Enforcement of Investment Treaty Arbitration Awards

A Global Guide

Consulting Editor Julien Fouret
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1. Overview

1.1 General trends in Switzerland
Switzerland is generally regarded as a pro-enforcement jurisdiction. The country has a good track record with regard to the enforcement of international arbitration awards. While there have been no published cases on the enforcement of investment treaty awards, Swiss courts have been seized once, successfully, with jurisdiction to enforce a provisional measure decision by an investment treaty arbitral tribunal. Furthermore, Swiss BITs have been used by Swiss investors on several occasions to bring claims against other states before investment treaty arbitration tribunals.

As Switzerland is home to a large volume of financial assets held by foreign parties in Swiss banks, it is likely only a matter of time before the enforcement of an investment treaty final award is sought in Switzerland.

1.2 Historical background
Swiss courts have yet to be seized with jurisdiction to enforce a final ICSID arbitral award. Accordingly, there is no specific historical background in Switzerland in the context of enforcement of investment treaty arbitral awards, whether ICSID or non-ICSID.

It may be noted, however, that in general Switzerland has always been favourable to foreign investment protection. Switzerland became a party to the ICSID Convention on September 22, 1962. The country concluded its first BIT (with the Republic of Niger) shortly afterwards, on September 27, 1962.

Even though Switzerland has yet to be a respondent in investment treaty arbitration proceedings, there are 15 reported and three known cases in which Swiss BITs have been invoked. Thirteen of these cases have been filed with ICSID.1

The ICSID cases filed include Alimenta v Gambia,2 SGS v Pakistan,3 SGS v Philippines,4 Mensik v Slovakia,5 SGS v Paraguay,6 Philip Morris v Uruguay,7 Swisslion v

2 Alimenta SA v Gambia (ICSI Case ARB/99/15).
3 Société Générale de Surveillance SA (SGS) v Pakistan (ICSI Case ARB/01/13), Decision on Objections to Jurisdiction, August 6 2003.
4 Société Générale de Surveillance SA (SGS) v Philippines (ICSI Case ARB/02/6), Decision on Objections to Jurisdiction, January 29 2004.
5 Branimir Mensik v Slovakia (ICSI Case ARB/06/09).
Two cases filed by Swiss companies under the Switzerland-Pakistan and Switzerland-Iceland BITs were settled by the parties before they could be considered by arbitral tribunals. Several UNCITRAL cases are also known to have been brought under Swiss BITs. The Switzerland-Uzbekistan BIT was relied upon in an investment arbitration initiated under the UNCITRAL Arbitration Rules before the Permanent Court of Arbitration in Romak v Uzbekistan. The Switzerland-Libya BIT was successfully relied upon in 2010 in an UNCITRAL arbitration, opening the door for Swiss investors to be reimbursed for their investments in Libya. In 2011, the arbitral tribunal in another UNCITRAL arbitration, Alps Finance v Slovakia, applied the Switzerland-Slovakia BIT.

2. International conventional instruments

2.1 International agreements
Since Switzerland is a party to the ICSID Convention, final ICSID awards are regarded as final court decisions of the Swiss judiciary following recognition. Switzerland is also a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, which it ratified on March 9 1959. The Swiss Federal Statute on Private International Law 1987 (Private International Law Act or PILA) simply refers to the New York Convention and does not contain any other provisions on the enforcement of foreign arbitral awards. Accordingly, non-ICSID investment awards may be recognised and enforced under the New York Convention.

2.2 Model investment treaties
The Swiss 'model' BIT is not an official model but only a template or working document used by the Swiss government in negotiations. While each Swiss BIT is
negotiated individually by the government, however, many Swiss BITs share some essential characteristics.

