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Defending Foreign Parties: Enforcement Pitfalls

By Daniele Favalli and Fabian Martens

In a globalized economic environment, parties are often confronted with commercial litigation abroad. In particular in the United States, foreign parties are increasingly in need of litigation counsel to defend civil actions brought against them.

Counsel in charge of the foreign party's defense will assess risks at the beginning of the proceedings and will then define the appropriate defense strategy. When at the drawing board for the defendant's strategy, an experienced counsel will consider a number of issues that are commonly thought of at the beginning of litigation, e.g., moving the case from state to federal courts, objecting to the court's jurisdiction, or raising a *forum non conveniens* objection.

One issue not likely to be included in the initial review is whether any defenses to be raised at the recognition and enforcement phase should be brought up at the beginning of the litigation. In other words, one may not necessarily think at the initiation of the proceedings of issues regarding the end of the litigation. Thinking about recognition and enforcement would mean considering a scenario where counsel lost the case before the U.S. court, a thought indeed not welcomed by counsel.

Foreign recognition and enforcement laws, however, may provide for defenses to be raised at an early stage in the pending litigation. Possibly, if these defenses are not invoked at the commencement of the proceedings, defendant may be considered to have fully appeared in the U.S. litigation without effectively raising the defenses

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Does the U.S. Copyright Act Remedy Infringements Abroad?

By Manjit Gill

As economic globalization continues across a wide spectrum of industries, with increasing pressures for greater efficiency and cost savings, U.S. companies hoping to survive and indeed thrive in the new world economic order will continue to look for new opportunities to transact business overseas. For some companies, this mission has meant the setting up of an office in another country to handle "back office" operations. For others, it has entailed the migration of manufacturing plants to far-flung locales, whether in China, India, or other emerging economic powers. Regardless of the form of this global activity undertaken, these companies must be concerned not only with the successes of their global operations (always paramount), but also with which legal regime has jurisdiction to govern the protection

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necessary to avoid a later enforcement of an unfavorable decision.

This article will look at cases against Swiss defendants. Specifically, the Swiss Private International Law Act (PILA) of 1989 provides that foreign decisions stemming from contract, unjust enrichment, and unlawful act claims may not be enforced against a Swiss defendant having its seat (only) in Switzerland. As a *conditio sine qua non*, however, the Swiss defendant must object to the foreign proceedings at their beginning. The defendant must declare it will object to a later enforcement in Switzerland.

Recognition and Enforcement of Foreign Judgments

For a decision of a foreign court to be enforceable in Switzerland, it must first be recognized.[1] Once recognized, a foreign decision becomes binding within the Swiss territory and is equivalent to a Swiss decision in its legal effects.

Ordinarily, Switzerland recognizes and enforces foreign decisions when the respective foreign courts do so. As a prerequisite for enforcement, however, jurisdiction must exist under Swiss law. It is irrelevant whether the foreign court (i.e., the court rendering the decision) had jurisdiction under its domestic laws. Under Swiss law, a foreign court had "indirect jurisdiction" when it rightfully (from a Swiss perspective) assumed jurisdiction to decide the matter. If the foreign court is found (indirectly) competent according to PILA, its decision will be recognized and enforced.

As a general rule, indirect jurisdiction is commonly accepted for decisions rendered in the country of the defendant's domicile. The principle of general jurisdiction at the defendant's domicile is deeply rooted in the European and, particularly, in the Swiss legal tradition.[2] In addition, even the defendant's "habitual residence" in the country where the decision was rendered may suffice if the claims have a connection to the venue. From a Swiss perspective, however, habitual residence will likely not suffice if the defendant has its formal domicile in Switzerland.

Specific Protection for the Defendant Domiciled

In addition to the above, jurisdiction may either be positively provided for or restricted by a specific provision of PILA. Certain provisions of PILA on jurisdiction, however, are more restrictive to protect Swiss interests against foreign decisions. A stronger protection is, in particular, available to Swiss defendants in cases where no (or insufficient) ties exist to the country in which the foreign decision is rendered.

For judgments relating to claims based on contract, unjust enrichment, and claims based on unlawful acts, these restrictions are particularly strict. If the domicile of the defendant is in Switzerland, such foreign decision is generally not recognized in Switzerland.[3] Decisions may not be enforced, even if an unlawful act occurred in the country in which the decision was rendered. Likewise, even if contractual obligations are performed in the country in which the decision is rendered, the decision is not to be recognized and enforced in Switzerland when the defendant is domiciled there.[4]

Unconditional Appearance

A court's jurisdiction may stem from the parties' agreement thereto. The parties are in a position to define jurisdiction before or after a dispute arises by means of an appropriate jurisdictional clause.

