

# *Swiss Law*

## *The Enforcement of Australian Judgements and Arbitration Awards in Switzerland*

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### 1. Introduction

International legal disputes in civil matters often involve lengthy litigation. However, obtaining a judgement or arbitration award in a party's favour is not always sufficient for that party to enforce their civil claim. If the losing party refuses to comply with the judgement or award then the judgement or award must be enforced by the relevant authorities.

The enforcement of judgements and arbitration awards in international legal disputes becomes problematic when a decision has to be enforced in a different country from the country in which the decision was made. The court systems of most countries are organised nationally and represent a core element of state sovereignty. As a result, foreign judgements are not automatically recognised or enforced. The jurisdiction of courts and legal effects of decisions generally only extend to the borders of the country in which the relevant court is situated. Pursuant to this basic principle of nation states, foreign judgements are not generally enforceable outside the country in which the decision was handed down.

However, the private international law of most countries as well as various international treaties provide for exemptions to the state sovereignty principle in certain circumstances. The recognition of foreign judgements under the relevant private international laws and treaties therefore expands the effect of a foreign judgement into another country. Generally, a relevant court or authority in the other country must formally recognise a foreign judgement under these rules.

Individuals and businesses operating on an international level must consider how judgements will be viewed in foreign countries and whether these judgements are enforceable in foreign countries. This article deals with the enforceability of foreign judgements and arbitration awards in civil matters in Switzerland, with a particular focus on the recognition and enforcement of Australian judgements in Switzerland. As the field of international enforcement of judgements is often governed by country-specific treaties relevant only to particular countries, the information contained in this article may not necessarily be applicable to other (non-Australian) foreign decisions.

## 2. **General Principles Relating to the Recognition and Enforcement of Foreign Court Judgments in Switzerland**

Articles 25 to 32 of the Swiss Federal Code on Private International Law dated 18 December 1987 (“CPIL”)<sup>1</sup> governs the recognition and enforcement of judgements by foreign courts. In addition, Article 149 of the CPIL which was last amended on 1 January 2011 is also relevant.

In Switzerland, the procedure to have a foreign decision recognised and enforced consists of the following two steps:

- The first step is the recognition of the foreign judgement by a Swiss court. This gives the foreign judgement the same legal effect in Switzerland as a Swiss judgement.
- The second step is the actual enforcement of the foreign judgement. This step is mainly governed by the Swiss Federal Code on Debt Enforcement and Bankruptcy (“CDEB”)<sup>2</sup> and the Swiss Federal Civil Procedure Code (“CPC”)<sup>3</sup>.

### 2.1. **Recognition of Foreign Judgements in Switzerland**

Pursuant to Article 25 of the CPIL, a foreign judgement will only be recognised if it meets all of the following three criteria:

- a) the foreign court or authority which handed down the foreign judgement must have had the jurisdiction to do so;
- b) the foreign judgement must be final or at least all ordinary legal appeals or remedies must have been exhausted; and
- c) there are no grounds to refuse recognition of the foreign judgement pursuant to Article 27 of the CPIL.

#### 2.1.1. Jurisdiction of the Foreign Court

Article 25(a) of the CPIL could be interpreted as requiring the Swiss authorities to comprehensively examine a foreign country’s rules on jurisdiction. However, for the Swiss court to assess whether the foreign judgement was handed down by a court with the relevant jurisdiction would be very laborious and time-consuming. Accordingly, Switzerland has decided on a simpler interpretation of this provision. This criterion is met if the foreign court had jurisdiction under the provisions of the CPIL or, failing that, if the defendant was resident in the country where the foreign judgement was handed down (Article 26(a) of the CPIL). In property disputes, the jurisdiction of foreign courts is established when the parties have

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<sup>1</sup> Schweizerisches Bundesgesetz über das International Privatecht (IPRG, SR 291)

<sup>2</sup> Schweizerisches Bundesgesetz über Schuldbetreibung und Konkurs (SchKG, SR 281,1)

<sup>3</sup> Schweizerische Zivilprozessordnung (ZPO, SR 272)

made an agreement, considered valid under the CPIL, to submit to the jurisdiction of the foreign court or have participated in the legal proceedings before the foreign court without reservation (Article 26(b) and (c) of the CPIL).

