A practitioner’s perspective on judicial support:
Enforcement of foreign awards in Switzerland
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)
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
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.
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
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
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)
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
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)
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
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
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
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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