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Enforcement: Swiss courts may dispense with the requirement of a full certified translation of an award under Art. IV(2) of the New York Convention

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In its recent decision dated 2 July 2012 in case 5A_754/2011, the Swiss Supreme Court ruled for the first time on the issue of whether, pursuant to Art. IV(2) of the New York Convention (“NYC”), a full translation of an award must be produced by parties seeking recognition and enforcement in every case, without exception, or whether courts can dispense with the requirement in certain circumstances.

In the case before the Supreme Court, the party seeking enforcement had filed a certified German translation of only the dispositive part of the English language award, along with a non-certified translation of the arbitral tribunal’s decision on costs. The cantonal court decided that it had a sufficient command of the English language that it could dispense with a full translation for reasons of procedural economy, especially since a translation of the disputed

decision on costs, which had given rise to an objection to enforcement, had been produced.

The appellant contended that Art. IV(2) NYC required a party seeking enforcement to produce a certified translation of the full award even if the court considered that it had sufficient knowledge of the original language of the award. It went on to argue that a comprehensive translation of the full award was necessary for an examination of its objection to enforcement on the basis that that the award was contrary to Swiss public policy (Art. V(2)(b) NYC).

The Supreme Court began its analysis with a short review of the doctrine, noting that some commentators took the position that Art. IV(2) NYC was binding on the courts, while others considered that courts could dispense with the requirement of a full translation. The Supreme Court also considered jurisprudence on Art. IV(2) NYC from a number of jurisdictions, contrasting a decision by the highest court in Austria concluding that a translation of the entire award will always be required, with the decisions of courts in other countries dispensing with the requirement of a translation altogether. Among these were the decisions of Dutch courts finding that they had sufficient knowledge of English to fully understand the content of the awards before them, as well as that of a Norwegian court which relied on the fact that translations were expensive and could distort the original wording of an award. The Supreme Court also noted the decision of a German court which found a party's request for a translation of an award into English to be unwarranted on the grounds that the party had signed the contract and conducted the arbitration in English.

The Supreme Court then turned to the exercise of interpreting Art. IV(2) NYC, noting that the purpose of the NYC was to facilitate the recognition and enforcement of foreign arbitral awards. It therefore considered, in line with its previous jurisprudence on the NYC, that courts had to interpret the Convention in an enforcement-friendly manner by adopting a pragmatic, flexible and non-formalistic approach. According to the Supreme Court, the purpose of Art. IV(2) NYC is to ensure that the award at issue is presented to a court in a form which it can sufficiently understand in order to be able to rule on the various grounds for refusal of recognition or enforcement set out in Art. V NYC. Given that Swiss courts are, nowadays, as a rule, not dependent on a translation of an English award, the Supreme Court considered that the purpose of Art. IV(2) NYC is met even in the absence of such a translation. Therefore, the Supreme Court considered that to interpret the provision strictly to require a full translation of an English award would be contrary to the spirit and purpose of the Convention. It concluded that the partial translation produced by the party seeking enforcement was sufficient to fulfil the requirements of Art. IV(2) NYC.

The Supreme Court's decision is a welcome step forward in making the process of seeking recognition and enforcement of English language awards before the Swiss courts even less costly and burdensome. However, the decision leaves unclear what exactly a party seeking recognition and enforcement of an award in Switzerland should produce with its application. In particular, the Supreme Court left open whether it was necessary to produce at least a partial translation of the most important parts of an English language award, such as the dispositive, as had been done in the case before it. The Supreme Court's reasoning suggests that the purpose of Art. IV(2) NYC would be met even if only the English original of the award is filed, although this is not clearly stated in its decision. In addition, while many courts in Switzerland may have sufficient command of the English language to make a translation unnecessary, some may not. In such cases, the purpose of Art. IV(2) NYC as set out by the Supreme Court could not be said to be met in the absence of a full or partial translation. Lastly, the decision does not address to what extent its reasoning could apply to awards in widely-used languages other than English (and the three official languages of Switzerland, namely German, French and Italian), such as Spanish or Russian.

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It should be noted that the award creditor offered a full translation of the award before all three court instances, if the respective court deemed it necessary.

The Supreme Court's ruling essentially puts it into the court of enforcement's discretion whether it requires a translation or not (albeit with the Supreme Court strongly suggesting that Swiss courts should know English) and does not make a translation mandatory from the outset.

Walder Wyss acted for the party seeking enforcement.

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