In addition, Article 149(1) of the CPIL deals with the recognition of foreign decisions in relation to tortious, negligence or contractual claims. Judgements in relation to such claims are only recognised in Switzerland if they were handed down in the country in which the defendant was domiciled or normally resident and the claims are in relation to activities in that country.

Six further situations in which foreign decisions are recognised are listed in Article 149(2) of the CPIL. All these provisions directly or indirectly protect the Swiss principle of the place of jurisdiction being the domicile of the defendant. Ultimately, the crucial point is whether the Swiss court is of the opinion that the foreign court had the general jurisdiction to make a decision in the matter.

#### 2.1.2. No Legal Remedy / Finality of the Foreign Judgement

As a foreign judgement can only be assessed in a limited way by the Swiss courts, it must be non-appealable. The Swiss court being asked to enforce the decision must be certain that the foreign decision is final. Accordingly, two separate aspects of the legal validity must be considered: firstly, there must be an absence of an ordinary legal remedy against the decision (formal validity) and secondly, the decision must have become final (substantive validity).

A foreign judgement can only be recognised in Switzerland if no ordinary remedy is available to appeal the decision in the country where the decision was handed down. The absence of an ordinary remedy means that there are no further procedural possibilities to appeal a decision, which has not yet taken legal effect. If an ordinary legal remedy is still available then a decision is not yet formally or substantively valid and, therefore, Swiss courts are not able to recognise such a foreign judgement.

In addition, the finality of the foreign judgement must be assessed. A decision is not final when further ordinary legal remedies are available as discussed above. As many legal systems have no concept of formal validity (being the absence of an ordinary legal remedy), the CPIL also refers to the concept of finality of a judgement (substantive validity). The finality of foreign judgements (substantive validity) is assumed if no further legal remedies are available under the law of the country in which the decision was handed down.

2.1.3. Absence of Grounds for Refusal of Recognition Pursuant to Article 27 of the CPIL

Generally, Swiss courts may not assess a foreign decision on its merits (Article 27(3) of the CPIL). However, a foreign decision will not be recognised in Switzerland if there are grounds for refusal pursuant to Article 27 of the CPIL. There are two different types of grounds for refusal:

- a) grounds for refusal by Swiss authorities for official administrative reasons; and
- b) grounds for refusal which must be brought by one of the parties involved.

The recognition of a foreign judgement in Switzerland must be refused by Swiss authorities if the foreign judgement is clearly incompatible with the Swiss public order ("*ordre public*") (Article 27(1) of the CPIL). The Swiss public order includes Swiss constitutional principles, certain basic rights and specific legal and ethical values of Swiss society.

The following three additional refusal grounds on the basis of procedural errors in the original foreign proceedings may only be considered by Swiss courts if they are raised by one of the parties involved in the recognition proceedings (Article 27(2) of the CPIL):

- The absence of a proper summons to appear during the original foreign proceedings is a reason for refusal (Article 27(2)(a) of the CPIL). The aim of this provision is to prevent judgements originating from foreign proceedings which were clearly not procedurally correct, being recognised in Switzerland.

The absence of a proper summons is assumed if no summons was issued or if the foreign country's rules governing deadlines or formal requirements were not met. The absence of a proper summons can be considered rectified if the party who or which was not properly summonsed, participated in the foreign proceedings without reservation, meaning that the party did not appeal against the improper or missing summons in the original proceedings.

- A second reason for refusal is the violation of substantial Swiss procedural principles during the course of the original proceedings (Article 27(2)(b) of the CPIL). This provision protects the constitutional right to a fair and proper trial, including the right to be heard.

