.2. Under the Lugano Convention

(a–c) In contrast to enforcement under the PILS, the jurisdiction of the court issuing the judgment may, as a general rule, not be reviewed under the LC (Article 35(3) LC). It is to be noted, however, that a violation of most jurisdictional provisions of the LC – in particular of Articles 8–17 and 22 – will render a judgment unenforceable in the other LC contracting States (compare Article 35(1) LC). In these cases, the jurisdiction of the foreign court may be re-examined. For example, in a recent case (BGE 127 III 186 et seq.) the Swiss Federal Supreme Court refused to enforce an English default judgment. The court reasoned that since it could not review the grounds on which the English court based its jurisdiction, it could therefore also not exclude a violation of the provisions of the LC (namely of Articles 28(2) and 54B(3) of the 1988 LC). *Parties seeking a judgment which is intended to be enforced in Switzerland are thus well advised to ensure that the judgment sets out at least the grounds on which the court of origin based its jurisdiction*.

Under Article 5(1) LC, a party to a contract can be sued at the place of performance of its contractual obligations. In the former LC of 16 September 1988, Switzerland had made a reservation to this provision (see Article 1(a) of the Protocol No. I) which allowed it to refuse the enforcement of foreign judgments against Swiss residents where the foreign court based its jurisdiction solely on Article 5(1) LC, that is, the place of performance of the contractual obligations in question. The reservation expired on 1 January 2000 when Switzerland's revised Constitution came into effect and a previous constitutional guarantee that a debtor domiciled in Switzerland must be sued for personal debts at his domicile was repealed. As a consequence, the revised text of the LC which has entered into force on 1 January 2011 no longer provides for such reservation.

(b–c) With regard to reviewing jurisdiction agreements (Article 23 LC), the LC is very different from the PILS. If a judgment creditor seeks recognition and enforcement of a LC State judgment in Switzerland, Swiss courts are usually not permitted to review whether the foreign court or authority examined a jurisdiction agreement correctly, nor to review whether the foreign court or authority has overlooked such an agreement (Article 35(1) LC *e contrario*). However, Swiss courts may review jurisdiction agreements in certain legal areas (see, e.g., Article 35(1) LC in conjunction with Article 13 LC regarding insurance contracts).

(c–c) The LC recognizes the jurisdiction of foreign courts and authorities over claims where the defendant submitted *unconditionally* to the proceedings, that is, by pleading on the merits of the case without contesting the foreign jurisdiction or by subsequently retracting such plea. A party, however, who expressly contests jurisdiction while also defending itself on the merits in the foreign court is not deemed to have submitted unconditionally to the proceedings and can still raise the lack of jurisdiction of the foreign court as a defence in the enforcement proceedings (Article 24 LC).

12. Contractual Waiver

(a) A prior contractual waiver of service or notice is not a common practice in Switzerland, and it is highly unlikely that such a waiver would be recognized and followed by a Swiss court.

(b) Faced with a request for recognition and enforcement of a foreign judgment where the defendant has waived his right to be served or notified of the proceedings, a Swiss court would refuse enforcement if the court concluded that the defendant's essential rights to be heard and to participate at the proceedings were impaired. This will be the case both under the provisions of the PILS and of the LC (Article 27(2) lit. a – b PILS and Article 34(1)-(2) LC).

13. Service Requirements

In the absence of violations of Swiss procedural public policy (described in paragraph 8 *supra*), a Swiss court will respect the foreign methods of service of process. In order to pass the public policy test, the Swiss judge must be satisfied by evidence that the defendant was formally notified of the foreign proceedings, of the claims raised and of the factual allegations made by plaintiff. The defendant must have due notice in advance of court hearings. Therefore, proof of notifications should be submitted together with the application for enforcement.

