precautionary evidence based on the infringement of the Patent Act,[2] obtaining a precautionary expert opinion with regard to the medical consequences of an accident,[3] the expert opinion by a psychiatrist regarding the consequences of a car accident,[4] and the securing of evidence with regard to the construction of a building.[5] These cases show that to date most applications have revolved around personal injury claims. In commercial proceedings, an ascertainment of an infringement of a duty of care or the establishment of the causation of a damage by the defendant by a precautionary expert opinion at an early stage, could be invaluable, both as a procedural weapon but also as a 'trump card' in prior settlement negotiations.

The recent judgment by the Federal Tribunal shows that the instrument of applying for precautionary taking of evidence can be a helpful tool for the potential claimant. The jurisprudence of the Swiss Federal Tribunal during the past two years and also of the lower cantonal courts has, however, also shown that a claimant is well advised to formulate their request carefully and to bear in mind that in those cases where they have to rely on a court finding in favour of their legitimate interest, such interest and its basis in law must clearly be demonstrated to the court.

The fear that this procedural instrument could become a similar weapon as frequently wielded in pre-trial discovery phases in the US seems unwarranted. As shown in the Federal Tribunal's decision, the underlying claim which is to be proven by the evidence sought, needs to be plausible. Although the hurdle is no doubt lower than during the trial phase, only applications that clearly identify the documents sought, the evidence required or the expert opinion to be issued and based on which statutory entitlement, will be successful.

Notes

1 Federal Tribunal Decision 4A_118/2012.
2 Federal Tribunal Decision 4A_532/2011.
3 High Court of Zurich Decision LF120024-O.
4 High Court of Zurich Decision, published in ZR 111/2012, p 187 et seqq.
5 High Court of Zurich Decision LF120012-O/U.

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Attachment of state assets – a better weapon than immunity: the independent legal personality of the state-owned company

When a state faces attachment proceedings, the most common defence is to invoke state immunity. As in other legal regimes, Swiss case law distinguishes between cases where the state acts by virtue of its sovereignty (*iure imperii*) or according to private law (*iure gestionis*). In the latter case, state assets may be subject to attachment. If a creditor asserts that the state is liable for debts of a state-owned company, there is a high risk that the courts may decide that it is a case of *iure gestionis*. State assets may thus be attached.

In a published decision of 5 March 2012,[1] the Swiss Federal Supreme Court (SFSC) gave welcome guidance on the state's liability for debts of state-owned companies in the context of attachment proceedings. The matter concerned whether the Republic of Uzbekistan was privy to (or liable under) the contract with the claimant in proceedings for an attachment order involving an Uzbek company.

The SFSC ruled that it was not arbitrary for the Court of Appeal to consider that the Uzbek company had its own legal personality and that the Republic of Uzbekistan was not liable for the company's debts. As a result, the Republic of Uzbekistan's property located in Switzerland could not be attached. In doing so, the Republic of Uzbekistan did not even have to rely on its immunity from jurisdiction and execution.

Facts

A Swiss company made an application to the District Court of March (canton Schwytz) requesting an attachment order against the Republic of Uzbekistan for a debt of US$14,441,000 in principal and interest. This application was based on a sale agreement between the Swiss Company and an Uzbek company described as the 'equipment and supply base for the central Asian region of the committee of the State of Uzbekistan for supply and repairing in agriculture'. A plot located in Switzerland, property of the Republic of Uzbekistan, was designated in the application as the object of the attachment order.

After execution of the attachment order by the debt collection office and notification of the attachment order document, the Republic of Uzbekistan filed an objection to the attachment order which was dismissed by the District Court. The Republic of Uzbekistan appealed the dismissal of the objection to the Court of Appeal of the Canton of Schwytz ('*Kantonsgericht*') that upheld the appeal and lifted the attachment order. The Swiss company filed an appeal in civil matters before the SFSC. This appeal was dismissed insofar as the appeal was declared admissible.

The decision of the Swiss Federal Supreme Court

The central issue examined by the SFSC was whether assets of the Republic of Uzbekistan could be subject to attachment for the Uzbek company's debts.

