Possible Enforcement of Worldwide Freezing Orders in Switzerland

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The Swiss Federal Supreme Court recently published a decision rendered last addressing the enforceability of an English Worldwide Freezing Order ("**WFO**") in Switzerland. Of particular interest was the question whether a party can apply for a mere declaration of enforceability without actually seeking to enforce the WFO against specific assets (ATF 4A_366/2011, decision of 31 October 2011). The decision in German can be downloaded on http://jumpcgi.bger.ch/cgi-bin/JumpCGI?id=31.10.2011_4A_366/2011.

A WFO, a preliminary injunction preventing a defendant from disposing of assets pending the resolution of the underlying substantive (arbitration or court) proceedings, has been described as one of the "nuclear weapons" of commercial litigation and arbitration, such is their effect on litigation. In practice, WFOs are often sought before arbitration or litigation has been commenced and without prior notice to the defendant.

In Switzerland, the enforcement of worldwide freezing injunctions is generally possible, provided that certain conditions are met. According to the established Swiss court practice, a WFO issued by a Court of a EU Member State is characterised as a provisional measure which may, in principle, be declared enforceable based on Articles 25 et seq. of the Lugano Convention of 1988 (the "**LC 1988**"), provided that the underlying dispute concerns a civil and commercial matter in the sense of the LC 1988. The LC 1988 also applies to provisional measures issued by a State court in support of arbitration proceedings (EuGH 17.11.1998, Rs. C-391/95, *Van Uden Maritime BV*, para. 33). According to the *Denilauer* precedent of the European Court of Justice, an *ex parte* interim order may be enforced under the LC 1988 to the extent the defendant has been granted the right to be heard in the underlying proceedings prior to the application for recognition and enforcement in Switzerland. Therefore, a WFO confirmed pursuant to an *inter partes* hearing would, in principle, be enforceable in Switzerland, subject to satisfying certain conditions. Even ex parte orders may be enforceable, if the defendant has been given sufficient notice of the order. This interpretation is still valid under Article 32 of the revised Lugano Convention of 2007 (the "**LC 2007**"), which corresponds to Article 25 LC 1988.

In the recently published case, the Supreme Court had to decide on an appeal against a decision of the Zurich Appeal Court. Initially, the claimants (thirty corporations) had requested the Zurich District Court (the Court of first instance) on 20 December 2010 to (i) declare a WFO of the High Court of Justice, Queen's Bench Division, Commercial Court of London dated 24 November 2010 enforceable

and (ii) to order protective measures against the defendant and a bank in Switzerland (D) where the defendant held an account. Invoking Art. 39(2) of LC 1988, the claimants tried in particular to limit the defendant's rights to dispose of his funds held on the accounts with bank D. In its decision of 22 December 2010, the Zurich District Court rejected both requests. The claimants appealed against this decision before the Zurich Appeal Court, which in essence rejected the appeal and confirmed the decision of the Zurich District Court.

It was undisputed that the claimants' requests had to be decided on the basis of the old Lugano Convention of 1988 (the "**LC 1988** ") as the WFO in question was issued by the English Court before the entry into force of the LC 2007 in Switzerland on 1 January 2011. Against this background, the Court of first instance held that a WFO can, in principle, be declared enforceable upon request and after submission of the required documents, provided that (i) the decision is enforceable in the State of origin, (ii) the decision has been notified to the defendant and (iii) there are no grounds for refusal according to Articles 27 and 28 LC 1998.

The Zurich Appeal Court had requested an additional condition to be met: The claimant had to show a legitimate interest in obtaining a declaration of enforceability of the WFO in Switzerland. Indeed, under Swiss domestic procedural law, declaratory relief is often subject to the demonstration of an actual interest in such relief. If the claimant could be compensated by monetary relief, the existence of a legitimate interest in obtaining declaratory relief is often denied. According to the Zurich Appeal Court, the claimants had no legitimate interest in obtaining a declaratory order unless they applied for the actual enforcement of the WFO in Switzerland. The Zurich Appeal Court further raised a fact which in its view also showed that the claimants had no legitimate interest in seeking a declaration that the WFO was enforceable: Although the WFO was not legally binding on third parties on Swiss territory, banks in Switzerland would usually comply voluntarily with a foreign freezing order, at least for a certain period of time (assuming that the bank has been informally notified of the WFO). The Zurich Appeal Court thus concluded that the declaration of enforceability would (*de facto*) not be of any additional use to the claimants.

The claimants then appealed to the Swiss Federal Supreme Court. The appeal was allowed. According to the Supreme Court, the LC 1988 does not require that a party shows a legitimate interest in obtaining a declaration of enforceability of a freezing order. Furthermore, the (Swiss) bank's voluntary compliance with a foreign freezing order is no obstacle to the claimant's right to have the order declared enforceable. Indeed, once the claimant obtains such a declaration, the foreign freezing order is treated as if it were a Swiss decision. The recognition of a foreign judgment thus results in its equal treatment with domestic judgments. The declaration of enforceability by domestic courts further allows for a facilitated enforcement procedure.

The Supreme Court considered that a party benefitting from an English WFO has a legitimate interest in obtaining a declaration of enforceability from a Swiss court. (This finding, while made under the LC 1988, should equally apply under the LC 2007 (Articles 38 et seq.)). Consequently, the appeal was allowed and the matter remanded to the lower court, which was ordered to examine whether the freezing injunction at hand was enforceable in Switzerland per se. The lower court had not looked into the substance of the freezing order since it had concluded that the claimants were in any event not entitled to a declaration of enforceability.

The decision of the SFCS is of interest to arbitration practitioners and litigators alike, particularly as it confirms the assumption that a party in the possession of a WFO has a legitimate interest in obtaining a declaration of enforceability from a Swiss court. Freezing orders have thus become a widespread tool. And much to their dismay, Swiss banks remain a prime target for foreign and Swiss injunctions.