14. Cession

(a–b) Switzerland does not know the institution of cession of judgments, but only the cession (i.e., assignment) of claims as provided in Articles 164 et seq. of the Swiss Code of Obligations (CO). It is therefore doubtful whether Swiss courts would accept any foreign title under which a party not mentioned in the judgment tries to execute the judgment in Switzerland. A written assignment of the amount awarded by the foreign court, on the other hand, or the nomination of a third party to execute a foreign judgment in Switzerland on behalf of the creditor named in the judgment by a power of attorney, are of course possible. An assignment could, however, provoke a new procedure on the merits. In order to avoid any evidentiary problems, the signature of the assignor should be notarized.

15. Interim Relief

(a) Pursuant to Article 10 lit. a and b PILS a Swiss court has the power to issue interim measures if it has jurisdiction over the substance of the matter, or if such measures are to be enforced in Switzerland. Under the LC, a similar rule applies:

Article 31 LC provides that a Swiss court may order provisional, including protective, measures even if another LC contracting State has jurisdiction as to the substance of the matter. Therefore, the Swiss courts may grant interim relief both under the PILS and the LC whenever this seems appropriate to protect the claimant's rights.

A claimant requesting interim measures has to credibly show that he has a good arguable case (which argument is facilitated if there is already a foreign judgment) and that failure to make an adequate order would cause detrimental prejudice which would be difficult to remedy subsequently (Article 261(1) lit. a – b CPC).

The most effective conservatory measure is an attachment order pursuant to Articles 271–281 LDCB (so-called *Arrestbefehl*). An attachment order is granted ex parte by the judge at the place of enforcement or at the place where the assets of the defendant are situated (Article 272(1) LDCB). The plaintiff has to provide prima facie evidence of the existence of the assets to be attached (such as an account with a specific bank), of a claim due and payable against the defendant and that at least one of the grounds for attachment listed in Article 271(1) LDCB is given. Attachment orders may be directed against Swiss residents, against persons residing outside of Switzerland as well as against foreign companies. The grounds for an attachment (so-called *Arrestgründe*) are listed in Article 271 LDCB as follows:

- the debtor has no fixed abode (Article 271(1)(1) LDCB);
- the debtor is about to flee, has already fled or is hiding assets (Article 271(1)(2) LDCB);
- the debtor is in Switzerland in transit only, if the claim is of a nature that it is usually paid instantly (Article 271(1)(3) LDCB);
- if the debtor does not have his residence (or, in the case of a company, its seat) in Switzerland, and no other ground of attachment is available, the claim must have a sufficient connection to Switzerland and must be based on a written acknowledgment of indebtedness in the meaning of Article 82(1) LDCB (Article 271(1)(4) LDCB);
- earlier attempts of the creditor to enforce monetary claims against the debtor have resulted in bankruptcy or certificates of shortfall (Article 271(1)(5) LDCB);
- the creditor is in the possession of a definitive enforceable instrument, such as a judgment of a Swiss Court or an enforceable foreign judgment (Article 271(1)(6) LDCB). In principle, no declaration of enforceability is required under the LC for the claimant to avail himself of interim, including protective, measures (Article 47(1) LC). However, pursuant to a recent amendment in Article 271(3) LDCB, the competent authority has to decide on the enforceability of a judgment before granting an attachment of the debtor's assets. Therefore, the judgment creditor should provide a confirmation of enforceability pursuant to Article 54 in conjunction with Appendix V LC (see paragraph 4 *supra*) when applying for an attachment under Article 271 LDCB for a judgment which is enforceable under the LC. It is to be noted that this new ground for attachment has only entered into

force on 1 January 2011, and many questions on its scope of application remain controversial.

The defendant is unable to intervene in the attachment procedure and there is no contradictory hearing until after the attachment order has been granted (Articles 272(1) and 278(1) LDCB). The defendant's rights are nevertheless protected in three different ways:

– The judge granting the attachment order may require the plaintiff to post a bond in order to cover possible damages to the defendant resulting from an unjustified attachment (Article 277 LDCB; see *also infra*).
– The attachment is only a provisional remedy and is forfeited within ten days unless the plaintiff pursues his claim in what is called the 'validation' procedure (so-called *Arrestprosequierung*; Articles 279 et seq. LDCB).
– The defendant may move for a discharge of the attachment (so-called *Arresteinsprache*) based on certain narrow procedural grounds (Article 278(1) LDCB).