The SFSC pointed out that this issue raises the question of whether the Republic of Uzbekistan was privy to (or liable under) the contract with the Swiss company ('*Passivlegitimation*'). This legal concept must be determined in international relations according to the law applicable to the matter. An assessment as to whether the Uzbek company may be considered an organ of the Republic of Uzbekistan involves an application of Uzbek law in accordance with Article 154(1) of the Swiss Federal Act on Private International Law ('PILA'). This provision sets out that companies shall be governed by the law of the state under which they are organised. The applicable law to the company governs the enjoyment and the exercise of civil rights (Article 155(c) PILA). Accordingly, the decisive question was whether the Uzbek company was organised in a way that reflects the characteristics of the personality of legal persons, in particular the legal capacity of acquiring and undertaking obligations, which would thus exclude the state's liability for the company's debts.

The SFSC set out the reasoning of the Court of Appeal that based its decision on documents produced by the parties, in particular the corporate documents related to the Uzbek company and extracts of the Uzbek Civil Code.

Analysis of the corporate documents

The starting point of the analysis of the Court of Appeal was the decision of 6 May 1991 from the Uzbek Cabinet of Ministers on the creation of the Uzbek company described as the 'Cooperative Committee of the Uzbek Soviet Socialist Republic for equipment and technical supply and for repairing of equipment in the area of agriculture industry' and the decision of 16 July 1991 confirming the company's regulation. The Uzbek company was labeled in the regulation as a 'republican organ of the state administration' which 'is subordinated to the Cabinet of Ministers of the President of the Uzbek Soviet Socialist Republic'. Nevertheless, the Court of Appeal put forward that the regulation allowed the Uzbek company to use its own financial resources, banking accounts, accountancy and endowed it with legal capacity to enter into contracts, all of which constitute evidence of the existence of an independent legal personality. This point of view was reinforced by the interpretation of the relevant provisions of the Uzbek Civil Code.

Analysis of the Uzbek Civil Code

The respondent produced extracts of Articles 22 to 26 of the Uzbek Civil Code in force at the time of the creation of the company. According to Article 24, state-owned companies, Kolkhoz (collective farms in the

Soviet Union) and state organisations are considered as legal persons. On this basis, the Court of Appeal ruled that a cooperative committee such as the Uzbek company had legal personality. The Court of Appeal further referred to Article 80 of the Uzbek Civil Code. This provision provides that '[l]egal persons constituted by the State are not liable for the obligations of the latter. The State is not liable for the obligations of the legal persons it has constituted, with the exception of cases prescribed by law'. In the absence of liability for legal persons constituted by the state, the Court of Appeal concluded that doubts on whether the Republic of Uzbekistan was privy to (or liable under) the contract with the Swiss company prevailed, and lifted the attachment order on the state's plot.

No arbitrary decision

In cases of attachment proceedings, the creditor must only prove the plausibility (as opposed to the establishment) of: (i) the debt; (ii) a ground for an attachment order; and (iii) the existence of assets belonging to the debtor. Furthermore, the appeal before the SFSC is limited to the violation of constitutional rights. In most cases, the appellant may only allege a breach of the protection against arbitrary conduct. To be considered arbitrary, a decision must seriously infringe a rule of law or a clear and unquestioned legal principle or be shockingly at odds with justice and equity.[2] As a result, to set aside the Appellate Court decision, the Swiss company could only argue that the application of the law and/or the establishment of the facts made by the Appellate Court was arbitrary.

The Swiss company argued that the Court of Appeal, in deciding that the Republic of Uzbekistan was not privy to (or liable under) the contract, arbitrarily reviewed the establishment of facts set by the District Court without limiting its review to obvious incorrect establishment of facts as required by the Swiss Civil Procedure Code. According to the SFSC, this argument was based on the incorrect conception that the conclusion of the Court of Appeal regarding the doctrine of privity of contract would constitute an establishment of facts. The existence, the content and the relevance of the documents produced by the parties (in particular the decision of 6 May 1991, respectively 16 July 1991) were not contested by the Swiss company. As a result, the latter did not criticise the establishment of the facts but the interpretation and the application by the Court of Appeal of these documents, which is a question of law subject to the full review of the Court of Appeal. The SFSC highlighted that foreign law that must be applied in Switzerland has the characteristic of a rule of law but not of a fact. The Court of Appeal was hence empowered to take into account extracts of the Uzbek Civil Code that were not produced before the District Court.

