ThoughtLeaders4 Disputes • November 2023

Disputes MAGAZINE

SPECIAL EDITION

STATES OF CONFLICT: NAVIGATING SOVEREIGN & STATES DISPUTES AND ENFORCEMENT

TENSION BETWEEN PRO-ARBITRATION CULTURE AND RESPECT OF SOVEREIGN IMMUNITY IN SWITZERLAND

Authored by: Benoît Mauron (Partner) and Anton Vallélian (Associate) - LALIVE

As States become more and more involved in international commerce, is the 'Swiss connection' requirement to lift sovereign immunity still compatible with Switzerland's international obligations?

As one of the world's largest financial, banking and trading centres and home to many of the world's largest international organisations ("IO"), Switzerland is an obvious choice for enforcement against sovereigns – something reinforced by the pro-arbitration approach of its jurisdictions and their restrictive interpretation of State immunity.

In practice, however, satisfying the general international law requirements to lift sovereign immunity is not always sufficient. The case must also have a connexion to Switzerland, a century-old domestic law requirement that has recently been affirmed by the Swiss Federal Supreme Court ("SFSC") in decision 5A_406/2022 of 17 March 2023 on the enforcement of an ICSID award against Spain.

Connection to Switzerland Requirement Reaffirmed in SFSC Decision 5a_406/2022

On 4 April 2022, Schwab Holding AG ("Schwab Holding") relied on an ICSID award to apply for the attachment of trademarks, patents, real estate, bank accounts, and other assets allegedly belonging to the Kingdom of Spain.[1] The award was one of several holding Spain liable under the Energy Charter Treaty, due to renewable energy reforms. Schwab Holding's application was denied in first and second instances, so it took the case to the SFSC where it argued that the connection to Switzerland requirement did not apply to the enforcement of ICSID awards for the following two main reasons:

(1) Article 54(1) ICSID Convention, which states that parties ought to treat ICSID awards as decisions of domestic courts, precludes such an additional requirement; and

(2) This requirement breaches Article 54(3) ICSID Convention, under which enforcement of ICSID awards is governed by the rules applying to the execution of judgments in the State where enforcement is sought.

The SFSC rejected these arguments. It held that the connection test was allowed under Article 54(1) ICISD Convention as it did not amount to a review of the content of the award. It also considered that this was a procedural requirement of the law governing the execution of judgments in Switzerland, as allowed under Article 54(3) ICISD Convention.

Addressing the connection to Switzerland test, the SFSC recalled that it is met for instance when the claim originated from or was to be performed in Switzerland, or when the debtor performed certain acts in Switzerland. Conversely, the mere location of assets in Switzerland has not been considered sufficient to create such connection. Unfortunately for the petitioner, this requirement was not satisfied in the present case.

In the authors' view, this conclusion is unwarranted and, arguably, in breach of international law.

Atavistic Domestic Law Restrictions v. Modern International Law Tendency

This connection to Switzerland requirement has nothing to do with international law, whether conventional or customary, but is based entirely on Swiss domestic procedural law.[2]

The SFSC first introduced it (implicitly) in its 1918 Dreyfus decision.[3] It dates back to a world largely at war, with fewer than 80 sovereign States, and without today's framework of international trade and arbitration.

In those days, Switzerland's neutrality had few exceptions, hence the necessity to have a good reason to side against a sovereign, but that justification has not substantially changed to reflect the times. According to more recent decisions from the SFSC:

1 The decision is anonymised. It however transpires from the facts that the dispute arises from ICSID case ARB/15/37 between OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain.

2 SFSC Decision 106 Ia 142, para. 3.

3 SFSC Decision 44 I 49, para. 3.

"A State is not obliged by international law to allow recognition or enforcement pro-ceedings against foreign States for non-sovereign matters. Rather, it is entitled to impose a certain self-restraint in this respect within the framework of its domestic law. According to its national law, each State must therefore determine, by regulating the local jurisdiction of its authorities, the limits within which it feels itself called upon to decide disputes arising from the non-sovereign actions of foreign States."[4]

While the justification has not changed in a century, the world has moved on, leaving the relevance of this requirement and the extent of the 'self-restraint' mentioned by the SFSC open to question.