(b) A court granting the interim relief may require the applicant to provide security for damages arising out of the unjustified attachment (Article 273 LDCB). The decision on the amount is in the discretion of the court which will take into account the amount in dispute and the potential damage the respondent might suffer as a result of the interim relief granted. The courts also require an advance payment in the amount of the presumptive court fees and, upon application of the debtor, a security for compensation for legal costs must be provided, in order to secure respondent's entitlement to such compensation in case he prevails. Whereas the advance payment can only be paid through a money transfer, the security can also be provided by means of a bank guarantee (stand-by letter of credit; see Articles 98–100 CPC). The court may increase or decrease the total amount of the security as well as of the advance payment as the procedure develops.

16. Interest

In terms of the original judgment, the Swiss courts will recognize the interest awarded by the foreign court as long as such interest does not violate Swiss public policy. It may be assumed that if the judgment refers to Swiss francs, interest rates up to 15% *per annum* (the current maximum rate for consumer credits in Switzerland) will not be considered a violation of Swiss public policy. Judgments awarding higher interest rates will have to be examined on a case-to-case basis.

A statutory interest of 5% *per annum* from the day of the debtor's default can be recouped in the enforcement proceedings, if no other rate of interest has been agreed upon. Any excess must be made the object of a separate action.

17. Time of Enforcement and Subsequent Action

(a) The time required to obtain a decision recognizing and enforcing a foreign judgment depends strongly on the case load of the court at the place of enforcement and thus varies. Generally, for both money judgments and other judgments, three months should be a reasonable estimate for the duration of the proceedings before the Court of First Instance. If the decision of the first instance is appealed by the defendant, the appeal might take another three to six months. Finally, a complaint to the Swiss Federal Supreme Court will result in another delay of approximately six months.

(b) Once enforcement is granted, money judgments are enforced in accordance with the rules contained in the LDCB. If the debtor is a corporation or an individual registered as a merchant in the commercial register, the debtor is subject to bankruptcy proceedings, which lead to an automatic attachment of the entirety of the debtor's assets. If an individual is not registered in the commercial register, he is subject to the rules on bankruptcy only at his own request and only if there is no other prospect of resolving the debtor's indebtedness. Otherwise, the creditor can still request the enforcement authorities for an attachment and subsequent liquidation of specific assets of the debtor, which leads to seizure of such assets, (i.e., *inter alia*, movables, immovables and claims). There is no civil imprisonment or restraint on leaving the country.

(c) With regard to judgments other than money judgments, Article 343(1) CPC provides for various enforcement instruments, such as penal fines for contempt of the court pursuant to Article 292 of the Swiss Criminal Code or procedural fines of up to CHF 5,000 or up to CHF 1,000 per day for non-compliance. Further enforcement instruments are the application of force against property or against the obligated person (e.g., the taking away of a chattel or the clearing of premises), the granting of leave to obtain substitute performance, the replacement of a necessary declaration of intent of the judgment debtor (e.g., the granting of consent) by the judgment (Article 344 CPC), and the obligation to pay damages if the judgment debtor fails to comply with the court's orders or a conversion of the performance into a claim for money (Article 345 CPC).

(d) The cantonal courts of first instance – usually called District Courts – are competent for enforcement; uniform federal procedural rules now apply (Articles 335 et seq. CPC). Decisions granting or refusing enforcement can be appealed to the respective superior cantonal court, and afterwards to the Federal Supreme Court. These are automatic rights of appeal, that is, leave to appeal need not be applied for. Appeal proceedings will usually take between three to six months.

If the enforcement falls within the scope of the LC, the party against whom enforcement is sought may appeal against the decision within one month of service thereof (Article 43(5) LC). If that party is domiciled in a contracting State other than that in which the decision authorizing enforcement was given,

the deadline for filing the appeal is two months (Article 43(5) LC). The LC contains no special time limit for claimant's appeal against a decision refusing to grant enforcement. This time limit is determined by the CPC. The appeal has to be filed to the cantonal Court of Appeals within ten days. Complaints to the Federal Supreme Court have to be filed within thirty days after notification of the cantonal decision.