According to figures kept by the Swiss Federal Department of Economic Affairs, Switzerland is party to more than 120 BITs.\footnote{See Federal Department of Economic Affairs website, available at www.seco.admin.ch/themen/00513/00594/00450/?lang=en.}

Many Swiss BITs include a non-exhaustive list of what constitutes an ‘investment’. This includes movable and immovable property, any kind of participation in companies (eg, shareholdings), industrial property rights or claims to money or performance having an economic value.\footnote{See, for example, Article 1(2) of the Switzerland-Barbados BIT; Article 1(5) of the Switzerland-Hong-Kong BIT.}

The Swiss unofficial model BIT thus provides a broad definition of ‘investment’ that seeks to incorporate various economic, financial and business accounting concepts of investment.\footnote{Article 1(2) of the unofficial model BIT provides: “The term ‘investments’ shall include every kind of assets [sic] in particular: (a) movable and immovable property as well as any other rights in rem, such as servitudes, mortgages, liens, pledges; (b) shares, parts [sic] or any other kinds of participation in companies; (c) claims to money or to any performance having an economic value; (d) copyrights, industrial property rights (such as patents, utility models, industrial designs or models, trade or service marks, trade names, indications of origin), know-how and goodwill; ...”}

Most Swiss BITs are broad in scope in terms of the timing of the investment and do not require that an investment be made after conclusion of a BIT in order for it to benefit from the protections of the BIT.\footnote{See, for example, Article 3(1) of the Switzerland-Iran BIT, which states: “The present Agreement shall apply to investments ... whether prior to or after the entry into force of the Agreement.” See also Article 6 of the Switzerland-Uruguay BIT, Article 2 of the Switzerland-Lithuania BIT and Article 6 of the Switzerland-Uzbekistan BIT.}

The standards of protection found in Swiss BITs are similar to many ‘European-style’ BITs and include provisions on direct and indirect expropriation,\footnote{Article 6(1) of the unofficial Swiss model BIT reads: “Neither of the contracting Parties shall take, either directly or indirectly, measures of expropriation, nationalization or any measures having the same nature or the same effect against investments of investors of the other Contracting Party, unless the measures are taken in the public interest ...” See also Article 6(1) of the Switzerland-Bangladesh BIT; Article 5(1) of the Switzerland-India BIT; Article 7 of the Switzerland-Senegal BIT; Article 5(1) of the Switzerland-South Africa BIT; Article 5(1) of the Switzerland-Saudi Arabia BIT; and Article 6 of the Switzerland-Libya BIT.} fair and equitable treatment,\footnote{Simon Gabriel, “Investment Planning via Switzerland” (2013) 31 ASIA Bulletin 20; Alps Finance and Trade AG v Slovak Republic (UNCITRAL 2011), declining jurisdiction over a claim against Slovakia after determining that the claimant was not an ‘investor’; N Bernasconi-Osterwalder & V Hua, “Recent Developments in International Investment Disputes: Investment treaty cases from September 2010 to October 2011”, IISD Report, October 2011.} arbitrary, unreasonable or discriminatory measures,\footnote{Philip Morris v Uruguay (ICSID Case ARB/10/7), Decision on Jurisdiction, July 2 2013.} full protection and security,\footnote{See, for example, Article 6 of the Switzerland-Uruguay BIT, Article 2 of the Switzerland-Libya BIT, Article 6 of the Switzerland-Zambia BIT and Article 6 of the Switzerland-Uzbekistan BIT.} free transfer of funds,\footnote{See, for example, Article 1(1)(b) of the Switzerland-Kazakhstan BIT; Alps Finance and Trade AG v Slovak Republic (UNCITRAL 2011), declining jurisdiction over a claim against Slovakia after determining that the claimant was not an ‘investor’; N Bernasconi-Osterwalder & V Hua, “Recent Developments in International Investment Disputes: Investment treaty cases from September 2010 to October 2011”, IISD Report, October 2011.} national treatment\footnote{See, for example, Article 1(1)(b) of the Switzerland-Kazakhstan BIT; Alps Finance and Trade AG v Slovak Republic (UNCITRAL 2011), declining jurisdiction over a claim against Slovakia after determining that the claimant was not an ‘investor’; N Bernasconi-Osterwalder & V Hua, “Recent Developments in International Investment Disputes: Investment treaty cases from September 2010 to October 2011”, IISD Report, October 2011.} and most-favoured nation (MFN) treatment.\footnote{See, for example, Article 1(1)(b) of the Switzerland-Kazakhstan BIT; Alps Finance and Trade AG v Slovak Republic (UNCITRAL 2011), declining jurisdiction over a claim against Slovakia after determining that the claimant was not an ‘investor’; N Bernasconi-Osterwalder & V Hua, “Recent Developments in International Investment Disputes: Investment treaty cases from September 2010 to October 2011”, IISD Report, October 2011.}
Many Swiss BITs also contain a so-called ‘umbrella clause’. Specifically, all Swiss BITs have included an umbrella clause since conclusion of the BIT with China in 1986. Some umbrella clauses in Swiss BITs are modelled on the umbrella clause contained in the OECD Draft Convention on the Protection of Foreign Property, although the exact wording varies. The most common wording found in Swiss BITs follows, however, the unofficial model BIT clause. This clause is, in most cases, inserted under the title ‘other commitments’ and separated from the substantive provisions of the BIT by two dispute resolution clauses and a subrogation clause. Swiss BITs do not contain rules concerning the enforcement of arbitral awards based on these BITs. Some BITs, however, contain provisions stating that the
decisions of arbitral tribunals will be final and binding on the parties to the dispute and shall be executed without any delay.\textsuperscript{15}

