

Bankruptcy of party in ongoing arbitration does not affect enforceability of award (Swiss Supreme Court)

by *Practical Law Arbitration*, with *Schellenberg Wittmer Ltd*

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In *Decision 5A_910/2019*, the Swiss Supreme Court considered that an award rendered in a foreign arbitration may be recognised and enforced in Switzerland, even if the award was rendered after a party went bankrupt. The subject matter of the arbitration does not become non-arbitrable following a party's bankruptcy, if the arbitration was initiated before bankruptcy.

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In a recently published decision, the Swiss Supreme Court dismissed an appeal against a lower court judgment recognising and enforcing an LCIA award.

The root of the dispute was an agreement between a third-party funder and a Swiss company for the financing of an ICC arbitration in Switzerland. The Swiss company terminated the funding agreement and the third-party funder initiated LCIA arbitration in England challenging the validity of that termination. During the LCIA proceedings, the Swiss company went bankrupt and the Swiss bankruptcy authorities assigned the right to defend in the arbitration to the Swiss company's former director (A). In its final award, the tribunal found that the funding agreement had not been terminated and ordered A to pay the costs of the arbitration.

To collect on the costs award, the third-party funder initiated debt enforcement proceedings against A in Switzerland. A opposed the preliminary recognition and enforcement of the award and filed appellate proceedings, arguing that the dispute was no longer arbitrable (*Article V(2)(a), New York Convention*) following the Swiss company's bankruptcy.

The Supreme Court dismissed the appeal. Among other things, the court highlighted that any dispute involving an "economic interest" is arbitrable from a Swiss law point of view. The notion of economic interest is understood in a broad sense and includes all claims with a financial value for at least one party. Although matters governed by Swiss insolvency law generally involve an economic interest, they cannot be settled by arbitration if they are closely connected with the administration of the insolvency proceedings, as these are matters over which the public authorities have exclusive jurisdiction. However, while the court acknowledged that a party's bankruptcy may change the nature of a dispute, it held that it does not necessarily affect the arbitrability of the substance matter and bar the enforcement of the award. Whereas Swiss law provides an automatic suspension of litigation in Switzerland at the time of bankruptcy, this principle does not apply to foreign litigation or arbitration. The court considered that, in light of its prior case law on foreign litigation, the recognition and enforcement of a foreign award, made after a party was declared bankrupt, is not per se excluded, provided the arbitration was initiated prior to bankruptcy. The arbitration's subject matter does not suddenly become non-arbitrable.

Case: *5A_910/2019 (Swiss Supreme Court) (1 March 2021)*.

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