Arbitral award against foreign state requires sufficient domestic connection with Switzerland

20 December 2018 | Contributed by Tavernier Tschanz

Facts
Decision
Comment

In a recently published decision, the Supreme Court dealt with:

- the issue of state immunity in the context of the enforcement of an arbitral award; and
- the relationship between Swiss procedural law and the New York Convention.

It found that state immunity prevents the enforcement of an arbitral award against a foreign state if there is no sufficient connection between the claim and Switzerland, and that this situation does not conflict with Switzerland's obligations under the New York Convention.\(^{(1)}\)

Facts

In arbitration proceedings between a UK company (B) and the Republic of Uzbekistan in Paris under the United Nations Commission on International Trade Law Arbitration Rules, the arbitral tribunal issued an award in favour of B, which assigned its proceeds under the award to a Guernsey company (A).

In order to enforce the award, A requested the attachment of a real estate property belonging to the Republic of Uzbekistan in Switzerland. The attachment was granted by the first-instance court and then lifted by the same court, further to the Republic of Uzbekistan's objection. A appealed the first-instance court's decision to lift the attachment before the cantonal court, which rejected the appeal. A thus challenged the cantonal court's decision before the Supreme Court.

Decision

The cantonal court had found that the appellant was not in possession of a definitive enforcement title, which would have justified an attachment, because the foreign arbitral award was unenforceable in Switzerland. According to the cantonal court, there was no sufficient connection between the claim and Switzerland, and the Republic of Uzbekistan's state immunity thus prevented the enforcement of the award.\(^{(2)}\)

The appellant argued that the cantonal court had applied the law arbitrarily in the realm of Article V of the New York Convention, and that the outcome of the challenged decision was arbitrary, as the cantonal court had failed to answer the question of whether the domestic connection requirement should play any role in the context of the New York Convention, which sets out exhaustively the grounds for refusal of recognition and enforcement of a foreign arbitral award (Article V).\(^{(3)}\)

The Supreme Court rejected the appellant's first argument, holding that arbitrariness would be given only if the cantonal court, in its reasoning, had put itself into a manifest contradiction with a clear norm or undisputed principle of law, which it had not.\(^{(4)}\)

The Supreme Court also rejected the appellant's second argument. It held that, in order to obtain the
attachment of assets located in Switzerland belonging to a foreign state, the domestic connection requirement comes into play where the foreign state has acted as a holder of private rights.\(^{(5)}\) This requirement will be met, in particular, if the obligation from which the claim arises was established, or was to be performed, in Switzerland, or if the state has established Switzerland as the place of performance; it will not be met merely if assets are located in Switzerland or if the award was issued by an arbitral tribunal seated in Switzerland.\(^{(6)}\)

The domestic connection requirement is an aspect of the foreign state's immunity from Swiss jurisdiction and must be examined \textit{ex officio}. If it is not met, Swiss courts have no jurisdiction on the matter and they must close the proceedings without any decision on the merits of the case.\(^{(7)}\)

For matters covered by the New York Convention, the question of whether the recognition and enforcement of a foreign arbitral award should be granted or refused is exclusively governed by that convention. However, the examination of this question must take place in proceedings which are governed by the national procedural law, consistent with Article III of the New York Convention.\(^{(8)}\)

As a procedural prerequisite, the domestic connection requirement must be addressed prior to the merits of the case. Therefore, a Swiss court seized with a request for attachment cannot even address the grounds for refusal of enforcement provided by Article V of the New York Convention if the domestic connection requirement is not met. In that case, it lacks jurisdiction over the foreign state and must dismiss the request for attachment.\(^{(9)}\)

Based on these reasons, the Supreme Court upheld the cantonal court's decision and rejected the appellant's challenge.

**Comment**

In the case at hand, the Supreme Court could review the challenged decision only under the limited aspect of arbitrariness,\(^{(10)}\) which is likely to have had an impact on the outcome of its decision. The Supreme Court itself held that:

\[
\text{[t]he question of what findings the Supreme Court would reach if it was called to rule upon an appeal from a res judicata decision on the recognition and enforcement of a foreign arbitral award made against a foreign state without limiting the power of review... must thus remain open here.}\(^{(11)}\)
\]

The domestic connection requirement is well established under Swiss law, and it was constantly applied by the Supreme Court, not only in relation to enforcement proceedings based on attachments against states, but also in relation to attachments against a debtor that has no residence in Switzerland (Article 271(4) of the Debt Enforcement and Bankruptcy Law).

However, as this decision shows, in cases where enforcement based on an attachment is sought against a foreign state, this requirement may reduce the creditor's chances to recover its claim: the creditor not only has to obtain an award against a foreign state in its favour and to find assets \textit{iure gestionis} of such state in Switzerland, but it also has to establish a sufficient domestic connection between its claim and Switzerland.

For further information on this topic please contact Frank Spoorenberg or Daniela Franchini at Tavernier Tschanz by telephone (+41 22 704 3700) or email (spoorenberg@taverniertschanz.com or franchini@taverniertschanz.com). The Tavernier Tschanz website can be accessed at www.taverniertschanz.com.

**Endnotes**

\(^{(1)}\) Supreme Court, 5A_942/2017, 7 September 2018 (in German, marked for publication in the official court reporter).

\(^{(2)}\) Ground 3.

\(^{(3)}\) Ground 6.1.
According to the Supreme Court, "arbitrary application of the law will only be deemed to have occurred where the challenged decision is manifestly untenable and in clear conflict with the facts, or represents a gross violation of a norm or undisputed legal principle, or runs counter or offends notions of justice; what is required in this respect is that the decision is found to be arbitrary not merely in terms of its reasoning, but also in terms of its outcome" (Ground 4).