- A third reason for refusal is the non-observance of the validity of foreign judgements (Article 27(2)(c) of the CPIL). This applies when a Swiss decision or a recognisable decision by a third country in the same matter became effective before the foreign judgement being considered became effective.

If earlier legally valid and finalised Swiss proceedings exist then the Swiss decision is given precedence and the foreign judgement cannot be recognised. Swiss proceedings (and the resulting final decision) are also given precedence over foreign proceedings if the Swiss proceedings take longer than the foreign proceedings, provided that the foreign proceedings were commenced later.

Furthermore, a foreign judgement cannot be recognised in Switzerland if another trial in relation to the same dispute took place in a third country. This is the case when the decision of the third country was handed down earlier and this decision could be recognised in Switzerland (so-called *res judicata*).

#### 2.1.4 No Assessment of the Foreign Judgement on its Merits

Generally, Swiss courts cannot assess the factual issues of a foreign decision (Article 27(3) of the CPIL).

However, the validity of a foreign judgement can be limited by partial recognition. This means that only a part of the decision is recognised in Switzerland, for example because another part of the decision violates the Swiss public order.

#### 2.1.5. Consequences of Non-Recognition

If a foreign judgement is not recognised in Switzerland then it cannot be enforced in Switzerland and therefore cannot have any legal effect in Switzerland.

However, it is possible for a foreign judgement which is not recognised in Switzerland to indirectly have an effect on parties in Switzerland, especially when the decision is enforceable in a third country.

#### 2.1.6. Procedural Considerations

Applications for the recognition of foreign decisions should be addressed to the applicable authority of the relevant canton in which a foreign decision is to be enforced (Article 25 of the CPIL).

A recognition application must be accompanied by a complete and certified copy of the foreign decision and a confirmation that the ordinary legal remedies for appealing the foreign decision are exhausted or that the foreign decision is final.

If a foreign judgement was handed down in the absence of the losing party (so-called judgement in absentia), the application for recognition must also include a certificate stating that the losing party was properly summonsed and in a timely manner so as to enable the losing party the possibility of defending itself.

Recognition and enforcement proceedings in Switzerland are two party proceedings in which the party opposing the application must be heard and may file evidence.

As previously mentioned under point 2.1.3, a party opposing the recognition application should be aware that certain grounds for refusal must be claimed by the affected party itself.

If a foreign judgement is recognised by a Swiss court, the Swiss court may issue an enforcement declaration on application by the interested party (Article 28 of the CPIL).

## 2.2. Enforcement

### 2.2.1. General

The second stage is the enforcement of the recognised foreign decision. While the recognition of foreign judgements is mostly governed by the CPIL, the actual enforcement of a foreign judgement is largely governed by the Swiss Federal Code on Debt Enforcement and Bankruptcy ("CDEB") as well as the Swiss Federal Civil Procedure Code ("CPC") which has been in effect since 1 January 2011.

In order to effect enforcement, a judgement requiring action by one of the parties is required. This means that the judgement must require the losing party to perform a certain action, such as payment of money or completion of a particular task. If the judgement is for payment of an amount of money or provision of a security deposit, the CDEB applies (Article 38 of the CDEB). The commencement of relatively simple debt recovery proceedings will lead to the enforcement of such a judgement in Switzerland in most cases.

The civil procedural rules of the CPC are applicable to judgements which do not require payment of money (Article 335 of the CPC).

2.2.2. Principles of Swiss Debt Recovery Proceedings  
(Enforcement of Monetary Judgements)

In order to enforce a monetary judgement, a creditor must commence debt recovery proceedings by lodging an application for debt recovery (Article 67 of the CDEB) at the place of residence or the place of the registered office of the debtor (so-called "ordinary place of debt recovery", Article 46 of the CDEB). Articles 48 to 53 of the CDEB also provide for additional so-called "exceptional places of debt recovery", which are not discussed in this article.

