

recognition and execution are requested.

Thus, until the end of 2010 Lugano decisions will be enforced in Switzerland based on Lugano I. As of the beginning of 2011, Swiss courts will exclusively apply the Lugano II treaty. Similarly, the new attachment ground of Article 271 paragraph 1 no 6 DEBA, which also comes into force at the beginning of 2011, may only be invoked from then onwards.

Conclusion

Waves of change in the legal field of civil procedure law are advancing towards Switzerland. The new CPA will do away with local procedural rules in civil matters, at least on paper. The revised Lugano Convention will attempt to clarify several issues that have

been contentious over the past decades.

The new attachment reason of Article 271 section 1 no 6 DEBA is likely to bring about significant changes to the Swiss debt enforcement landscape. It will do away with the uncertainties encountered to date when faced with the question of safety measures under Lugano I.

The fact that all enforceable judgments and arbitral awards shall in future entitle a debtor to attach property of a creditor without meeting any further requirements hands potential petitioners a powerful new tool in their attempts to have their outstanding debts paid. Switzerland with its tradition of being a safe-harbour for assets will undoubtedly become the target of increased attachment requests in the future, both from national and foreign creditors.

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Switzerland ratifies the United Nations Convention on Jurisdictional Immunities of States and Their Property

On 16 April 2010, Switzerland became the ninth state to ratify the United Nations Convention on Jurisdictional Immunities of States and Their Property dated 2 December 2004 (the 'Convention'). Although the Convention will not enter into force until 30 states file their instruments of ratification with the Secretary-General of the United Nations, it is already worth reflecting on how it will affect current Swiss practice on the twin issues of sovereign immunity from jurisdiction, ie, the possibility of a foreign state becoming a party to domestic court proceedings, and sovereign immunity from execution, ie, the possibility of the assets of a foreign state being subject to preliminary and/or enforcement measures ordered by a domestic court.

The concept of state immunity

State immunity is a function of state sovereignty. States are sovereign and equal

as a matter of law and they cannot be subjected to the jurisdiction, ie, the *imperium*, of another state. Over time, however, most states have come to agree that exceptions may exist to the rule of sovereign immunity, thus departing from the concept of absolute immunity and opting for restrictive immunity. In fact, most jurisdictions now accept that, under some circumstances, sovereign immunity may be lifted. There is much less consensus, however, as to when and how such circumstances can be said to exist. The practice of national courts in this respect varies widely, depending on each jurisdiction's take on the breadth of the concept of sovereign immunity.

The current Swiss practice on state immunity

In Switzerland, there is very little statutory legislation on state immunity. The matter is mostly governed by case law, in particular that of the Federal Supreme Court. In addition,

Switzerland is also party to a number of international conventions addressing issues of sovereign immunity, albeit with a more limited scope than the Convention.¹

Since the beginning of the 20th century, the Federal Supreme Court has consistently applied the concept of state immunity restrictively. Accordingly, it distinguishes between matters involving foreign states acting in their sovereign capacity, ie, *de iure imperii*, and matters involving foreign states acting in their private capacity, ie, *de iure gestionis*. Where the state acts *de iure imperii*, state immunity applies and the state cannot be a party to proceedings before Swiss courts, nor can its assets be subjected to measures of constraint. Where the state acts *de iure gestionis*, however, sovereign immunity may be lifted, provided the matter has an ‘appropriate’ connection with Switzerland (in German: ‘*Binnenbeziehung*’; in French ‘*rattachement suffisant*’).² A connection is deemed appropriate where the legal obligation arose or was, or had to be, performed in Switzerland. However, the location of the debtor’s assets in Switzerland, the claimant’s domicile in Switzerland or even the existence of an award rendered by an arbitral tribunal seated in Switzerland cannot create such a connection.³

The Federal Supreme Court generally views immunity as a single concept and, as a matter of principle, makes little distinction between immunity from jurisdiction and immunity from execution.⁴ Yet, in addition to the general requirements set out above, immunity from execution requires that the very assets covered by enforcement measures be earmarked for the state’s ‘public’ activities. Under Article 92(1) of the Debt Collection and Bankruptcy Act⁵ ‘assets belonging to a foreign state or a central bank and assigned to tasks which are part of their duty as public authorities’ cannot be subjected to preliminary and enforcement measures by Swiss courts. Such ‘public’ assets include, for example, buildings used by diplomatic missions, the rolling stock of state railway companies and cultural centre/buildings run by foreign consulates in Switzerland. Most importantly, the Federal Supreme Court holds that state immunity only covers monetary assets that are ‘clearly earmarked for concrete goals of public interest, which supposes that they can be distinguished from other assets’.⁶ Under the current regime, therefore, foreign monetary assets are effectively not covered by state

immunity unless the defendant state can prove that they were clearly earmarked for specific public interest projects.

The impact of the Convention on state immunity from jurisdiction in Switzerland

The Convention codifies the principle of restrictive immunity. While recognising the general principle of state immunity, it enumerates a number of exceptions to it. As a result, a state cannot invoke immunity from jurisdiction in respect of proceedings concerning commercial transactions, contracts of employment, personal injuries and damage to property, determination of rights of ownership, possession, and use of property, intellectual and industrial property, participation in companies or other collective bodies, ships owned or operated by a state. This list of exceptions reflects the general distinction between *de iure imperii* and *de iure gestionis* activities and does not depart significantly from current Swiss practice.

