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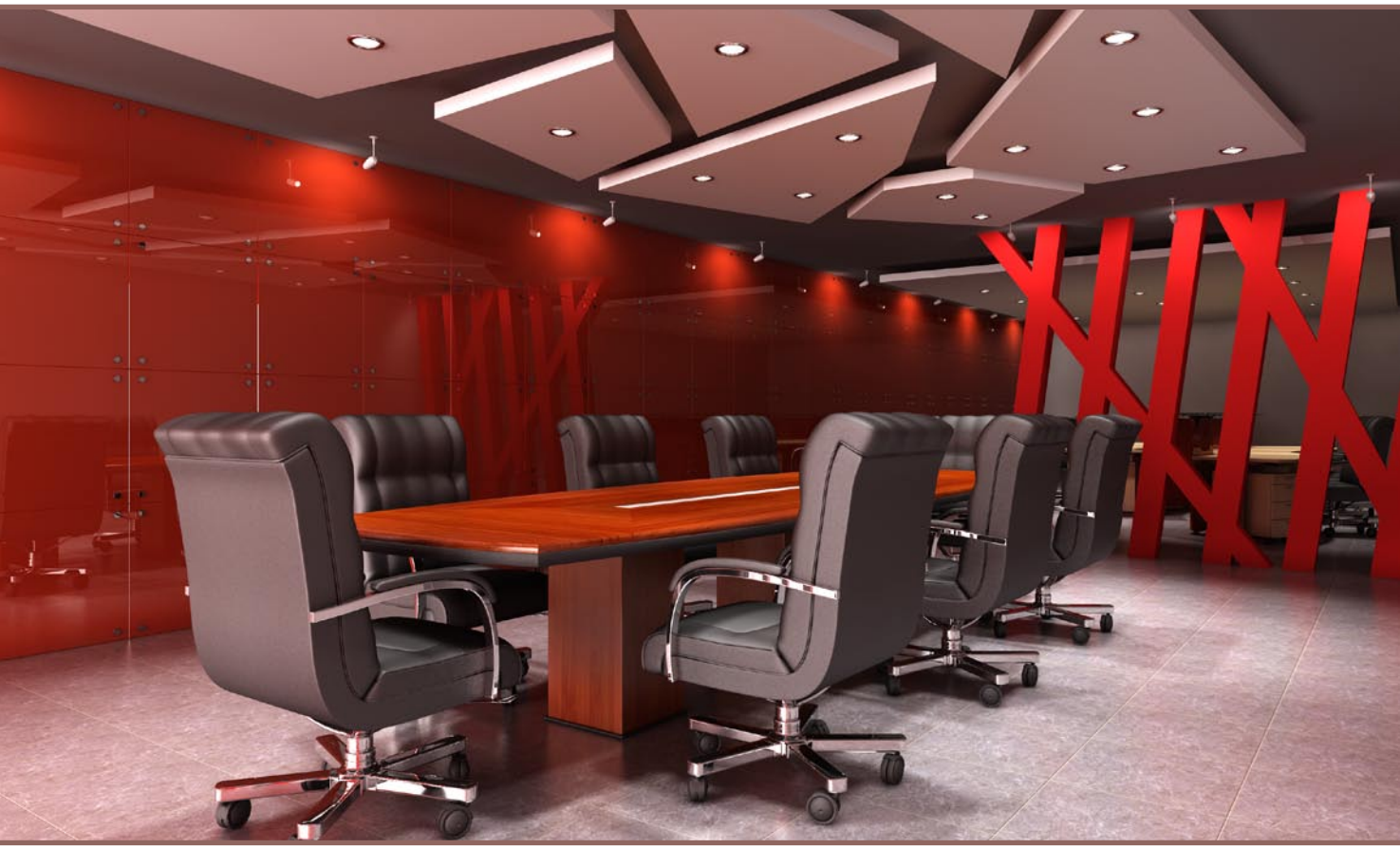

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Enforcement of Foreign Arbitral Awards: The Swiss Pro-Enforcement Framework and Judicial Approach

BY DOMITILLE BAIZEAU | LALIVE

Switzerland is one of the leading countries for the conduct of international arbitration. It is also a significant place for the enforcement of foreign arbitral awards, i.e., awards rendered in international arbitral proceedings conducted outside Switzerland. This is primarily due to the large volume of financial assets held by foreign parties in Swiss banks and also to Geneva's role as a centre for commodity trading and related financial transactions.