When a party makes an unconditional appearance before a court, the court is deemed to have jurisdiction to hear the case at stake, regardless of any prior agreement by the parties. The party arguing its case, thereby, implicitly waives its objections to the court's jurisdiction. Where a defendant declares, without any reservation, its intention to argue the merits of the case, the defendant is deemed to have "unconditionally appeared" before the foreign court.[5] As a consequence of the doctrines of bona fide, a defendant substantially participating in the pending proceedings is not entitled to later claim the decision should not be enforceable for lack of jurisdiction.

The principle of general jurisdiction at the defendant's domicile is deeply rooted in the European and, particularly, in the Swiss legal tradition.

Unconditional appearance, however, cannot be inferred when the defendant only files procedural motions to challenge the court's jurisdiction.[6] In other words, it is common to seek dismissal of the case for lack of jurisdiction if the U.S. court may not have jurisdiction.

How U.S. Decisions May Be Refused Enforcement

If a defendant does not appear in the foreign (non-Swiss) court at all, it may under no circumstances be deemed to have appeared and thereby accepted the court's jurisdiction. In such a case, the defendant foregoes any possibility to influence the outcome of the matter. Non-appearance will avoid recognition and enforcement of any U.S. decisions rendered against a Swiss defendant in

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the above described circumstances. Under Swiss law, by not appearing the defendant thereby expresses its intention to defy recognition of the decision in Switzerland.

Not to appear in court at all is not advisable from a legal perspective (the defendant may have a strong case on the merits) or tactically (the defendant does not want to cede all control and leave the proceedings to plaintiff). Indeed, the strategy of non-appearance may cause substantial disadvantages. First, even if the U.S. decision is not enforceable in Switzerland, it does have material effects. Specifically, it may be recognized in other jurisdictions and, of course, in the country in which the decision was rendered. Second, the defendant's position may be strong and should, therefore, be heard and not forfeited. If the defendant is confident about the strength of its arguments, it may prefer to litigate the case with a chance of being awarded a decision in its favor. Third, the defendant is ceding control over the matter and is leaving the conduct of the proceedings to plaintiff—which is obviously a less-than-desirable strategy.

According to the Swiss doctrine, it is advisable not only to challenge the jurisdiction of the foreign court, but also to specifically raise the enforcement defense.

Reservation under Swiss PILA

Swiss (case) law offers the Swiss defendant the option to oppose later enforcement of the decision, even if the case was argued on its merits before a U.S. court. To benefit from this rule, the Swiss defendant must make an explicit reservation at the beginning of the proceedings against any later enforcement of the decision. To meet the above described requirements under Swiss law, the defendant must raise the objection as early as possible, but with the statement of defense at the latest.[7] This rule applies even if foreign procedural laws would allow an objection at a later time.

Such an explicit reservation also safeguards the interests of the claimant, because it is made aware at the beginning of the litigation that the decision (against a Swiss defendant) may not be enforceable in Switzerland. When the claimant is made aware of possible enforcement risks, it is given the opportunity to withdraw the complaint from U.S. courts and to file the respective claim before any Swiss court having jurisdiction on the matter.[8]

Swiss Case Law and Doctrine

There are a number of cases by the Swiss Federal Court (SFC) concerning the application of the foregoing principles:

- In 1970, the Swiss Federal Court defined the prerequisites for the reservation of a Swiss citizen against an Italian decision (when neither the Lugano Convention nor the PILA were yet in force, but the principles remained unchanged after the enactment of the Swiss PILA).[9] Specifically, the Court held that the defendant did not have to seek the dismissal of the case for lack of jurisdiction if it was unlikely to succeed. Accordingly, it was sufficient to declare, before arguing the case on the merits, that the defendant would not accept to litigate before that court and that it would oppose the later enforcement of the decision in any other country.
- In 1971, the Swiss Federal Court decided (based on a Swiss-Belgian Convention on execution of court decisions) that the defendant, *before or during the hearing*, had to declare in an appropriate manner that it reserved the right to oppose recognition and enforcement of the decision in Switzerland.[10]
- In a decision of 1972, the Swiss Federal Court referred to the minutes of a bilateral treaty on execution of decisions between Germany and Switzerland. The SFC held that a defendant's reservation was sufficient if the defendant communicated that it submitted only to the procedure in the forum country and opposed the execution of the decision in the other country.[11]

The previously cited Swiss case law dates back to a period before the enactment of PILA. The wording of PILA, however, corresponds virtually identically to the principles developed by the Swiss Federal Court. In addition, these rules have been widely accepted by commentators in the Swiss doctrine.[12]

According to the Swiss doctrine, it is advisable not only to challenge the jurisdiction of the foreign court, but also to specifically raise the enforcement defense. The defendant is entitled both to challenge the court's jurisdiction and also to make the appropriate reservation against a later enforcement of the decision.