Switzerland also has a practice of concluding free trade agreements (FTAs) as a member state of the European Free Trade Association (EFTA) (Iceland, Liechtenstein, Norway and Switzerland). Switzerland currently has 29 FTAs in force.\textsuperscript{16}

\subsection*{2.3 Dispute resolution clauses in investment-related conventional instruments and practice}

Swiss BITs have, since 1981, systematically contained investor-state dispute settlement clauses (or so-called ‘diagonal clauses’), allowing the investor to bring a claim directly against the host state.\textsuperscript{17} Before 1981, all BITs concluded by Switzerland contained only so-called ‘horizontal clauses’, which obliged investors to seek diplomatic protection in order to bring a claim against host states.\textsuperscript{18} The first diagonal clause enabling investors to bring proceedings directly against the host state was included in the Switzerland-Sri Lanka BIT of 1981. Switzerland has since been renegotiating its BITs with a view to including diagonal arbitration clauses and thus allowing investors to initiate claims directly against the host state.\textsuperscript{19}

With regard to the choice of forum, Swiss BITs mostly designate ICSID and UNCITRAL mechanisms for the settlement of investor-state disputes. Around 56\% of them provide for both mechanisms and leave the investor with the option to choose.\textsuperscript{20} In some BITs, the UNCITRAL Rules have been indirectly referred to by allowing the arbitral tribunal to choose the procedural rules applicable to the arbitration proceedings, “in conformity with” or by being “guided” by the UNCITRAL Rules.\textsuperscript{21} The ICC Rules are also available under some Swiss BITs.\textsuperscript{22}

Cooling-off periods, which prevent the investor from initiating arbitration proceedings immediately after the emergence of a dispute, may also be seen in most Swiss BITs.\textsuperscript{23} The length of these cooling-off periods varies from three\textsuperscript{24} to 12 months,\textsuperscript{25} the average period being six months.\textsuperscript{26}

Of the FTAs concluded by Switzerland, only two contain investor-state dispute
Switzerland

settlement provisions: these are the Japan-Switzerland FTA and the Singapore-EFTA States FTA. Switzerland is also a party to the Energy Charter Treaty (ECT), which contains investor-state dispute settlement mechanisms for investments falling within the scope of the charter. 56

3. State practice in ICSID and investment treaty arbitration with regard to enforcement

3.1 Legislation
The New York Convention is the main applicable law for the enforcement of any foreign award in Switzerland. Pursuant to Article 194 of the Swiss PILA, it applies directly with respect to any arbitral awards rendered by an arbitral tribunal seated outside Switzerland, even if that country is not a contracting state to the convention. 57

No specific Swiss legislation has been enacted to ensure or limit compliance with investment treaty awards. Procedurally, the enforcement of arbitral awards entails the availability of debt collection or other enforcement processes, which in Switzerland are governed in part by federal statutes and in part by local cantonal procedural rules.

