

SWITZERLAND

Sovereign immunity

Urs Feller and Marcel Frey from Prager Dreifuss examine the scope and limits to sovereign immunity in Switzerland and the recognition and enforcement of decisions against a foreign state

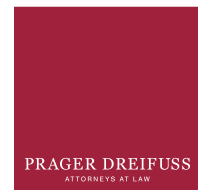
Enforcing a decision against a foreign state in Switzerland – no straight forward issue

As a rule, attachment proceedings initiated by a creditor in Switzerland based on a court or arbitral decision are quite straightforward. The applicable Debt Enforcement and Bankruptcy Act grants creditors who hold a judgment in hand an effective instrument to safeguard their claims in the form of a quick ex-parte blocking measure. This so-called *Arrest* may be granted by the single court judge in the district of the located debtor assets without any further requirements as to a connection to Switzerland, as long as the underlying claim is due and unsecured and assets have been plausibly identified in Switzerland. The attachment judge is even competent to issue attachment orders not only for assets located in his district but also for any other assets identified by the applicant throughout Switzerland, including real estate.

This efficient instrument becomes significantly more cumbersome when the counterparty of attachment proceedings is a sovereign state.

In investor-state arbitrations, the issue of enforcing awards against sovereign states frequently rears its head. Switzerland, as a major global financial hub, thus often encounters situations where parties attempt to enforce judgements or awards against debtor states by pursuing assets deposited with Swiss banks, usually by first applying for attachment based on an award or a foreign court decision. The following article is intended to give creditors a short overview as to the statutory prerequisites and guiding jurisprudence under Swiss law that need to be borne in mind.

Suffice to say at the outset that in the land in which the League of Nations once had its seat, and which today still is host country to many UN-agencies and other international organisations such as the Bank for International Settlements (BIS), with its registered office in Basel, attaching and enforcing claims against foreign states is not a straightforward matter.



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Recognition and enforcement of a decision against a foreign state in Switzerland

Identification of state assets located in Switzerland

Before dealing with the legal complexities of enforcement in Switzerland, the primary question of locating assets must be addressed. At the beginning of any court proceedings against a state, the issue of subsequent enforcement in the event of a positive award should be analysed. Frequently, legal battles against states prove to be long, complicated and costly. Engaging in such proceedings without a clear strategy at the beginning as to how a successful award or decision could be enforced may prove detrimental, since the risks of states mobilising significant energies to avoid compliance with judgments against them should not be underestimated.

Identifying assets of a debtor, which are located in Switzerland, is not a simple matter. The creditor cannot simply address a request to the debt enforcement office and request seizure of debtor assets wherever they may be located. The law requires the applicant to identify with a high degree of precision the asset and its location. The applicant

must credibly establish either a banking relationship, or a movable asset or real estate in Switzerland, which he or she wishes to attach.

This practical issue may pose a first significant challenge since the exact location of state funds may not be known. Real estate registers are not open to the public, unless a particular interest can be demonstrated and so far, there is no nationwide central real estate register. Even where an applicant can demonstrate that they have an interest (such as an open claim against a debtor), the creditor must still be able to identify the relevant plot of land.

Bank-client confidentiality further prohibits banks from reacting on mere fishing-expeditions. Thus, courts deny requests for seizure of funds in 'all Swiss bank accounts'. Securities are frequently held in corporations that do not reveal their shareholders to the public unless stock exchange regulations require disclosure.

The forensic research into the debtor's assets, in particular where a state is concerned, should thus form part of the due diligence process preceding the court and enforcement exercise.

Therefore, the further explanations below assume that a creditor benefitting from a foreign (non-Swiss) decision has successfully identified assets in Switzerland.

Recognition of foreign decisions under Swiss law

The first procedural hurdle that a party applying for enforcement of a decision against a foreign state in Switzerland must pass is the recognition of the decision. In arbitration proceedings, the Swiss courts will review an international award from the limited perspective of the formal prerequisites under the New York Convention, to which Switzerland is a signatory.

Ordinary state decisions are in principle also recognised in Switzerland if the following prerequisites are satisfied:

First, the court rendering the judgement for which enforcement is sought (against the foreign state) must have been competent to issue such a judgment. This is the case if the court's jurisdiction is provided for by Swiss law (based on a provision on the conflict of laws), or if the defending party had its residence in the country of the issuing court. Further, such a decision shall be recognised when issued in a dispute over a monetary claim where the parties agreed to the competence of the court or where the defendant entered into the matter without reservations. In addition, the decision needs to be final; i.e. no ordinary appeal is possible (or has been rejected) against the decision.