First, States are more and more active in commercial affairs, notably through States-owned entities. As sovereign actors become an increasingly established feature of international commerce, so too do disputes involving them. According to the ICC's latest statistics, 19.8% of new cases with the ICC involved a State or State entity. This represents 228 cases per year – an 85% increase in just four years[5] and there is no reason to believe that other arbitral institutions have not experienced a similar increase. If one also takes into consideration investment treaty arbitrations, these numbers cast light on the volume of cases where enforcement against sovereigns is involved.

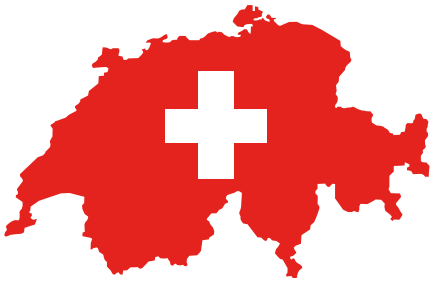
Second, Swiss neutrality is perhaps now more nuanced than it has ever been and Switzerland is certainly more integrated in the international community (joining the UN in 2002 and the UN Security Council as a non-permanent member in 2023). In recent times, it has also deviated from its historical "self-restraint" by implementing sanctions other than those decided by the UN Security Council (e.g., Russian invasion of Ukraine).

Finally, is the proposition that "a State is not obliged by international law to allow recognition or enforcement proceedings against foreign States"[6] still true today? Switzerland has ratified several international treaties on immunity, including the 1972 European Convention on State Immunity, its additional protocol as well as the 2004 UN Convention on Jurisdictional Immunities of States and Their Property.[7] None of these treaties contain such a general restriction to enforcement. Although they include some reservation in favour of domestic law, this, arguably, does not allow limitations broadly preventing the enforcement of awards against sovereigns.

Preventing enforcement also impedes creditors' rights to equal treatment and access to justice – fundamental rights that are now enshrined in the European Convention on Human Rights ("ECHR") and the UN Covenants (another body of rules that did not exist in 1918 but now limit Switzerland's prerogative to self-restraint).

Abandoning the connection to Switzerland test would also be in line with the development of immunity for IOs. This has seen Article 6 ECHR (right to a fair trial) prevail over immunity if an organisation does not provide for an alternative dispute resolution mechanism in disputes of a private law character[8].

Whether or not the connection to Switzerland requirement is, in principle, compatible with Switzerland's international obligations, Swiss courts must ensure that its application does not constitute a violation of international obligations. In other words, the rules on immunity must be interpreted to reconcile the interests of States to carry out their tasks as public authorities without hinderances or foreign influences, and those of private actors transacting with States to receive what they legitimately expected from their contracts.



Conclusion and Take Away

Four days after Decision 5A_406/2022, Swiss courts had another opportunity to consider the Swiss connection test in the context of an application to attach the assets of the Republic of Uzbekistan. In that case, Uzbekistan had signed a document guaranteeing payment with explicit references to Swiss legal remedies and the State's assets in Switzerland. The connection to Switzerland was therefore only textual, yet was considered sufficient to justify enforcement.[9]

While this development is obviously positive for enforcement in Switzerland, it promotes a somewhat form-over-substance approach. This seems at odds with the balance to be struck between granting States a degree of immunity to guarantee the fulfilment of sovereign tasks (and the ensuing promotion of Switzerland's international relations) and preserving the integrity of international trade (given the increasing involvement of States as economic or commercial actors).

In conclusion, parties must be careful and anticipate potential immunity defences. To this end – and in view of the SFSC's rather formalistic approach – we would recommend having detailed waivers in contracts with sovereigns ideally complying with the requirements of foreseeable enforcement jurisdictions.

4 SFSC Decision 106 Ia 142, para. 3. See also Decision 144 III 411, para. 6.3.2.

5 ICC Dispute Resolution 2020 Statistics, p. 11.

6 SFSC Decision 106 Ia 142, para. 3.

7 The UN Convention on Immunity was ratified by Switzerland on 16 April 2010 (with entry into force once ratified by 30 States.) It is considered to be a codification of customary international law (SFSC Decisions 4A_331/2014, dated 31 October 2014; 4A_542/2011 and 4A_544/2011, dated 30 November 2011; 136 III 575).

8 SFSC Decisions 4C_518/1996, dated 25 January 1999 and 130 I 312. See also Waite and Kennedy v. Germany [GC], No. 26083/94, ECHR 1999-I and Beer and Regan v. Germany [GC], No. 28934/95, 18 February 1999.

9 SFSC Decision 5A_469/2022, dated 21 March 2023, para. 3.1.