Furthermore, the Swiss Company asserted that the Court of Appeal misapplied and misinterpreted Uzbek law by considering, contrary to the District Court decision, that the Republic of Uzbekistan was not privy to (or liable under) the contract with the Swiss company. On this point, the SFSC deemed that the Court of Appeal was entitled to substitute its own application of the law to that of the District Court and that the conclusion that the Uzbek company was more likely to have been an independent legal personality than a state organ could not be qualified as arbitrary.

Conclusions

The lessons learned from this decision are that, in the context of attachment orders, Swiss courts apply foreign law to determine whether or not the state assets may be attached for the debts of a state-owned company. In doing so, the Court of Appeal has a wide discretionary power to determine the content of the applicable foreign law. The SFSC's review is limited to arbitrary conduct which considerably hinders the chances of success of requests brought before it.

By the enactment of laws, foreign states may freely organise the status of companies registered in their territory and determine whether or not the state is liable for debts incurred by these companies in their international business relations. The SFSC left nevertheless the door ajar in an *obiter dictum* to the application of the theory of lifting of the corporate veil rendering states liable for such debts.

The SFSC also mentioned that the Swiss company could have tried to draw arguments from the privatisation process that occurred in Uzbekistan before the parties entered into their agreement in 1995. On this basis, the Swiss company could have asserted that the Court of Appeal did not take into account an element which would serve to establish the existence of the states' liability for the debts

of the Uzbek company. Having failed to bring this forward, the SFSC had no authority to examine this point further.

In light of the above, foreign states are well protected under Swiss law from attachment orders on their assets located in Switzerland for debts of state-owned companies (or similar entities) registered in their territory if their domestic law provides these companies with an independent legal personality and an exclusion of state liability for their debts. The creditor of such companies is therefore left with little hope of success when commencing attachment proceedings against the state.

Notes

1 ATF 138 III 232.

2 See for example ATF 124 V 137, paragraph 2 b.

TURKEY

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The inefficacy of jurisdiction agreements in Turkey – a comparison with *Erich Gasser*

Incorporation of a jurisdiction clause in a commercial contract has become *sine qua non* in contemporary business practice but the efficacy of doing so is under dispute in many jurisdictions. In the last decade, the Member States of the European Union have experienced the cataclysmic fallout of the European Court of Justice's (ECJ)'s landmark decision in *Erich Gasser*[1] and the effect of the decision in question has been the subject of controversy ever since. In parallel, the functionality of jurisdiction clauses in Turkey is being curtailed by the rigid bankruptcy rules, in the process undermining party autonomy and procedural certainty. This article will compare the ramifications of *Erich Gasser* and the Turkish bankruptcy rules and argue that the present Turkish legislative order creates a more unwarranted situation in Turkey than the one which was created by *Erich Gasser* in the Brussels Regulation regime.

The question in *Erich Gasser* was whether the courts of the Member State whose jurisdiction was contractually agreed by the parties were nonetheless obliged to stay their proceedings if the courts of another Member State had been seized first. Specifically, there was an exclusive jurisdiction agreement between the parties in favour of Austrian courts. Despite the clause, Misrat brought proceedings in Italy for a declaration of non-liability. When Gasser brought proceedings in Austria for the substantive claim, the question arose whether the Austrian court could entertain the jurisdiction clause and exercise jurisdiction accordingly.

Before the ECJ's decision in *Erich Gasser*, the English courts[2] had taken the view that Article 23 of the Brussels Regultaion (exclusive jurisdiction agreements) would take precedence over Article 27 (*lis pendens*) of the Regulation by holding that an exclusive jurisdiction clause would deprive the courts of the other Member State of jurisdiction.[3] This would mean that the courts of the Member State which have been contractually conferred exclusive jurisdiction by the parties could exercise jurisdiction even if the courts of another Member State had been seized first. However, the ECJ in *Erich Gasser* held an opposite view and ruled that 'a court second seised whose jurisdiction has been claimed under an agreement conferring jurisdiction must nevertheless stay proceedings until the court first seised has declared that it has no jurisdiction.'[4]

The ECJ's decision has drawn immense criticism. As Fawcett explains, an exclusive jurisdiction clause comprises two aspects: a positive aspect whereby the parties agree to bring proceedings in the contractually agreed forum and not to object to the jurisdiction of that forum and yet a negative aspect whereby the parties undertake not to litigate against each other in a forum other the one contractually agreed upon.[5] However, the

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