

SWITZERLAND



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Enforcing arbitral awards against foreign State assets in Switzerland – an effective tool?

International companies and their counsel are often relieved to hear that a dispute involving a foreign State can be submitted to arbitration. Local courts in many jurisdictions apply specific procedural or substantive rules of administrative or public law to disputes involving their Government. Arbitrating the dispute is a welcome relief because it deprives the opposing Government of the privileges normally associated with its public and sovereign nature – or does it?

True, arbitration clauses are generally considered to operate as waivers of a State's immunity from jurisdiction. However some practitioners tend to forget that a second, more insidious, kind of immunity exists – *immunity from execution*.

Immunity from execution derives from public international law and covers a State's property located on another State's territory and related to the performance of a mission of public service of the owner State.³ Such property cannot be made subject to enforcement (execution) measures by local courts.

The position of Swiss law on the issue is more than relevant: for obvious reasons, practitioners faced with defaulting States are often likely to discover that their opponent holds at least some financial assets on bank accounts in Switzerland. Other 'popular' solutions include *e.g.* seizing funds held in trust for foreign Governments by international organizations, such as the International Air Transport Association (IATA) in Geneva.

Swiss law imposes three criteria on would-be enforcers, which are well worth keeping in mind before embarking on the recognition and enforcement process, especially where the assets concerned consist of bank accounts.

First, the claimant's claim in the arbitral proceedings must be linked to the respondent State's *iure gestionis* (*i.e.* commercial) activity, and not *iure imperii* (*i.e.* public) activity.⁴ The distinction between *iure gestionis* and *iure imperii* is well-known in most legal systems and Swiss law is no different to other systems in that respect.

³ See *e.g.* I. Pingel-Lenuzza, *Les immunités des Etats en droit international*, Bruylant, 1997, pp. 369-370.

⁴ See ATF 134 III 122, para. 5.2.1.

Second, and more specifically “Swiss”, the claim on which the award is based must derive from a legal relationship having “sufficient connections” with Switzerland.⁵

“Sufficient connections” either means that (i) the underlying obligations have been created, or were to be performed, in Switzerland, or (ii) the respondent State has undertaken actions which may locate the place of performance in Switzerland.⁶ The mere presence in Switzerland of the foreign State’s property or of the claimant’s domicile⁷ is not enough.

Third, and most importantly, the immunity from execution only covers assets “designated (*affectés*) for tasks incumbent on [State authorities] as holders of public authority.” (Article 92(1) of the Federal Statute on Debt Enforcement and Bankruptcy).

This is problematic, especially where, as often in practice, assets are present in the form of monies deposited on bank accounts. How is one to determine whether such monies, which by definition are fungible, are designated for public or private ends?

The usual solution is to apply a presumption. Traditional international law did not contain any such presumption but most States’ generally tend to admit a presumption according to which foreign States’ property has a public character. It is then usually incumbent upon the private party seeking enforcement to establish that the monies were destined for private use – often a very difficult task.

The Swiss solution is clearly more in favour of private opponents of States in arbitration proceedings. The Swiss Supreme Court recently held that:

“Liquidities, whether in cash or in the form of debts against a bank, may only be withdrawn from the seizure when they have been clearly affected to concrete goals of public utility, which entails their separation from other property.”⁸

In order to evade enforcement, it is therefore usually up to the respondent State to establish that the monies deposited on its Swiss bank account(s) have been clearly separated and designated for public ends – an often arduous, if not downright impossible, task for the defendant State.

This Swiss presumption of private designation may be contrary to public international law (in particular the yet not-in-force United Nations Convention on Jurisdictional Immunities of States and Their Property), and may be reversed in the future. In the meantime though, it remains a powerful argument in favour of enforcing arbitral awards against States in Switzerland. To the extent that they can show that the underlying transaction had some connection with Switzerland, practitioners will avoid the hassle of having to prove the “private” character of the assets they want to seize, unlike in most other jurisdictions – and be more likely to meet success in their endeavours against foreign sovereign Governments.

⁵ Free translation, ATF 134 III 122, para. 5.2.2.

⁶ *Ibid.*

⁷ See ATF 82 I 75 and ATF 106 Ia 142, para. 5.

⁸ ATF 134 III 122, para. 5.2.3, restating ATF 11 Ia 62, para. 7b. This latter decision takes, as an illustration of “concrete goals”, the example of maintenance costs of an embassy. See also ATF 86 I 23, para. 5 and D. Favre, *L’immunité de juridiction et d’exécution dans la jurisprudence du Tribunal fédéral*, Mélanges H.P. Walter, p. 483 (doc. 5).