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Swiss Federal Supreme Court provides guidance on rules of State immunity applicable to enforcement of ICSID awards

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In a decision issued on 23 November 2011, the Swiss Federal Supreme Court gave some welcome guidance on the rules of immunity applicable to the enforcement of ICSID awards in Switzerland (Decision 5A_681/2011 dated 23 November 2011 – The published decision is redacted but mentions the date of the ICSID award and the defendant State).

The Court rejected an appeal of the Geneva Debt Collection Office's (the "**DCO**") refusal to attach assets held in Geneva by the International Air Transport Association (**IATA**) in the name of Kyrgyzaeronavigatsia, a Kyrgyz State company. The applicant (probably the claimant in the underlying ICSID arbitration, Turkish company Sistem Muhendislik Insaat Sanayi ve Ticaret A.S) had sought the attachment in order to enforce an ICSID award issued on 9 September 2009 against the Kyrgyz Republic in connection to a hotel operation project (ICSID Case No. ARB(AF)/06/1).

Initially, a Geneva Court had granted the attachment in the amount of 11 million Swiss Francs and asked the DCO to enforce it. The DCO however considered that the attachment was incompatible with Article 92 of the Swiss Debt Enforcement and Bankruptcy Law ("**DEBL**"), which prohibits the seizure of assets of a foreign State or a foreign central bank intended for uses incumbent upon the foreign State in its exercise of its sovereign authority.

The DCO based its decision on a "verbal note" from the Kyrgyz Ministry of Transport and Communication to the Swiss Permanent Mission to the United Nations dated 17 September 2010 stating that the amounts held by IATA were exclusively allocated to activities performed in the exercise of sovereign authority, namely the surveillance of airspace.

The applicant appealed this decision by contesting the evidentiary weight to be given to this Note. However, the DCO confirmed its decision, relying on additional documents, including a fax from the Kyrgyz Embassy in Switzerland dated 1st October 2010 stating that IATA was authorised by Kyrgyzaeronavigatsia to collect charges due for use of Kyrgyz airspace, and a letter of the official representative of the Government of the Kyrgyz Republic dated 22 October 2010 stating that Kyrgyzaeronavigatsia was en entity of the Kyrgyz Ministry of Transport and Communication and that its assets were all allocated to public authority activities and therefore immune.

By decision of 15 September 2011, the Cantonal Surveillance Authority rejected the appeal on the

grounds that the documents produced by the Kyrgyz Republic showed that the assets held by IATA were exclusively allocated to activities related to the exercise of sovereign authority.

The applicant appealed this decision before the Swiss Federal Supreme Court, arguing that the facts of the case had been arbitrarily established. However, the Swiss Federal Supreme Court rejected the appeal. It found that it was not arbitrary to consider that the surveillance of national airspace was a task performed by a sovereign, and hence *iure imperii*. Charges levied for this task were exempted from attachments pursuant to Article 92 DEBL.

In Switzerland, there is very little statutory law on the issue of State immunity. The matter is mostly governed by case law, in particular that of the Swiss Federal Supreme Court. Although Switzerland ratified the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property on 16 April 2010, the Convention is not yet in force. The Convention will only enter into force once thirty States file their instruments of ratification. Until then, the rules established by the Swiss Supreme Court prevail.

Since the beginning of the 20th century, the Swiss Supreme Court has consistently applied the concept of State immunity restrictively. Accordingly, it distinguishes between matters involving foreign States acting in their sovereign capacity (de *iure imperii*), and matters involving foreign States acting in a private or commercial capacity (de *iure gestionis*). Where the State acted de *iure imperii*, sovereign immunity applies and a State cannot be a party to proceedings before Swiss courts. Where the State acted de iure gestionis, however, sovereign immunity from jurisdiction may be lifted, provided the matter has an 'appropriate' connection with Switzerland (in German: "*Binnenbeziehung*"; in French "*rattachement suffisant*"). Such connections are deemed to be established in cases in which the claim originated or had to be performed in Switzerland, or in cases in which the debtor performed certain acts in Switzerland. However, the mere location of assets or of the claimant's domicile in Switzerland, or the existence of an award rendered by an arbitral tribunal with seat in Switzerland, are not in themselves sufficient to create such a connection.

The Swiss Federal Supreme Court generally does not clearly distinguish between immunity from jurisdiction and immunity from execution. However, in addition to the general requirements mentioned above, assets must be intended for uses incumbent upon the State in its exercise of its sovereign authority in order to be immune from execution under Article 92(1) DEBL. Such assets include buildings used by diplomatic missions, the rolling stock of State railway companies, and cultural centres run by foreign consulates in Switzerland. With respect to funds held by foreign States, the Swiss Federal Supreme Court has made clear that they must be clearly earmarked for specific uses in the public interest in order to enjoy immunity, and therefore must be distinguishable from other assets.

The Swiss Federal Supreme Court's application of Swiss domestic law on immunity from execution is consistent with Article 55 of the ICSID Convention, which provides that the obligation of enforcement in Article 54 shall not "be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution." The Supreme Court did not, however, refer to the provision explicitly, as doing so was not necessary, especially since neither party in the proceedings appears to have invoked it.

In sum, pursuant to the case law, three requirements must be met in order for a Swiss court to determine that a State asset is not immune from execution, namely: (1) the foreign State must have

acted in a private or commercial capacity (de *iure gestionis*); (2) the transaction out of which the claim against the foreign State arises must have a qualified connection to Switzerland; and (3) the asset must not be intended for uses incumbent upon the foreign State in the exercise of its sovereign authority, as such assets are excluded from enforcement proceedings pursuant to Article 92(1) DEBL. The decision at hand seems to show that a foreign State can rely on the same immunities and privileges against the enforcement of an ICSID award as it could against any other foreign decision or award. In a legal landscape with little case law and few statutory rules, this decision brings some welcome guidance in respect of the enforcement of ICSID awards.

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