The application of federal or cantonal enforcement processes depends on the nature of the relief awarded. Monetary awards are enforced through summary court proceedings under federal law, specifically the Federal Debt Enforcement and Bankruptcy Act 1889 (DEBS). Non-monetary awards (e.g., orders for specific performance, restitution of a chattel, award or right in real property, and other injunctive relief) require the institution of local cantonal proceedings. Both types of enforcement process are necessary for enforcing mixed (i.e., monetary and non-monetary) awards.

If the debtor is domiciled in Switzerland, the creditor must first request the Debt collection office (DCO), which is not a court, of the place of domicile to issue a summons to pay the amount due within 20 days. An objection must be filed before the local court by the debtor to halt the proceedings before the DCO. The debtor must first file this objection before raising any defences under the New York Convention before the local court.

3.2 Domestic legal provisions
Under the New York Convention, Swiss courts will deny enforcement only if one or more of the defences set out in Article V is established. The debtor seeking to resist enforcement bears to a large extent the burden of proof regarding the availability of any of these defences. Even where a defence is proved, enforcement of the award will not be denied where the court is satisfied that the debtor is acting or has acted in bad faith.

In the context of enforcement of investment treaty awards, the defences of arbitralibility and public policy merit specific mention.

49 Article 194 of the PILA states: “The recognition and enforcement of a foreign arbitral award is governed by the New York Convention of June 10, 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.”
The concept of arbitrability is very broad under Swiss law, so that the defence of lack of arbitrability under Article V(2)(a) of the convention is limited in scope. The defence of breach of public policy under Article V(2)(b) is equally limited, since a very serious breach is required. 'Public policy' is defined very narrowly by Swiss court practice. The Federal Tribunal (or Federal Supreme Court) has defined 'public policy' in one of its decisions as follows:

The material findings regarding a litigious claim only then violate public order if they run against fundamental principles of law and are therefore totally incompatible with the legal order and the system of values. These principles include the maxim pacta sunt servanda, the prohibition of the misuse of the law, the principle of good faith, the prohibition of uncompensated expropriation, the prohibition of discrimination and the protection of the incapacitated.50

Accordingly, it would be possible for a debtor to resist enforcement of an award based on the public policy defence only in very exceptional circumstances.

Finally, Swiss courts do not apply with excessive formalism Article IV of the New York Convention, namely the requirement to submit to the court the authenticated original or a certified copy of the award and of the arbitration agreement, together with a certified translation. This is particularly so where the party resisting enforcement does not dispute the existence of the arbitration agreement, or the award or the accuracy of a translation. Caution is, however, required as the approach may vary from one canton to the next.

While an incomplete request can be completed at a later stage (including on appeal), the best approach is to provide, at the outset, all relevant documents and certified translations, together with evidence that the award is enforceable and has not been suspended, by way of copies of the relevant foreign legal provisions and even an affidavit by counsel explaining the legal status.

In relation to the defences of sovereign immunity that may be raised by a debtor state to resist enforcement, since there is no general legislation on sovereign immunity in Switzerland, the legal framework is broadly defined through court practice. Swiss courts have adopted a restrictive concept of state immunity, limiting it to cases in which foreign states act as sovereigns (acta jure imperii), as opposed to cases where states act as merchants and execute commercial acts (acta jure gestionis).51

As such, execution is permitted against all commercial property of the state, but not against property serving official or governmental purposes. Swiss courts therefore look to the purpose of assets located in Switzerland as a decisive criterion for determining

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50 BGE 116 II 634, para 4. Translation taken from M Orelli, "Chapter 2, Part II: Commentary on Chapter 12 PILS, Article 177 (Arbitrability)", in Arroyo (note 1 above), p 51.
their nature. As a rule, assets that are not earmarked as sovereign purpose property are subject to execution; assets allocated for the performance of sovereign acts, which always include the assets of diplomatic missions, are immune from execution.