Within the scope of the LC, Article 47(3) LC provides that during the time specified for an appeal, and until a decision on the appeal has been rendered, no measures of enforcement may be taken other than protective measures against the property of the party against whom enforcement is sought. Pursuant to the CPC, the appeal against decisions on the declaration of enforceability has suspensive effect, except for conservatory measures such as a civil attachment (Article 327a CPC). The complaint to the Federal Supreme Court usually has no suspensive effect (Article 103(1) FCS).

If the question of recognition of a foreign judgment poses itself as a preliminary question in proceedings before a Swiss authority, the authority concerned can itself decide this question. It is, in other words, not necessary to refer the matter to another court in separate or special enforcement proceedings.

18. Expenses, Legal Fees and Security for Costs

(a) Court fees are levied pursuant to fee schedules which vary from canton to canton and which usually are established by the cantonal Court of Appeal. Thus, the costs involved in proceedings for recognition and enforcement of any given particular foreign judgment will depend on the canton involved, the amount in dispute, and the complexity of the issues at stake. Court fees are rather modest in Switzerland and a simple procedure of enforcement will be significantly less costly than a proceeding on the merits. If the amount in dispute is around CHF 100,000, the court fee might be in the range of CHF 8,000 to CHF 10,000; if the amount is around CHF 1,000,000, the court fee will be approximately CHF 30,000 (Zurich). The fees of the cantonal courts of appeal are similar.

(b) Attorneys' fees are subject to agreement between client and attorney. Charges for legal services rendered are usually based on hourly rates. The cantons have enacted schedules for attorneys' fees which apply where the attorney is compensated directly by the court (namely if there is a defence counsel appointed by the court or in cases of entitlement of a party to legal aid) or for the determination of the compensation for legal costs of the winning party (fee shifting, see *infra*, paragraph (d)). These fee schedules take into account the amount in dispute, the difficulty of the case, and the amount of work that had to be done by the attorney. Expenditures of the attorney (such as cost for telecommunications, translation services, computerized information retrieval services, travel costs and accommodation) are payable separately.

(c) Swiss attorneys are not permitted to conclude an agreement with their clients according to which their professional fee is entirely substituted with a share in

the potential outcome of a litigation, or to in advance entirely waive their professional fee in case of an unfavourable outcome. However, it is now permitted by law to conclude fee arrangements which are partially contingent on the outcome, so long as the fee due in case of an unfavourable outcome covers the attorney's costs.

(d) Under Swiss civil procedure rules, fee shifting is the general rule. Thus, a party losing litigation has not only to pay the court fees but also reasonable compensation to the winning party for its legal fees, based on the schedule for attorneys' fees (*supra*, paragraph (b)). The courts have a certain discretion in fixing the exact amounts of the court's fees and the compensation and in allocating such amounts between the parties. Generally, the winning party will recover most of its costs.

(e) Pursuant to Article 98 CPC the court may require the applicant to provide advance payment in the amount of the presumptive court fees (see already paragraph 15(b) *supra*). It is common practice that most courts make liberal use of their discretion and demand advance payments for the court's fees on a routine basis. In addition, upon application of the respondent, the plaintiff may in certain cases be ordered to post security for the compensation for legal costs of respondent which becomes due if the plaintiff loses in the proceeding (principle of fee shifting). The reasons for ordering security are listed in Article 99 CPC. Security may be levied if the plaintiff is neither domiciled in Switzerland nor in a country which has ratified the Hague Convention on Civil Procedure of 1954, if the plaintiff is insolvent, or if there are other reasons to fear that the compensation for legal costs might not be paid.

19. Bankruptcy/Liquidation

(a) All creditors are treated equally within the different classes of creditors, regardless whether they are foreign or not.