Lastly, no denial reasons pursuant to Swiss law may be at issue. Such reasons may be invoked in instances where recognising a decision would violate Swiss material public policy or where the underlying judgment rendered abroad was issued in violation of procedural guarantees considered to be fundamental in Switzerland (i.e. improper service, violation of the right to be heard, *lis pendens* in Switzerland).

If these criteria are satisfied, the decision is, in principle, recognised in Switzerland without any material review of its content. This having been said, the actual enforceability of such a decision if the defendant is a sovereign state, is further contingent on additional factors (discussed below).

Identification of and enforcement into state assets

The second hurdle entails convincing the court seized with the enforcement application that the assets identified by the applying creditor are eligible for seizure (and liquidation thereafter) under Swiss enforcement proceedings.

As in other states, Switzerland differentiates a state's (public) property according to the function it fulfils. It divides the assets belonging to a state into two distinct categories: assets that perform a public function and serve some public purpose (assets serving *acta iure imperii*); and assets that are held merely as financial assets by the state concerned, comparable to the way a private individual would hold his private funds (assets for *acta iure gestionis*). Commercially used assets are assets that are not managed based on sovereign power. With regards to this category of assets, Swiss courts (and most courts in the world) have developed rules that permit enforcement.

The outlined categorisation leads to the concept of 'limited state immunity', which has been developed over the years by the Swiss Federal Tribunal, the country's highest federal court. The concept is discussed in some more detail below.

In short, Swiss courts will deny any applications that aim at enforcing party claims against state assets that fall under the category of *iure imperii*, e.g. the embassy account, since Switzerland will not permit, in accordance with the public law concept, the interference by its courts into the sovereign management of a state's affairs. The sovereign purpose must be present and recognisable. Potential future sovereign

usage is not taken into account.

Where the enforcement of a decision, however, pertains to state assets that are held for non-public functions and are employed with commercial intent comparable to any private party, Swiss courts are in principle willing to entertain attachment proceedings, under the condition that the assets must reveal some sufficient link to Switzerland (more details below).

In Switzerland, when confronted with an application in this regard, the Swiss courts will apply their own Swiss law view (*lex fori*) of whether this criterion is met or not. The statutory provisions governing the limits on the seizure of debtor assets (so-called indispensable items) give some guidance in this regard. The statutory text provides that assets of a foreign state or a foreign central bank are excluded from such safeguarding measures. The same is expressly provided for in the treaty between Switzerland and BIS. Applications to the debt enforcement office in Basel requesting the sequestration of funds of a central bank will thus under normal circumstances not be successful.

Concept of limited state immunity under Swiss law

Pursuant to the longstanding jurisprudence of the Swiss Federal Tribunal, based on a decision going back nearly a century (Federal Tribunal Decision 44 I 53 of 1918), and in line with worldwide legal consensus in this matter of public law, Swiss courts have developed and refined their understanding of the concept of limited (or relative) state immunity. The concept is based on the universal understanding that no sovereign state can be subject to the state authority of another state. The principle is derived from the basic rule that in our world of states, each state is equal to the other and may not exercise court power over another ("*par in parem non habet iurisdictionem*").

In its Swiss interpretation, this means that foreign states are, in principle, always immune from material court proceedings before Swiss courts, and therefore immune to subsequent enforcement proceedings (such as the attachment of assets).

Only in exceptional situations, as developed by the courts, may this general immunity be limited both with regards to court immunity and to any corresponding enforcement immunity. This latter extension to enforcement is a recent development dating back to approximately the mid-fifties of the previous century. This means that only where the state acts similarly to a natural person, its court immunity may be set aside and it may be treated like a normal party to civil court proceedings and, if found liable, be subject to enforcement proceedings.

Requirement of sufficient nexus to Switzerland

In addition to the hurdle of state immunity, Swiss jurisprudence has developed a further criterion that must be complied with when dealing with enforcement applications involving foreign states as debtors. Only where the legal relationship giving rise to the decision for which enforcement is sought has a sufficiently close nexus to Switzerland, such an application will be accepted by the Swiss courts.

In other words, even where the foreign state has acted in a private capacity and assets that are in principle available for liquidation to the benefit of a creditor have been identified in Switzerland, Swiss courts will still only allow enforcement against such assets if the circumstances of the underlying case have such close links to Switzerland that applying the country's court system may be deemed reasonable to enforce the

decision against the foreign state.