The concept of acts within the scope of public authority is interpreted broadly by the Swiss Federal Supreme Court. For example, money (whether in the form of cash or bank accounts) is exempt from seizure only if it has been clearly assigned to definite public purposes, which implies a separation from other assets. Bank accounts and other assets belonging to an embassy are, however, assumed to be for a public purpose and therefore immune from enforcement. Bank accounts of embassies and diplomatic missions, which are subject to specific provisions in the 2004 United Nations Convention on Jurisdictional Immunities of States and their Property, are therefore treated by Swiss courts with much caution. The same applies to funds specifically allocated to the purchase of arms or cultural centres/buildings for foreign citizens run by a foreign consulate in Switzerland.

The property of foreign central banks and similar monetary authorities is subject to special protection, in addition to general state immunity rules. Article 92(1) of the DEBS provides that enforcement is excluded with respect to "assets belonging to a foreign State or a central bank and assigned to tasks which are part of their duty as public authorities". This is in line with Article 19 of International Law Commission’s Draft Articles on State Immunity, which exclude the property of the central bank of a foreign state from the scope of commercial property.

The enforcement of an award against a state’s assets was considered in 2007 by the Swiss Federal Supreme Court, albeit in a commercial arbitration context, in the Noga case. Noga had obtained an arbitral award in its favour against the Russian Federation, but was initially unable to obtain its enforcement, in spite of some

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53 BGE 134 III 122, para 5.2.3; 5A_618/2007; AFG 381/2000, in Knuchel (note 51 above), p 1186.
55 BGE 112 la 148, paras 4-5.
56 The United Nations Convention on Jurisdictional Immunities of States and their Property of December 2 2004 was ratified by Switzerland on April 16 2010. This convention has not yet entered into force worldwide.
57 Giroud & Leroux (note 54 above), p 39; Ratification Report 2009, 25, para 7 (in free translation from the French original): “Inssofar as the relations between Switzerland and the other Contracting States are concerned, they shall substitute domestic law, specifically the principles developed in the case law of the Federal Tribunal”, available at www.admin.ch/ch/f/gg/pc/documents/1413/Bericht.pdf.
58 BGE 86 I 23, para 5, in which the Swiss Federal Supreme Court considered that funds specifically allocated to the purchase of arms were earmarked for a public purpose and thus protected from enforcement. Such earmarking must, however, be real and effective, otherwise subject funds will not be considered as "assigned to their original public purpose". See, more generally, BGE 124 III 382, para 4a (in free translation from the French original): “Case law places military activities under the jure imperii, or sovereign acts, rubric”;
widely reported attempts to seize Russian assets. In February 2003, Noga started
enforcement proceedings against certain assets of the Russian Federation with the
International Air Transport Association (IATA) in Geneva on the basis of a settlement
agreement. Because this agreement had been concluded in Switzerland, the Swiss
Federal Supreme Court considered, on the basis of the *Binnenbeziehung* doctrine, that
the Russian Federation's assets with IATA could be rightfully seized. This doctrine
may be summarised as a requirement on a party to show a Swiss connection in order
that enforcement acts against foreign states may be permitted. In particular, the
Swiss Federal Supreme Court held that a connection with Switzerland is established
where a state conducts activities in Switzerland.