(b) The recognition of a foreign bankruptcy subjects the debtor's assets which are located in Switzerland to the legal consequences of bankruptcy proceedings according to Swiss law (Article 170(1) PILS). All local assets are liquidated pursuant to the LDCB and the proceeds are distributed firstly to the creditors to whom the respective assets have been pledged and to the privileged creditors – namely employees – having their domicile in Switzerland. If a surplus remains, it will be handed over to the foreign bankruptcy administration. However, this is possible only after prior recognition of the foreign schedule of creditors. In the recognition process, the Swiss court will examine whether the interests of the creditors domiciled in Switzerland have been duly considered; these creditors have to be heard in the recognition proceedings (Article 173 PILS).

20. Lawyers (Who Can Appear?)

A Swiss lawyer admitted to the bar in one canton can appear before any cantonal or federal court in Switzerland. A lawyer of a Member State of the European Union or the European Free Trade Association who is entitled to practice in the legal profession in the country of origin can also appear before any cantonal or federal court in Switzerland. This possibility applies to all civil proceedings including enforcement proceedings. Only certain criminal proceedings with a statutory requirement to be represented by a lawyer are excluded. The admission to appear before court is either temporary if the lawyer acts within the freedom to provide services or permanent if he or she registers with the cantonal regulatory authority.

21. International Treaties

In addition to the LC, which has already been described in detail herein, bilateral treaties are in force notably with the following countries:

– Germany (Treaty of 2 November 1929);
– Austria (Treaty of 16 December 1960);
– Belgium (Treaty of 29 April 1959);
– Spain (Treaty of 19 November 1896);
– Italy (Treaty of 3 January 1933);
– Liechtenstein (Treaty of 25 April 1968);
– Sweden (Treaty of 15 January 1936);
– Czechoslovakia (Treaty of 21 December 1926, which is being applied to the two new republics which emerged out of the former Czechoslovakia).

In relation to signatory States of the LC, the above treaties apply only in matters to which the convention does not apply (Article 66 LC). Bilateral treaties exist also on the cantonal level (e.g., Treaty of certain cantons with Württemberg of 12 December 1825/13 May 1826 concerning bankruptcy proceedings, see BGE 104 III 68).

22. Cross-Examination of Affidavit's Deponent

Affidavits as such are in general not admissible as evidence in Switzerland and will be regarded as allegation of the party submitting it. Nonetheless, affidavits from a foreign proceeding might be helpful in some cases in order to demonstrate to a Swiss court that the person making the affidavit could be heard as a witness in Switzerland.

It is to be noted that in Switzerland the taking of evidence in civil as well as in criminal matters, in particular the interviewing of witnesses for the purpose of gathering evidence for a court proceeding, is reserved to the State authorities

(police, district attorneys and judges, etc.). Whoever takes such actions on Swiss territory for a foreign party or for submission in a foreign proceeding, and whoever facilitates such actions, may be punished by imprisonment pursuant to Article 271 of the Swiss Criminal Code.

23. Required Affidavit

No affidavits are required for the recognition and enforcement of foreign judgments in Switzerland.

24. New Action Instead of Enforcement

(a) If the cause of action led to a judgment, the case is considered res judicata, provided the foreign judgment is enforceable in Switzerland. A Swiss court would therefore dismiss a new action on the original cause of action if the defendant raises the res judicata defence (Article 9(3) PILS). If, on the other hand, the foreign judgment is unenforceable in Switzerland, a new action on the original cause of action is possible.

(b) The question as to the period of prescription for raising an action must be answered based on the substantive law applicable to the merits of the dispute.

25. Prescription

The question within what period from granting of the judgment in the foreign country the enforcement proceeding must be initiated in Switzerland is basically covered by the *lex causae*, that is, the law of the foreign jurisdiction. In Switzerland, a claim based on a judgment is generally subject to a ten-year statute of limitations, which statute of limitations may be interrupted and renewed, for example, by applying for a payment order with the debt collection authorities.

26. States/Cantons

As has already been described in detail in paragraph 1, Swiss law distinguishes between money and non-money judgments. Whereas the requirements for the recognition and enforcement of both types of judgments as well as the proceedings governing recognition and enforcement are now governed by federal law, the court organization is left at the discretion of the twenty-six different cantons. A party seeking enforcement therefore has to first identify the competent cantonal authority before filing an application for enforcement.