

SWISS FEDERAL SUPREME COURT IDENTIFIES WEAKEST LINK

Freezing of state-owned assets in Switzerland based on an arbitral award: beware that there is a sufficient link to the country



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Switzerland's Federal Supreme Court has recently rendered a leading decision on the issue of enforcing arbitral awards against state-owned assets located in Switzerland by which it specified its century-old practice relating to the requirement of a sufficient link between the claim sought to be enforced and Switzerland.

In a decision dated 7 September 2018, the Swiss Federal Supreme Court ruled on a freezing order relating to a piece of real estate in Switzerland belonging to a foreign state. The freezing order was based on an award rendered under the UNCITRAL arbitration rules by an arbitral tribunal seated in Paris.

While the freezing order was initially granted on an ex parte basis, the Federal Supreme Court finally confirmed the lower court's decision annulling the freezing order on the main grounds that no sufficient link existed between the underlying dispute and Switzerland.

In reaching this conclusion, the Swiss Federal Supreme Court built on the well-accepted distinction made in international public law between activities *jure imperii* (i.e. where the foreign state carries out acts of a governmental or public nature) and *jure gestionis* (i.e. where the foreign state carries out acts of commercial nature similar to a private individual).

Under the Swiss Federal Supreme Court's standing practice, while the first enjoys absolute immunity, the latter does not where the claim sought to be enforced against the state does not present a sufficient link to Switzerland.

In this case the Federal Supreme Court was, for the first time, faced with the question of ascertaining whether its practice of requiring a sufficient nexus to Switzerland was in line with Switzerland's obligations under the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (NYC), namely Art. V.

Indeed, the creditor primarily argued that Art. V NYC, which contains an exhaustive list of grounds for refusal of enforcement, makes no mention to state

sovereignty, thus preventing Swiss courts from adding any additional criteria such as a sufficient link to the Swiss territory.

The creditor's line of argumentation was, however, entirely rejected by the Federal Supreme Court. It ruled that the requirement of a sufficient link between the claim sought and Switzerland was, rather than a matter of the merits of the case, a matter of admissibility. Based on the procedural nature of the requirement, the Federal Supreme Court concluded that it fell outside the scope of the application of the NYC.

It follows that the NYC does not prevent the Federal Supreme Court from setting out restrictions on the jurisdiction of Swiss courts regarding state actors, in particular the requirement of a link to Switzerland for the enforcement of claims against sovereign debtors.

Sufficient link to Switzerland

According to the Federal Supreme Court, a sufficient link to Switzerland is deemed given where the underlying claim sought to be enforced was established or performed in Switzerland, or if the foreign state carried out specific acts in Switzerland giving rise to place of performance in Switzerland.

However, the fact that the assets of the foreign state are merely located in Switzerland or that the claim was the object of an award rendered by an arbitral tribunal seated in Switzerland are not deemed sufficient links to Switzerland.

While the Federal Supreme Court's decision is in line with its past practice, it begs the question as to why a foreign state should be treated differently from a private person in spite of the fact that it was not acting in its sovereign capacity.

It also demonstrates the stability of Switzerland's practice with regard to freezing state-owned assets and the protection it offers to foreign states which wish to place their assets in Switzerland.

Finally, any person entering into a contractual framework with a state would be well-advised to agree on an express immunity waiver clause in writing with the state in question so as to sidestep any obstacles if a freezing order is eventually required. Resorting to such a waiver is widely recognised and accepted by Swiss courts.

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