



A practitioner's perspective on judicial support:

Enforcement of foreign awards in Switzerland

INTRODUCTION

- Significance of Switzerland as a place of enforcement?
 - **Small country**
 - But large volume of **financial assets**
- **Scope of presentation:**
 - Enforcement of foreign awards in Switzerland – overview of legal framework
 - Judicial approach - General comments
 - Judicial approach - Recent cases: Art V.1(a) and Art. V.1(e)

LEGAL FRAMEWORK (1)

- **Direct application of NYC** - Art. 194 Swiss PIL Act:
 - “Recognition and enforcement of foreign awards governed by NYC”
- No requirement for **reciprocity**
- NYC also applies to **Swiss awards** by analogy Art. 192 PIL Act:
 - Waiver of right to challenge the award
 - If no domicile, habitual residence, or business establishment in Switzerland

LEGAL FRAMEWORK (2)

- No *exequatur* or recognition required as a first step
- Procedure depends on type of award:

- **Monetary awards**



Federal DEB Act
(summary proceedings)

- **Non-monetary awards**



Cantonal civil procedural rules - where enforcement is sought (unified in 2011)

Mixed awards: need separate proceedings

LEGAL FRAMEWORK (3)

MONETARY AWARDS

Debtor domiciled in Switzerland:

- Debt enforcement procedure under DEB Act
- **Summons to pay** issued by Debt Collection Office of domicile – not the Court
- **Court application** required only if objection to pay filed within 10 days
- **Summary proceedings** under cantonal procedural law
- **Review of NYC defences** at this point
- Usually **3 levels** (first instance and appeal in Canton + Federal Supreme Court) – a few months each
- **Costs** reasonable

LEGAL FRAMEWORK (4)

MONETARY AWARDS

Debtor not domiciled but has assets in Switzerland:

- **Preliminary** step required: **attachment order** under DEB Act
- Need sufficient **evidence** of assets located in Switzerland
- ***Ex parte*** Court application
- Expedited – no security for costs – low filing fee
- If objection within 10 days: *inter partes* court proceedings
- **Only review of *prima facie* compliance with NYC**
Main issue is “likelihood of debt”
- Once attachment order: validation through normal debt enforcement procedure under DEB Act

JUDICIAL APPROACH (1)

GENERAL COMMENTS

- **Few decisions** reported and otherwise available (about 40 in 40 years; 2 denials under Art. V in 20 years)
- **Pro-NYC approach – nothing very unusual:**
 - Close consideration to foreign NYC case law and commentaries
 - Burden of proof on party resisting enforcement (but effect of Art. IV.1(b))
 - Art. V.1 defences: discretion based on bad faith / abuse of right / estoppel
e.g. Objection not raised in arbitral proceedings
Express agreement to comply?
 - Art. V.2 defences may be raised by Court

JUDICIAL APPROACH (2)

GENERAL COMMENTS – ART. IV

- **Art. IV requirements:**

- **Flexibility** – was held to suffice:

French translation of Chinese language award of which only the first and last pages were certified. (Geneva, 1999)

- **But caution required** - was held not to suffice:

German translation of Russian language award not certified. (Zug, 1998)

JUDICIAL APPROACH (3)

GENERAL COMMENTS – SOME TRENDS?

- Art. V.1(a) – **flexibility** on requirement of Art. II.2 but no hard and fast rule (*recent case*)
- Art. V.1(b) & (d) – requirement for **serious** breach **raised** in the arbitration
- Art. V.1(e) – **no enforcement of award set aside**; no need for award enforceable at seat; **no suspension by operation of law** (*recent case*)
- Art. V.2(a) – **liberal interpretation** Art. 177 PIL Act
- Art. V.2(b) – **Serious breach** of public policy required

JUDICIAL APPROACH (4)

GENERAL COMMENTS – PUBLIC POLICY

- **No breach if:**
 - No recourse against award under law of the seat (Court of Appeal, Basel-Stadt, 5 Nov 2003)
 - Summary denial of counterclaim (Court of Appeal, Geneva, 11 Dec 1997)
 - Award of compound interest (Supreme Court, 9 Jan 1995);
 - Non signature of the award by one member of the tribunal (First instance, Tessin, 19 June 1990).
- **Breach:**
 - Arbitration clause providing that arbitrator could not be removed; breach entailed damages of CHF1M; arbitrator had provided advice on transaction - enforcement denied (Court of Appeal, Zurich, 26 July 1995)

RECENT ENFORCEMENT CASES (1)

■ Art. V.1(a): validity of arbitration agreement (1)

Federal Supreme Court, 31 May 2002 (Yearbook, XXVIII, 2003, 835-841)

- Charter party concluded through broker; not signed by the parties A and B
- Reference to A's T&C (in which arbitration clause) in charter party; no evidence of mention of arbitration in any communication with B
- B failed to make one voyage; arbitration in London; two awards rendered against B by default
- *Held:* - enforcement denied
 - No valid arbitration agreement under Art. II.2
 - Art. IV.1(b): onus re existence of arbitration agreement meeting requirements of Art. II.2

RECENT ENFORCEMENT CASES (2)

■ Art. V.1(a): validity of arbitration agreement (2)

Federal Supreme Court, 16 Jan 1995, *CNT v MSC*
(Yearbook, XXI, 1996, 690-698)

- Arbitration clause on pre-printed bill of lading signed by carrier and consignee, not shipper
- Shipper had filled in the form; long term business relationship; same forms; arbitration part of industry practice; consignee and shipper part of same group
- Goods damaged/lost
- Shipper's insurer commenced court proceedings against carrier in Geneva
- *Held*: Art. II.3 case
 - Strictly: formal requirements not met
 - But carrier had right to believe in good faith that shipper approved all terms
 - Arbitration clause valid

RECENT ENFORCEMENT CASES (3)

■ Art. V.1(a): validity of arbitration agreement (3)

Federal Supreme Court, 12 Jan 1989 (Yearbook, XV, 1990, 509 – 514)

- Standard form GAFTA contract between G and T with GAFTA arbitration clause; signed by London broker only
- Goods not delivered; arbitration commenced by T and stayed
- Addendum to contract signed by both parties: arbitral proceedings stayed and “other terms of original contract remain in force”
- New breach; award rendered against T
- *Held:* - enforcement allowed
- Arbitration agreement valid

RECENT ENFORCEMENT CASES (4)

- **Art. V.1(e): Not when suspension by operation of law**
Federal Supreme Court, 9 Dec 2008 (ASA Bull. 3/2009, 530-539)
 - ICC award and addendum of award, Paris seat
 - Art. 1506 French NCPC: enforcement of award suspended for period during which recourse under NCPC may be exercised
 - No *exequatur* of addendum of award in France; recognition in Switzerland
 - *Held:* - suspension by operation of law as opposed to suspension by order of Court insufficient to resist enforcement under Art. V.1(e)
 - Recognition confirmed
 - Confirmation of recent case law

THANK YOU

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