After commencement of debt recovery proceedings and payment in advance on account of costs by a creditor (Article 68 of the CDEB), the debtor is sent an order for payment requiring him, her or it to pay the debt in addition to the costs of the debt recovery proceedings within 20 days (Article 69 of the CDEB). The debtor may file an objection (so-called "Rechtsvorschlag") to the order for payment within 10 days (Article 74 of the CDEB). If an objection is filed, the debt recovery proceedings are suspended and judicial proceedings are commenced to assess the grounds on which the objection is made (so-called "Rechtsöffnungsverfahren").

The proceedings to assess the objection must be in the form of summary proceedings (Article 85 of the CDEB and Article 251 of the CPC) and take place in a court at the place of debt recovery (Article 85 of the CDEB). This means that the responsible judge must allow the parties an opportunity to respond with an oral or written statement. The judge must make a decision, which is usually based on documentary evidence, within 5 days after the opportunity to make a statement (Article 84 of the CDEB and Article 256 of the CPC).

If a creditor holds a foreign judgement then the creditor may ask the judge to discontinue the proceedings to assess the debtor's objection on a permanent basis (so-called "definitive Rechtsöffnung", Article 80 of the CDEB). If a discontinuation of the proceedings to assess the debtor's objection is demanded on the basis of a foreign judgement which has already been recognised in Switzerland then the debt recovery proceedings will continue unless the debtor can provide evidence that, in the meantime, the debt has been paid, deferred or has become statute-barred (Article 81(1) of the CDEB).

If a creditor requests the permanent discontinuation of proceedings to assess the debtor's objection on the basis of a foreign judgement which has not yet been formally recognised in Switzerland then pursuant to international treaties or the CPIL, the debtor may raise the same objections as in the normal recognition proceedings discussed above (Article 81(3) of the CDEB).

If the court dismisses the objection of the debtor or if no objection is raised then the debt recovery proceedings may continue on application by the creditor (Article 88 of the CDEB). Based on the legal identity of the debtor and/or the choice of the creditor, the debt recovery proceedings are then continued either for garnishment (Article 89 to 150 of the CDEB) or for bankruptcy (Article 159 to 270 of the CDEB) in order to enforce the judgement (where assets are in existence).

### 2.2.3. Principles of Swiss Debt Recovery Proceedings (Enforcement of Non-Monetary Judgements)

Enforcement of Swiss and recognised foreign non-monetary judgements is mainly governed by Articles 335 to 346 of the CPC, unless specific international treaties apply.

Proceedings for the enforcement of a recognised foreign decision can be commenced by an application for enforcement either at the court of domicile or registered office of the debtor or at the court at the place of future enforcement of the orders in the judgement (Article 339(1) of the CPC). Enforcement proceedings are summary proceedings (Article 339(2) of the CPC) and the court may make orders to safeguard assets (without the debtor being heard, if necessary) (Article 340 of the CPC).

The court assesses the administrative enforceability of the decision and protects the right of a debtor to be heard by setting a short time period for a response (Articles 341(1) and 341(2) of the CPC). A debtor may raise objections against enforcement of the foreign judgement by claiming that new circumstances have arisen since the decision was made, such as payment, deferral or forfeiture of the debt or the application of a statute of limitations to the debt (Article 341(3) of the CPC). While payment or deferral of a debt must be evidenced promptly by written documents, other circumstances on which such objections are based are not required to meet this evidentiary requirement (Article 254(2)(c) of the CPC). It is, however, important to note that a re-examination of the facts in the foreign judgement is prohibited. Only new facts which are relevant to an objection to enforcement of the judgement are assessed.

A judgement in relation to a conditional order may only be enforced once the court has confirmed that the circumstances on which the order is conditional do in fact exist (Article 342 of the CPC). If the court considers the foreign judgement enforceable, the court will order enforcement measures. If the judgement requires the performance of an act, omission or sufferance from the debtor then the enforcing court may order a fine, compulsory measures (such as seizure of assets or eviction), substitution and/ or threaten



incarceration pursuant to Article 292 of the Swiss Criminal Code<sup>4</sup> (Article 343(1) of the CPC). If the decision to be enforced requires a declaration to be made then the enforceable decision is accepted in place of the required declaration (Article 344(1) of the CPC). If the losing party does not fulfil its obligations under the enforceable order then the winning party can demand compensation and/or the commutation of the required performance into a monetary amount (Article 345 of the CPC).

