

Arbitration - Switzerland

Comprehensive translation of award not required for enforcement in Switzerland

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Introduction

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Introduction

A party seeking enforcement of a foreign award must supply, among other formalities, the authenticated original award or a certified copy thereof (Article IV, Paragraph 1 of the New York Convention).(1)

If the arbitral award is not made in one of the original languages of the country in which enforcement is sought, the party seeking enforcement must produce a translation (Article IV, Paragraph 2 of the New York Convention).(2)

The Supreme Court recently ruled, for the first time, on the mandatory character of Article IV, Paragraph 2.(3) Confirming Switzerland's reputation as an arbitration-friendly forum, the court opted for a flexible and pragmatic interpretation of the New York Convention. It admitted that in certain circumstances, a party seeking enforcement in Switzerland of an award issued in English may be exempt from producing a certified comprehensive translation of the entire arbitral award into one of the Swiss national languages.

Facts

A party initiated recognition and enforcement proceedings for an International Chamber of Commerce commercial arbitral award before the cantonal court in Switzerland. The party filed a certified German translation of the dispositive part of the award, together with a non-certified German translation of the cost section, but filed no comprehensive German translation of the award.

The cantonal court held that it had sufficient knowledge of English not to request a full translation of the award, especially since a German translation of the decision on costs, which constituted the subject matter of the dispute, had been produced. It thus dismissed any objection to enforcement. The cantonal court granted recognition and enforcement of the award.

The cantonal court's decision was challenged before the Supreme Court on the ground of infringement of the mandatory requirements of Article IV, Paragraph 2. The challenging party further contended that the examination of its public policy-based objection to enforcement (Article V, Paragraph 2(b)) required careful consideration of the entire award, which implied a full translation thereof.

Decision

The Supreme Court dismissed the challenge and considered that the partial translation produced by the requesting party was sufficient to comply with the formal requirements of Article IV, Paragraph 2.

The Supreme Court noted the lack of uniform judicial practice in Europe,(4) as well as the absence of a clear converging scholarly view in favour of either a strict application of Article IV, Paragraph 2,(5) or a more pragmatic approach to the issue.(6)

Considering that the purpose of the New York Convention is to facilitate the recognition and enforcement of foreign arbitral awards, the Supreme Court held that it ought to be applied and construed in an enforcement-friendly manner, following a pragmatic, flexible and non-formalistic approach, including with respect to the formalistic requirements set forth in Article IV, Paragraph 2.(7)

The court concluded that:

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"one may nowadays assume that courts do generally not need a translation of arbitral awards in English and that the purpose of Article IV, Paragraph 2 of the New York Convention can be achieved even in the absence of such a translation".⁽⁸⁾

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Endnotes

(1) "To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply: (a) the duly authenticated original award or a duly certificated copy thereof; (b) the original agreement referred to in article II or a duly certified copy thereof."

(2) "If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent."

(3) Supreme Court decision 5A_754/2011, July 2 2012, X SA v Z LLC. The full text of the decision, which will be published in the official reports of the Supreme Court's decisions, is available in German, see <http://www.bger.ch/index/jurisdiction/jurisdiction-inherit-template/jurisdiction-recht/jurisdiction-recht-urteile2000.htm>.

(4) See, for example, the decisions referred to in Ground 5.3.

(5) See, for example, Bucher, in *Commentaire Romand, Loi sur le droit international privé – Convention de Lugano* 2011, Article 194 LDIP No 11; Berger/Kellerhals, *International and Domestic Arbitration in Switzerland*, 2nd ed 2011, No 1881; Kaufmann-Kohler/Rigozzi, *Arbitrage international*, 2nd ed 2010, No 871; and numerous other references in Ground 5.2.

(6) See, for example, Staehelin, in *Basler Kommentar, SchKG I*, 2nd ed 2010, Article 80 SchKG No 95; Kronke/Nacimiento/Otto/Port, *Recognition and Enforcement of Foreign Arbitral Awards* 2010, p 194; and numerous other references in Ground 5.2.

(7) Ground 5.4.3.

(8) Ground 5.5 (authors' translation).

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