

Kluwer Arbitration Blog

Facilitated enforcement of arbitral awards in Switzerland through freezing orders

Matthias Scherer (Editor in Chief, ASA Bulletin; LALIVE) · Wednesday, February 20th, 2013

By Matthias Scherer and Catherine A. Kunz

In a recent decision dated 21 December 2012 (5A_355/2012), the Swiss Federal Supreme Court clarified the conditions for obtaining a freezing order for the purpose of enforcing an arbitral award or a foreign court decision. The decision, which will be published in the forthcoming ASA Bulletin 2.2013 with an analysis by Blaise Stucki and Louis Burrus, confirmed the decision of a lower court that a freezing order could be issued based on a foreign arbitral award without any prior decision on its recognition and enforcement (*exequatur*).

The case before the Supreme Court concerned an award rendered by an arbitral tribunal seated in London in relation to a dispute arising out of a share purchase agreement. In its award, the arbitral award ordered A. and a third party to pay approximately USD 5 million to B. and C.

Based on this award, B. and C. sought a freezing order against A's assets in Switzerland. In support of their application, B. and C. produced a certified copy of the award, a copy of a letter from the arbitration institution confirming that the award had been notified to A., and an affidavit from an English lawyer stating that the award had become final and enforceable under English law, the law of the seat of the arbitration. The Swiss courts granted the requested freezing order without a declaration of recognition and enforcement (*exequatur*) having been issued. A. subsequently challenged the freezing order, arguing that prior *exequatur* of the award was a pre-requisite for a freezing order to be granted.

The first instance court admitted A's objection and overturned the freezing order on the grounds that B. and C. had failed to show that the conditions for the recognition and enforcement of the award under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "NY Convention") were met, as they had not produced the original arbitration agreement or a duly certified copy thereof as required under Article IV of the NY Convention.

B. and C. however successfully appealed this decision before the cantonal court of canton Vaud, which confirmed the freezing order. The cantonal court held that no prior *exequatur* was required for the issuance of a freezing order on the basis of an arbitral award or decision rendered by a foreign court. According to the court, an applicant seeking a freezing order is only required to establish *prima facie* that the award is enforceable.

A. then appealed this decision to the Swiss Federal Supreme Court, which rejected it and upheld the decision of the cantonal court, thus confirming the freezing order.

The Supreme Court considered that the issuance of a freezing order only called for a summary examination of the law and *prima facie* evidence of the relevant facts (namely the existence of an enforceable award and the existence in Switzerland of assets belonging to the debtor), and constitutes an interim order which does not have any *res judicata* effect for subsequent enforcement proceedings. The applicant only had to show *prima facie* the absence of any grounds for refusing the enforcement of the award. An in-depth examination of whether or not the award satisfies the conditions of Articles IV and V of the NY Convention will only be conducted if the debtor subsequently challenges the freezing order.

The Supreme Court's decision brings a welcome clarification on the requirements that need to be met in order for a party to obtain a freezing order on the basis of a foreign arbitral award. By stating that no prior exequatur is required for obtaining a freezing order based on a foreign arbitral award, the Supreme Court confirmed Switzerland's pro-enforcement approach. The Supreme Court's decision is good news for parties which have identified assets in Switzerland which they can enforce an award against, and should be taken into consideration by parties with assets which are at risk.

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