Whilst the volume of relevant cases is modest (approximately forty cases in the last forty years), Switzerland's track record is rather good: there have been only two instances in the last twenty years where enforcement of a foreign award was denied. In brief, Switzerland can clearly be described as a pro-enforcement jurisdiction and as such should figure on foreign counsel's radar screens when considering asset tracing and enforcement of arbitral awards, and indeed court judgments.

Swiss Legal and Procedural Framework for Enforcement of Foreign Awards

The New York Convention on the Recognition and Enforcement of Arbitral Awards 1958, ("NY Convention") is the cornerstone for the enforcement of any foreign award in NY Convention Contracting States, including Switzerland. In particular it sets out the defences to recognition and enforcement available to a debtor. Pursuant to Article 194 of the Swiss Private International Law Act, it applies directly with respect to any arbitral awards rendered by an arbitral tribunal seated in a country other than Switzerland, even if that country is not a Contracting State to the NY Convention.

Procedurally, the enforcement of arbitral awards entails the availability of debt collection or other enforcement procedures, which in Switzerland are governed in part by Federal statutes and in part by local cantonal procedural rules, soon to be unified.

The enforcement procedure available depends on the nature of the relief awarded. Monetary awards are enforced through summary court proceeding under the Federal Debt Enforcement and Bankruptcy Act 1889 ("DEB Act"). Non monetary awards (orders for specific performance, restitution of a chattel, award or right in real property, and other injunctive relief) call for local cantonal proceedings. Mixed awards must be enforced through two sets of proceedings.

If the debtor is domiciled in Switzerland, the creditor must first request the Debt Collection Office of the place of domicile (which is not a court) to issue a summons to pay the amount due within twenty days. A court application is required only if a formal objection is then filed within ten days by the debtor. The matter will then be heard in summary court proceedings under cantonal procedural law. It is at that point that NY Convention defences can be raised by the debtor.

There are usually three levels of courts in Switzerland (first instance and appeal court at the cantonal level and the Federal Supreme court, where the appeal is more limited and based only on the parties' submissions). The time frame however is reasonable, typically a few months at each level, and the costs are modest and usually awarded to the winning party.

Once the debtor's objection to enforcement has been dismissed by a final court decision, the creditor can go

back to the Debt Collection Office for the continuation of the debt collection proceedings. The process is usually fast, unless the creditor requires the filing of insolvency proceedings against the debtor.

If the debtor is not domiciled but has assets in Switzerland, the procedure is the same except that, as a preliminary step, the creditor must first obtain an attachment or freezing order pursuant to the DEB Act from the court where the assets are located. During such procedure, whether *ex parte* only or followed by *inter partes* proceedings, the judge will only review the compliance of the arbitral award with the NY Convention on a *prima facie* basis (likelihood of a debt). Once the creditor obtains the freezing order, the award may be enforced against those assets through the normal debt collection procedure under the DEB Act as if the debtor was domiciled in Switzerland, as described above.

The Swiss Courts' Approach to Enforcement of Foreign Awards

From the available Swiss courts' decisions and the abundant doctrine (which plays an important role in the Swiss legal system), one can conclude that Switzerland is a pro-enforcement or at least a pro-NY Convention jurisdiction.

