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Can an award be enforced in Switzerland while its execution is suspended at the foreign seat of arbitration?

Georg von Segesser (von Segesser Law Offices) · Thursday, February 26th, 2009

In its decision of 9 December 2008 (4A_403/2008), the Swiss Federal Supreme Court took the opportunity to clarify its practice regarding the enforcement of arbitral awards that are suspended at the foreign seat of arbitration. In the case before the Swiss Federal Supreme Court, Company Y requested recognition in Switzerland of an arbitral award rendered in France before the time limit for challenging the award in France had elapsed. Company X opposed recognition on the grounds that Article 1506 of the French NCPC suspended the execution of the arbitral award as long as the award could still be challenged. The Swiss Federal Supreme Court held that recognition could be refused under Article V (1)(e) of the New York Convention only if a court granted the suspension of the award. It was not sufficient that the suspensive effect derived directly from the application of the law.

Article 1506, first sentence, in conjunction with Article 1504 of the French NCPC, provides that the execution of an arbitral award rendered in France is suspended while the time period for setting aside proceedings is running. According to Article 1506, second sentence, of the NCPC, the initiation of setting aside proceedings has the same suspensive effect. In the case decided by the Swiss Federal Supreme Court, Company X opposed recognition in Switzerland of an award rendered in France. Company X argued that, due to operation of Article 1506, first sentence, of the NCPC, the requirements of Article V (1)(e) of the New York Convention were fulfilled, namely that the award "*has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made*".

In its decision, which is going to be published in the official reporter of precedents, the Swiss Federal Supreme Court rejected Company X's arguments. With regard to the first limb of Article V (1)(e) of the New York Convention, viz. the binding nature of the award, the Court held that the award became binding on the parties once no ordinary recourse was available (any more). For the award to be become binding, it was not necessary that it was enforceable in the country of origin. According to the Federal Supreme Court, the possibility to initiate setting aside proceedings under Article 1504 of the French NCPC did not fulfil the requirement of Article V (1)(e) of the New York Convention.

With regard to the last limb of Article V (1)(e) of the New York Convention, viz. the suspension of the award in the country of origin, the Swiss Federal Supreme Court analysed its previous decisions. Since one decision dating from 1984 had supported Company X's argument, the Federal Supreme Court took the opportunity to clarify its position. In line with the majority of legal

commentators and more recent decisions, the Federal Supreme Court held that only a suspension by a judicial decision, but not a suspension *ex lege* (viz. by direct operation of the law) gave the right to refuse enforcement of the award under Article V (1)(e) of the Convention. The Federal Supreme Court based this decision, *inter alia*, on the wording of Article V (1)(e), which had to be interpreted restrictively for facilitating the enforcement of foreign awards.

The decision, on its face, only concerns the situation where the losing party has not (yet) initiated setting aside proceedings. However, the reasoning of the Federal Supreme Court is also valid for the situation where the losing party has initiated setting aside proceedings and where the law provides for suspensive effect of these proceedings. For Article V (1)(e) New York Convention to apply, the party who challenges an arbitral award is therefore well advised to request the court to order suspension of the award.

Georg von Segesser / Dorothee Schramm

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