Conclusion

Counsel to foreign parties should review issues related to recognition and enforcement at the beginning of litigation. If the defendant is a Swiss party, counsel should particularly assess the situation in contract cases, cases of unjust enrichment, and cases based on unlawful acts. Specifically, counsel should investigate whether any defenses exist that need to be brought up at the beginning of the proceedings. Doing otherwise could lead to the loss of valuable defenses provided by the laws of the enforcing country.

Under Swiss law, a Swiss-domiciled defendant may avoid making an unconditional appearance in a foreign court (and, therefore, consenting to that court's jurisdiction) by making an

appropriate objection against future enforcement. According to this practice, a Swiss defendant is to make an explicit reservation against any later execution of the decision, which must meet the following requirements:

- It must be made at the beginning, even if the procedural laws suggest otherwise and would allow for the reservation to be made at a later time.[13]
- The reservation should explicitly declare its submission to the proceedings in the country of the pending procedure, but oppose recognition and enforcement in Switzerland.
- By making such an objection, counsel to the Swiss defendant is in a position to argue the merits of the matter before the U.S. court and, nevertheless, benefit from the "enforcement shield" provided by the Swiss Private International Law Statute.

Endnotes

1. Of course, any international treaties that specifically provide for the enforcement of a foreign judgment supersede the domestic laws of Switzerland and, therefore, also the provisions of the PILA (Art. 1 Section 2 PILA). This includes decisions rendered in the European Union, whose recognition and enforcement is provided for in the so-called Lugano Convention dated September 16, 1988, which entered into force in Switzerland on January 1, 1992. Since the United States is not a party to the Lugano Convention, however, this treaty does not apply for the enforcement of U.S. decisions in Switzerland.

2. Art. 30 Section 2 of the Swiss Federal Constitution.

3. Art. 149 para. 2 lit. a, e, and f PILA.

4. In addition, no judgment may be recognized in Switzerland if it is opposed to Swiss public policy, which includes those fundamental rules of the Swiss legal system as to which infringement would be intolerable. Public policy divides into two parts: The material side ensures that no decision is recognized that in its factual effect fundamentally violates Swiss values, while the formal side of public policy grants certain fundamental procedural rights that must have been respected in the proceedings before the foreign court. The public policy objection is, however, only a last resort defense to enforcement, and is beyond the scope of this article.

5. Decision of the Swiss Federal Court (SFC) dated August 20, 1996 (SFC 123 II 35); *see* Anton K. Schnyder and David Vasella, BASLER KOMMENTAR IPRG, Basel 2007, *re art.* 6 note 6.

6. Anton K. Schnyder and David Vasella, BASLER KOMMENTAR IPRG, Basel 2007, *re art.* 6 note 7.

7. Decision of the SFC dated March 8, 1972 (SFC 98 Ia 314, 319).

8. Martin Bernet and Nathalie Voser. *Praktische Fragen im Zusammenhang mit Anerkennung und Vollstreckung ausländischer Urteile nach IPRG*, in: SZIER 2000, S. 437–473.

9. Decision of the SFC dated July 8, 1970 (SFC 96 I 594).

10. SFC 97 I 151, February 3, 1971, p. 156.

11. SFC 98 Ia 311, March 8, 1972, p. 313 et seq.

12. Martin Bernet and Nathalie Voser, *supra* note 7 at p. 443; Adrian Dörig. ANERKENNUNG UND VOLLSTRECKUNG US-AMERIKANISCHER ENTSCHEIDUNGEN IN DER SCHWEIZ, Diss. St. Gallen 1998 (confirms mentioned Supreme Court practice, but at the same time convincingly questions whether such declaration is necessary at an early stage of the foreign proceedings. For the sake of prudence, however, it is advisable to adhere to the current practice of the Swiss Federal Court and to declare the reservations at the very beginning of the proceedings); Claudia Götz. DER GERICHTSSTAND DER RÜGELOSEN EINLASSUNG IM ZIVILPROZESSRECHT DER SCHWEIZ, Basel 2004 (confirms the practice as "consolidated" and applicable to cases under the PILA).

13. For the sake of clarity and security, the reservation should be made repeatedly to avoid later actions being falsely interpreted as an acceptance of the court's jurisdiction.

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