Under the NY Convention, as applied by the Swiss courts, arbitral awards will only be denied enforcement if one or more of the defences set out in Article V is established, namely:

- 1(a) Incapacity of a party; invalidity of the arbitration agreement (as defined in Article II(2) of NY Convention "agreement in writing");
- 1(b) Lack of proper notice of the proceedings; inability to present one's case (breach of due process);
- 1(c) Award covering a dispute outside the scope of the arbitration submission;
- 1(d) Arbitral tribunal not composed or arbitral procedure not conducted in accordance with parties' agreement or the law applicable;
- 1(e) Award not yet binding or set aside (challenged) or suspended;
- 2(a) Subject-matter of the dispute not capable of settlement by arbitration (arbitrability); and
- 2(b) Award in breach of public policy.

The burden of proof regarding the availability of the above defences falls to a large extent on the debtor seeking to resist enforcement. The last two defences may be raised by the courts on their own motion (i.e., even if not raised by the debtor) but not the first five, which have to be raised and argued. Notably, even where a defence is proven, enforcement may not be denied if the courts are satisfied that the debtor is acting or has acted in bad faith so that its defence amounts to an abuse of right, typically where the debtor never raised any objection during the arbitral proceedings.

On the specific grounds of Article V, the approach of the Swiss courts can be summarised as follows.

Regarding the requirement for the arbitration agreement to be in writing (Article V.1(a)), the courts do require a signed contract (even if the arbitration agreement may be incorporated by reference) or an exchange of communication (as per Article II.2). However, where those requirements are not met but the evidence clearly shows that the debtor had actual knowledge of the arbitration agreement, due for instance to its past dealings with the same party, the courts have allowed enforcement. The issue is particularly acute in shipping contracts usually concluded through a broker or signed by the carrier and the consignee but not the shipper.

Any defence pertaining to due process (Article V.1(b) & (d)) requires a serious breach, which was raised during the arbitral proceedings.

With respect to the defence of Article V.1(e) – award not yet binding, set aside or suspended – the Swiss courts adopt a predictable and sensible approach, in line with leading NY Convention commentaries. First, the award will be considered as binding even if still open to challenge proceedings in the country of the seat; or if it is not enforceable in that country. Secondly, the award can be enforced if subject to challenge proceedings (although a stay of enforcement may be granted under Article VI NY Convention), but it will not be enforced if it has already been set aside in the country of the seat (unlike in some other countries like France). Finally, the award will not be considered as "suspended" if suspended only by operation of procedural law rather than by a specific court decision.

The concept of arbitrability is very broad under Swiss law, so that the defence of Article V.2(a) (lack of arbitrability) is limited in scope. The defence of breach of public policy (Article V.2(b)) is equally limited, since a very serious breach is required. This defence has only been upheld in one case where the sole arbitrator had been identified in the arbitration agreement and could not be removed (if he was the agreement provided for a penalty of CHF 1 million); yet, he had acted as counsel for both parties on the underlying transaction. Enforcement was denied.

Finally, the Swiss courts tend to avoid excessive formalism when applying Article IV of NY Convention which sets out the documents required for enforcement, namely the authenticated original or certified copy of the award and of the arbitration agreement, together with a certified translation. This is particularly so when the party resisting enforcement does not actually dispute the existence of the arbitration agreement or of the award or the accuracy of a translation. However, caution is required as the approach may vary from one Canton to the next. Whilst an incomplete request can be completed at a later stage (including on appeal), the best approach is to provide, at the outset, all the relevant documents and certified translations, together with evidence that the award is enforceable and not suspended through copies of the relevant foreign legal provisions and even an affidavit of counsel explaining the legal position.

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Switzerland: A Leading Venue for International Arbitration

BY NORADÈLE RADJAI | LALIVE

Switzerland, a neutral country in the heart of Europe, has always been a popular venue for international commercial arbitration. Geneva and Zurich are amongst the four most frequently selected places for ICC Arbitrations worldwide whilst most ICC arbitrators come from Switzerland (ICC Bulletin Vol. 20/No. 1 (Spring 2009), 2008 Statistical Report). The reasons for this are clear from a review of the key features of international arbitration in Switzerland.