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## Combining Swiss arbitration with English enforcement – A powerful tool

Switzerland is well-known for its arbitration-friendly legal environment and has a long tradition of hosting international arbitration proceedings. By way of illustration, in 2006 Switzerland was again one of the most frequently selected countries for ICC arbitrations, two Swiss cities Geneva and Zurich being among the three most popular cities.<sup>1</sup> A particularly useful feature of arbitration in Switzerland is the speed with which an award reaches absolute finality. Recourse against an award, like in many other countries, is limited to setting aside proceedings which may be brought only on very limited grounds, of the type contained in the New York Convention. The Swiss specificity, however, is that the award is tested in only a single court, the Swiss Federal Supreme Court in Lausanne, well experienced in arbitration matters and restrictive in its handling of challenges. If a party dares challenging an otherwise final and binding award, which must be done within 30 days of the notification of the award, the application is normally decided within six months,<sup>2</sup> and most frequently rejected.

England, too, is a well known and highly reputed forum for international commercial arbitrations. The English courts, at all three levels through which a final award may have to pass before all remedies are exhausted, are generally most familiar with arbitration. One feature of the English judicial system which deserves particular attention is its impressive arsenal of enforcement tools and the courts' robust and courageous use of it. Combining Swiss arbitration with English tools for enforcement is thus a particularly effective package for a party in pursuit of its rights under an arbitral award. The following recent case serves as a useful illustration.

The case concerned a shareholders' agreement between a major European telecom company (Telecom) and an Asian wireless telecom

operator (Wireless). On the basis of its rights to a buyout at an agreed price, Telecom claimed payment of the difference between the agreed price and that actually paid. In the ICC arbitration proceedings held in Geneva, the Arbitral Tribunal upheld Telecom's claim and, in a carefully reasoned award, ordered Wireless to pay several hundred millions of US dollars to Telecom.

Under the ICC Arbitration Rules, the award was final and binding, but Wireless was not inclined to comply with it, as it should have done according to Article 28(6) of the rules. Wireless, apparently discouraged by the remoteness of any chance to succeed, did not bring setting aside proceedings before the Swiss Federal Supreme Court. Instead it commenced court proceedings against the award in its home country.

With the assistance of local counsel in numerous jurisdictions where Wireless was likely to have assets, especially in the form of roaming income, Telecom decided to focus its enforcement efforts in England, which was otherwise unrelated to the parties and their dispute.

The English proceedings proved particularly effective. Within weeks, English local counsel obtained from the English High Court recognition of the Swiss award as a "New York Convention award" under Section 101 of the Arbitration Act 1996. On the basis of this recognition, Telecom obtained an ex parte freezing injunction ("Mareva injunction") over Wireless' assets in England and Wales in an amount covering the award plus costs. The injunction also required Wireless to make disclosure of assets, a measure entirely unknown in Swiss proceedings, and indeed, most continental European laws. By a further order of the Court, the injunction was continued for a period of two months during which no application to set aside the provisional enforcement order could be heard.

There seems to be some doubt in England as to whether a worldwide Mareva injunction is available in support of the enforcement of a foreign arbitral award. However, the reputation and authority of English judges clearly reaches beyond their jurisdiction even without such powers. Here, Telecom had arranged for counsel in a number of other countries to monitor the injunction in England, in case it was insufficient to persuade Wireless to settle. The first stop after London was Singapore, where a court followed without much hesitation the decision of the English courts. This proved enough and Wireless settled the award in full, plus interest and costs.

As a result of this strategy, Telecom had its money a matter of weeks after the award had been notified.

The lesson of this case is clear: Arbitration in the right forum is a powerful dispute resolution mechanism but enforcement in the right forum can be equally crucial. Hence, a combination of fora, as in the case discussed above, is often the best strategy. ■

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<sup>1</sup> See the 2006 *Statistical Report*, ICC International Court of Arbitration Bulletin, Vol. 17/No. 1 (2007), pp. 12, 13.

<sup>2</sup> See Felix Dasser, *International Arbitration and Setting Aside Proceedings in Switzerland: A Statistical Analysis*, ASA Bulletin, 3/2007, pp. 456-459.

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