A complaint against an enforcement court's decision may be lodged by the parties and/or third parties whose rights are affected (Article 346 of the CDEB) within 10 days (Article 319(1) of the CPC). However, an appeal against a decision of the enforcement court is not possible (Article 309(a) of the CPC). This means that the only valid reasons for a complaint are the incorrect application of the law and an obviously incorrect determination of the facts (Article 320 of the CPC). Accordingly, new applications, statements of facts or evidence are not possible (Article 326 of the CPC). Complaints against decisions of Swiss enforcement courts are usually dealt with promptly, as any response to a complaint must be submitted within 10 days.

### 3. **Specific International Conventions Affecting the Recognition and Enforcement of Australian Judgements in Switzerland**

There is no general bilateral treaty between Australia and Switzerland governing the mutual recognition and enforcement of court judgements in civil matters. However, several multinational conventions in particular areas, which have been ratified by both countries, must be taken into consideration when dealing with legal relations between Switzerland and Australia. This article does not contain a detailed discussion of the exact requirements for recognition and enforcement of judgements in all these multinational treaties. Rather, the article only discusses the conventions currently applicable and the areas these conventions cover:

#### 3.1. The Hague Convention on the Recognition of Divorces and Legal Separations

The Hague Convention on the Recognition of Divorces and Legal Separations dated 1 June 1970 allows for the mutual recognition of divorces and legal separations which are legally valid and the result of court or other official proceedings in a country which is a party to the Convention.

The Convention does not apply to decisions in relation to the assignment of guilt or regulating the consequences of a divorce or legal separation. In particular, the Convention is not applicable to decisions about financial obligations or the custody of children.

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<sup>4</sup> Schweizerisches Strafgesetzbuch

3.2. The Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations

The Hague Convention on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations dated 2 October 1973 allows for the mutual recognition and enforcement of maintenance obligations arising out of a family relationship, affinity or marriage, including a maintenance obligation towards an extramarital child, between a maintenance creditor and maintenance debtor or a maintenance debtor and a public body which claims reimbursement of benefits paid to a maintenance creditor.

3.3. The Hague Convention on the Civil Aspects of International Child Abduction

The Hague Convention on the Civil Aspects of International Child Abduction dated 25 October 1980 provides for the prompt return of children who have been unlawfully removed from, or retained in a country which is a party to the Convention. The Convention requires custody rights existing in a country which is a party to the Convention, as well as access rights in the other countries which are parties to the Convention, to be respected.

In order to achieve this aim, the countries which are parties to the Convention must take all necessary measures and use the most expeditious procedures available.

The removal or retention of a child under 16 years is unlawful if it is in breach of joint or sole custody rights of a person or a public body, which are the result of a court or official decision under the law of the country in which the child was usually resident, and at the time of removal or retention of the child those rights were actually exercised or would have been exercised if the removal or retention had not occurred.

Accordingly, if an Australian court order in relation to custody rights is disregarded by the removal of a child to Switzerland, Swiss authorities are obliged under the Convention to indirectly enforce the Australian court decision by ordering the return of the child.

3.4. The Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption

The Hague Convention on the Protection of Children and Cooperation in Respect of Intercountry Adoption dated 29 May 1993 provides for the mutual legal recognition of adoptions completed under the rules of the Convention in a country which is a party to the Convention. Recognition of an adoption can only be refused if the adoption would be obviously contrary to public order in the country in which recognition is sought. However, the best interests of the child must also be taken into consideration.