The underlying principle of this rule states that Switzerland will not entertain claims and not make available its court system for claims against other states and will not become unnecessarily embroiled in the legal wrangles of other states, where there is no evident connection to Switzerland other than the simple location of assets in Switzerland. The public interests of Switzerland do not demand such compliant behaviour, which may well lead to political repercussions and jeopardise the relations Switzerland entertains to other states.

In contrast to the differentiation between public and private assets of states, which is a commonly accepted public law principle, the additional criteria of the sufficient connection to Switzerland is a distinctively Swiss feature of the courts' jurisprudence. It is a self-restraint obligation that is applied in the interest of the country itself in a balancing act between due process and diplomatic deftness.

As a self-standing principle, reviewing an application as to the existence of such a link must be performed even where a state has validly waived its right to court immunity. The courts have found that despite the existence of such a waiver, i.e. in the form of the conclusion of an arbitration agreement by the affected state or by the state partaking in court proceedings unreservedly, this does not oblige Swiss courts to make available the Swiss court structure for unrelated or only remotely linked disputes. The practice is to a degree a manifestation of Swiss procedural neutrality.

- **When does a sufficient link to Switzerland exist?**

Following this prevailing jurisprudence by Swiss courts, a sufficient link to Switzerland may be assumed where the underlying contractual agreement giving rise to a claim, for which recognition and enforcement is sought, has its origin in Switzerland. Also, actions by the foreign state that would indicate a place of performance in Switzerland under the contract could constitute an adequate nexus to the country.

As noted earlier, the mere location of assets in Switzerland is deemed an insufficient link to Switzerland and will not permit execution of a decision. Additionally, the mere fact that the arbitration tribunal that rendered the decision in question had its seat in Switzerland is not enough to create the necessary link, if such decision on the seat was the result of a decision by the arbitral tribunal itself, an arbitral institution or another third party.

- **Scholarly Criticism**

The requirement of the Swiss link developed by the courts has not gone without scholarly criticism. The main objection to its application is that it lacks a basis in statutory law and therefore is unconstitutional, since the Federal Tribunal is not competent to enact statutory law in *modo legislatoris*.

Legal scholars also rightly point out that the system leads to an unjustified disadvantage of Swiss communes, cantons and federal institutes compared to foreign states; since Swiss state entities are subject to debt enforcement into their non-public funds without reserve for actions performed in a commercial capacity.

Some scholars take the view that such practice, whereby assets of foreign states are welcome in Switzerland but cannot be subject to an attachment proceeding due to a lack of sufficient nexus, creates serious

concerns and a logical discord. From this perspective, the mere fact that assets are located in Switzerland should suffice as a close link to Switzerland in the context of attachment proceedings. The reasoning is primarily that if a foreign state deposits assets abroad, that state also must anticipate the possibility that they could also be seized abroad, as long as they are not safeguarded by immunity under international law.

Moreover, Switzerland equally had to reckon with legal disputes when accepting assets of foreign states. Accepting foreign assets, whilst at the same time prohibiting attachment proceedings in case of lacking sufficient nexus, is not justified.

- **Swiss nexus in practice – Change in the offering?**

Despite scholarly criticism, the Federal Tribunal – and major high courts such as the High Court of the Canton of Zurich – have upheld their jurisprudence regarding the requirement of the sufficient nexus when applying for enforcement. According to judgments by the Federal Tribunal, this jurisprudence has developed further from an initial practice by judges and has evolved into customary law and even into a form of law that is comparable with statutory law and thus sufficiently defined to build an additional enforcement requirement. In a more recent decision by the High Court of the Canton of Zurich, the court, though upholding the jurisprudence of the Federal Tribunal, stated that substantial reasons exist for the lawmaker to revisit this question and (possibly) re-cast the requirements in formal law. This suggestion has to date not developed any further.

A well thought out strategy is key

In a nutshell, after the recognition of a decision in Switzerland, a party applying for enforcement of this decision against a foreign state must identify assets located in Switzerland. According to the concept of 'limited state immunity' that has been developed over the years by the Swiss Federal Tribunal, Switzerland distinguishes between *acta iure imperii* and *acta iure gestionis* and will only allow applications that aim at enforcing party claims against state assets that fall under the category of *iure imperii*, i.e. assets comparable to the manner in which a private individual holds his private funds.

Moreover, an additional requirement is the sufficient link to Switzerland. Notwithstanding the academic criticism, the Swiss courts still uphold their jurisprudence protecting sovereign states from suit and enforcement without such link.

Enforcing awards or decisions against foreign states in Switzerland must not only deal with practical problems but also with several legal and procedural challenges. Setting up a well thought out strategy at the beginning of proceedings is thus highly advisable.