It is unclear, however, whether and how the existing requirement for appropriate connection between the claim and Switzerland (*Binnenbeziehung*) will survive the Convention. In fact, the Convention does not mention such requirement for the lifting of sovereign immunity in commercial transactions, whilst providing for even more stringent requirements in, eg, matters of personal injuries and damage to property. It remains to be seen how Swiss courts will adjust their practice to that new system.

The impact of the Convention on state immunity from execution

The Convention appears to depart significantly from current Swiss practice on state immunity from execution.

First, immunity from interim and preliminary measures – ‘pre-judgment measures of constraint’ – is made more or less absolute under the Convention, save for the defendant’s state consent to the lifting of this immunity. Contrary to current Swiss practice, where interim measures can be granted provided the requirements described above are met, the regime foreseen by the Convention only authorises measures of constraint if (i) the State has expressly consented to the taking of such measures or (ii) as post-judgment measures.

Secondly, the Convention also appears to depart from current Swiss practice on

one point of crucial practical importance, namely the immunity from enforcement of monetary assets held by foreign states in Switzerland. Today, the Federal Supreme Court holds that sovereign immunity does not cover monetary assets, except if they have been earmarked for ‘public’ goals. On the contrary, Article 19(c) of the Convention provides that sovereign immunity covers all assets, except if they have been earmarked for ‘private’ goals. Therefore, current Swiss practice and the Convention approach the issue from opposite perspectives. In effect, the Convention will reverse the *de facto* presumption in favour of ‘private’ affectation of monetary assets that currently appears to exist in Switzerland. While it is now up to the defendant State to show that monetary assets have been earmarked for a ‘public’ goal and are, as such, covered by sovereign immunity from enforcement, under the Convention, it will arguably be up to the claimant to establish that such assets have been earmarked for a ‘private’ goal and can therefore be seized or otherwise subjected to enforcement measures.⁷ Yet, in practice it is often impossible to say whether specific funds have been earmarked to any specific goal at all, especially where they take the form of indiscriminate bank accounts with large sums of money. By requiring individual claimants to establish that specific amounts of money were earmarked by the defendant state for given projects of a ‘private’ nature – a near-impossible feat in many cases – the Convention could complicate claimants’ quest to obtain enforcement over monetary assets held by foreign states in Swiss banks.

Finally, it should also be noted that Article 21 of the Convention goes even further by providing that funds held by foreign central banks and other ‘monetary authorities’ cannot, in any event, qualify as assets earmarked to ‘private’ activities, thus preventing any enforcement measures against any monetary assets held by a foreign central bank in Switzerland, irrespective of whether such monies might have been designed to be used in the context of a ‘private’ venture of the State concerned.

Conclusion

The Convention is a welcome step towards harmonising the law on sovereign immunity at a global level. Switzerland, as a host-state to many international conferences and organisations, has a particular interest in a

strong legal framework in this field because of the disproportionately large scope of activities conducted by foreign State on its territory. Yet, although the Convention is mostly in line with existing Swiss practice, it remains unclear how Swiss courts will react to the seemingly sweeping changes brought about by the Convention on certain specific points. The Convention has the potential to replace well-established notions of Swiss law on state immunity, eg, *Binnenbeziehung*. More importantly, it may have a significant impact on how private claimants can enforce judicial decisions on monetary assets held by foreign states in Switzerland. This was hailed by the Swiss Government as a major improvement but it remains to be seen how Swiss courts will react to the new framework set up by the Convention. New developments may certainly be expected on the issue of immunity from execution of state monetary assets held in Switzerland and should be followed closely.

Notes

- * LALIVE Attorneys-at-Law, Geneva. The views expressed in this article are those of the authors alone. They do not necessarily reflect the views of LALIVE or of its clients. The authors can be reached at sgiroud@lalive.ch and nleroux@lalive.ch. They would like to thank Ndanga Kamau for her assistance in editing the text.
- 1 See, eg, the 1972 European Convention on State Immunity and the 1972 Additional Protocol to the Convention for the Establishment of a European Court for State Immunity. Switzerland is also a party to various multilateral instruments which may have a bearing on the regime of immunity from jurisdiction such as the 1961 Vienna Convention on Diplomatic Relations, the 1963 Vienna Convention on Consular Relations and the 1958 Geneva Convention on the High Seas.
 - 2 Federal Supreme Court, ATF 106 Ia 148.
 - 3 Federal Supreme Court, ATF 106 Ia 148 and Decision 5A.261/2009 of 1 September 2009.
 - 4 Federal Supreme Court, ATF 124 III 322.
 - 5 Debt Collection and Bankruptcy Act (in French: *Loi fédérale du 11 avril 1889 sur la poursuite pour dettes et la faillite*, LP, RS 281.1).
 - 6 Federal Supreme Court, ATF 124 III 322, cons 5.2.3.
 - 7 Except if the defendant state consents (or had consented) to the lifting of the immunity and save the case of unspecified ‘exceptional’ circumstances – see Article 19 of the Convention.



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