3.5. The Hague Convention on the Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children

The Hague Convention on the Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children dated 19 October 1996 safeguards the recognition and enforcement of measures to protect a child (up to the age of 18 years) or a child's assets in all countries which are parties to the Convention, amongst other protections.

As a result, Switzerland would be required to recognise a decision by Australian authorities in relation to the guardianship of a child who is usually resident in Australia provided that no reasons for refusal under Article 23 of the Convention in Respect of Parent Responsibility and Measures for the Protection of Children exist.

4. **Principles in Relation to the Recognition and Enforcement of Foreign Arbitration Awards in Switzerland**

Pursuant to Article 194 of the CPIL, the New York Convention on the Recognition and Enforcement of Foreign Arbitration Awards dated 10 June 1958 (the 'New York Convention') governs the recognition and enforcement of foreign arbitration awards in Switzerland, regardless of whether the country in which the arbitration award was made is a party to the New York Convention or not.

Accordingly, the party seeking recognition and enforcement of an Australian arbitration award must present the Swiss court with valid originals or certified copies of the arbitration award and the arbitration agreement. Where applicable, the documents must also be translated into an official language of the country where recognition and enforcement is sought (Article IV of the New York Convention).

In Switzerland, the recognition and enforcement of an Australian arbitration award may only be refused on application by the losing party, if the losing party proves that under the law applicable to it, it was unable to enter into an arbitration agreement or that the arbitration award is not valid under the law to which the parties subjected it (Article V(1)(a) of the New York Convention).

The losing party can also claim that it was not given proper notice of the appointment of an arbitrator or the arbitration proceedings or did not have a chance to present its case (Article V(1)(b) of the New York Convention).

An Australian arbitration award cannot be enforced in Switzerland if the arbitration award contains decisions on matters which are not within the scope of the arbitration agreement (Article V(1)(c) of the New York Convention) or if the composition of the arbitration authority and/or the arbitration proceedings were not in accordance with the arbitration agreement between the parties (Article V(1)(d) of the New York Convention).

Understandably, only arbitration awards which have become binding and have not been set aside or suspended by the authorities of the country in which or pursuant to which law they were made, can be recognised and enforced (Article V(1)(e) of the New York Convention).

In addition, the recognition and enforcement of an Australian arbitration award in Switzerland can be refused if Swiss law prohibits the subject matter of the dispute to be resolved through arbitration or where the recognition and enforcement of an Australian arbitration award would contravene Swiss public order (Article V(2) of the New York Convention). In Swiss-Australian legal relations these last two refusal grounds are generally only theoretical and will only rarely be applicable.

Once a Swiss court has recognised a foreign arbitration award and declared it to be enforceable, the actual enforcement procedure follows the procedure for court judgements according to the type of order sought as outlined above. Arbitration awards for payment of money or a bond are to be enforced pursuant to the regulations of the debt recovery and bankruptcy laws, while all other arbitration awards are to be enforced pursuant to the Swiss Federal Civil Procedure Code.

## 5. Summary

This article demonstrates that in order for foreign (including Australian) judgements and arbitration awards to be enforced in Switzerland they must generally first be recognised. The recognition of foreign judgements is largely governed by the Swiss Federal Code on Private International Law ("CPIL"), while the recognition of foreign arbitration awards is governed by the New York Convention. For both types of decisions, the party seeking enforcement must file documents which prove the finality of the foreign decision (formal and substantive validity) and the party opposing enforcement can attempt to prevent or delay recognition and enforcement by raising different objections.

Recognition and enforcement of Australian decision in Switzerland can sometimes be problematic as Australian courts do not issue a formal confirmation of the non-appealability of a decision and Swiss law requires evidence of the final validity of the Australian decision. However, due to the similarity between the two legal systems and the underlying values (*Orde Public*), court judgements are relatively easily recognised and enforced on a substantive level.

As a general rule, Australian judgements or arbitration awards resulting from properly run proceedings can be assumed to be recognisable and enforceable in Switzerland.

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### Disclaimer

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