With regard to this requirement of a Swiss connection, it is sometimes argued
that the *Binnenbeziehung* doctrine is applicable to the enforcement only of awards
issued in Switzerland and not foreign awards, which are subject to the New York
Convention. Some authors consider, however, that the *Binnenbeziehung* doctrine
may apply to the enforcement of ICSID awards, since Article 54 states that an ICSID
award of which enforcement is sought should be regarded as a final judgment
rendered under the laws of place of enforcement. Accordingly, it cannot be ruled
out that Swiss courts would apply this requirement of a Swiss connection for the
enforcement of investment arbitration awards against states.

3.3 State experience in ICSID investment treaty arbitrations

There are no publicly known ICSID or other investment treaty arbitration cases to
which Switzerland has been a defendant.

3.4 National investors

There are no publicly known ICSID or other investment treaty arbitration cases in
which an investor has attempted to enforce or resist enforcement of a final award in
Switzerland.

It is, however, worth noting that Swiss Federal Tribunal has been seized once of
jurisdiction to enforce a provisional measure rendered by an ICSID tribunal. In that
case, an award was rendered against a Guinean state entity under the American
Arbitration Association (AAA) Arbitration Rules (but had not been affirmed by the US
courts). The claimant in the arbitral proceeding, Maritime International Nominees

60 BGE 134 III 122, para 5.3 (Noga v Office des poursuites de Genève). Russia's resistance to international
arbitral awards in favour of Noga was also at the core of a series of court decisions in a number of other

61 For discussion of this decision, see also Knoepfler (note 54 above), pp 1039-1046; E Gaillard, *Convention
d'arbitrage et immunités de juridiction et d'exécution des Etats et des organisations internationales* (2000) 18
ASA Bulletin 479-481.

62 Schneider & Knoll (note 51 above), pp 338-344.

63 See also *LIAMCO v Libya*, BGE 106 la 142, para 4, a case which concerned an award rendered in
Switzerland, and in which the Supreme Court ruled that the choice of Geneva as the place of arbitration
by the arbitrator did not constitute a sufficient connection to Switzerland.

64 Schneider & Knoll (note 51 above), p 344; Knoepfler (note 54 above), pp 1041-1042.

65 Schneider & Knoll (note 51 above), pp 344-345.

66 *Maritime International Nominees Establishment (MINE) v Republic of Guinea* (Swiss Federal Supreme Court,

Establishment (MINE), a Liechtenstein corporation, initiated enforcement proceedings before the Swiss and Belgian courts, while an ICSID proceeding was also initiated at the same time against Guinea for failure to enforce the award. The Swiss courts granted an attachment order against Guinean bank accounts on the basis of the AAA award.\(^6\)

Subsequently, however, Guinea obtained a provisional measure from the ICSID tribunal requesting the claimant to retract all existing attachment orders and to stop local court proceedings. The Federal Supreme Court referred the question of the ICSID tribunal's exclusive competence to the Geneva Court of First Instance.\(^6\) The Geneva Court of First instance held that, by initiating the ICSID proceeding, the claimant had accepted the exclusive jurisdiction of the ICSID tribunal under Article 26 of the ICSID Convention and thus had waived its right to enforce the AAA award under the New York Convention. The court considered that the AAA award was therefore no longer binding, on the basis of Article V(1)(e) of the New York Convention, and rejected MINE's enforcement application.\(^6\) The Geneva Supervisory Authority for the Enforcement of Debts and Bankruptcy came to the same conclusion and ordered the lifting of the attachment order.\(^7\)

In conclusion, the Swiss courts have demonstrated, at least in the context of the enforcement of a provisional measure, that they are prepared to attach state assets in furtherance of decisions rendered by an ICSID tribunal. This should bode well for when the time comes for Swiss courts to enforce an investment treaty final award.

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70 Ibid, para 3; (1989) 4 ICSID Reports 35 at 41-44, together with the decision of the Tribunal de première instance, Geneva (March 13 1986) at 41 et seq.
71 Ibid, para 3; (1989) 4 ICSID Reports 35 at 49-52, together with the decision of the Autorité de surveillance des offices de poursuite pour dettes et de faillite, Geneva (October 7 1986) at 45 et seq.
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