

Swiss Supreme Court finds nexus to Switzerland required for enforcement of ICSID award against foreign state assets

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

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In *Decision 5A_406/2022*, the Swiss Supreme Court rejected an appeal against the decision of a cantonal court that had refused to attach assets of the Spanish state that were located in Switzerland based on an ICSID award. The court found that a sufficient nexus with Switzerland was required, but that such a nexus did not exist in this case.

Speedread

Anya George and Leticia Morais, Schellenberg Wittmer Ltd

In a recently published German-language decision slated for official publication, the Swiss Supreme Court upheld the decision of a cantonal court which rejected a request to attach assets allegedly belonging to Spain and located in Switzerland in aid of enforcement of an ICSID award. The underlying ICSID award was one of many arbitral awards holding Spain liable under the Energy Charter Treaty for reforms to its subsidy scheme for renewable energy installations.

In its decision, the Swiss Supreme Court first clarified that a party seeking an attachment based on an ICSID arbitral award need not obtain a prior declaration of enforceability of the award by a Swiss cantonal court.

Second, the Swiss Supreme Court reaffirmed its case law with regard to the enforcement in Switzerland of awards against foreign state assets, according to which an attachment requires that:

- The foreign state was acting in a private capacity ("*iure gestionis*") rather than in a sovereign capacity ("*iure imperii*") in the legal relationship underlying the attachment claim.
- The legal relationship in question has a sufficient nexus with Switzerland.

The court concluded that these requirements also apply when enforcement against foreign state assets is sought on the basis of an ICSID arbitral award. In the present case, the investor was not able to demonstrate a sufficient nexus between the legal relationship and Switzerland.

This is the first time that the Swiss Supreme Court has confirmed that the requirement of a nexus with Switzerland, which stems from case law relating to the enforcement of awards under the New York Convention, applies when enforcement is sought against the assets of a foreign state based on an ICSID arbitral award. (*Decision 5A_406/2022 (17 March 2023)*).

Background

ICSID Convention

Article 54(1) of the ICSID Convention requires each contracting state to recognise as binding any award rendered under the ICSID Convention and enforce in its territory the pecuniary obligations imposed therein as if it were a final judgment of one of its own domestic courts.

Pursuant to Article 54(2) of the ICSID Convention, a party seeking recognition or enforcement of an award in the territory of a contracting state need only submit a copy of the award certified by the Secretary General of ICSID to obtain recognition and enforcement of the award.

Article 54(3) of the ICSID Convention states that execution of awards shall be governed by the laws concerning the execution of judgments in force in the state in whose territory such execution is sought.

Article 55 of the ICSID Convention provides for a contracting state's right to apply its own law on state immunity from execution.

Swiss court practice regarding enforcement against foreign states

According to the established case law of the Swiss Supreme Court, enforcement against a foreign state's assets requires that:

- The foreign state was not acting in a sovereign capacity ("*iure imperii*") but rather in a private or commercial capacity ("*iure gestionis*") in the legal relationship underlying the claim for which enforcement is sought.
- The said legal relationship presents a sufficient nexus with Switzerland.

Moreover, assets belonging to a foreign state that are located in Switzerland and serve sovereign purposes are excluded from enforcement.

For further information on arbitration, and enforcement of awards, in Switzerland, see [Practice notes, Arbitration in Switzerland](#) and [Enforcing awards in Switzerland](#).

Facts

In April 2022, an investor filed an application with the Regional Court of Bern-Mittelland requesting that several assets allegedly belonging to Spain and located in Switzerland, including bank accounts, real estate, trademarks and patents, be seized under a Swiss attachment order. The request was made on the basis of an ICSID award, which was one of the many awards holding Spain liable under the Energy Charter Treaty over its renewable energy reforms.

The court declared the request inadmissible, whereupon the investor lodged an appeal with the Higher Court of the Canton of Bern, which was unsuccessful.

The Higher Court of the Canton of Bern concluded that the investor was required to obtain a declaration of the ICSID award's enforceability from a cantonal court before it could seek the attachment. It also found that the investor had failed to demonstrate that the matter presented a sufficient nexus with Switzerland. Therefore, it denied enforcement of the ICSID award.

The investor appealed this decision to the Swiss Supreme Court.

Decision

The Swiss Supreme Court rejected the investor's appeal.

The court confirmed that the holder of an ICSID award need not obtain a separate *exequatur* decision prior to seeking an attachment order in Switzerland. The court noted in this regard that, pursuant to article 54(1) of the ICSID Convention, each contracting state must recognise as binding any award rendered under the ICSID Convention and enforce the pecuniary obligations imposed therein in its territory as if it were a final judgment of one of its national courts. Accordingly, pursuant to article 54(2) of the ICSID Convention, the interested party need only submit a copy of the award certified by the ICSID's Secretary General to obtain recognition and enforcement of the award in the territory of a contracting state. The enforcement of an ICSID award is therefore to be carried out by way of debt collection proceedings and does not require cantonal recognition proceedings. Therefore, apart from verifying the authenticity of the award, Swiss authorities may not review an ICSID award with regard to general recognition requirements and, in particular, are precluded from carrying out a public policy review.

The court reiterated its case law according to which an attachment against a foreign state's assets requires that the foreign state was not acting in a sovereign capacity ("*iure imperii*") but rather in a private capacity ("*iure gestionis*") in the legal relationship underlying the claim for which attachment of assets is sought, and that the underlying legal relationship presents a sufficient nexus with Switzerland. Moreover, assets belonging to a foreign state located in Switzerland that serve sovereign purposes are excluded from enforcement proceedings. The court also pointed to a recent case in which it had left open whether the requirement of a nexus is an issue going to the immunity of foreign states from the jurisdiction of Swiss courts, or to the international jurisdiction of Swiss courts as such, as in any event, the nexus requirement amounted to a procedural prerequisite absent which the court must declare the enforcement request inadmissible (see [Legal update, Enforcement of award against state not possible where no sufficient link to Switzerland existed \(Swiss Supreme Court\)](#)).

In the present case, the court had to consider, for the first time, whether the requirement of a sufficient nexus with Switzerland also applies if enforcement of an award against foreign state assets is based on the ICSID Convention, rather than the New York Convention. The petitioner argued that this was not the case, because the requirement in article 54(1) of the ICSID Convention, that states parties treat ICSID awards as they would the decisions of domestic courts, effectively precludes the requirement of a nexus. The court rejected this argument, pointing out that requiring a nexus to Switzerland did not mean that Swiss courts had the power to review the award as such.

The court also rejected the petitioner's argument that the nexus requirement breaches article 54(3) of the ICSID Convention, which provides that the enforcement of ICSID awards is governed by the rules that apply to the enforcement of judgments in the state where enforcement is sought. The court held that the requirement of a nexus is a rule of Swiss procedural law and therefore a rule of the state where enforcement is sought. It also pointed to article 55 of the ICSID Convention and to the many authors who have held that the requirement of a Swiss nexus is in line with the contracting state's right to apply its own law on state immunity from execution.

The court observed that there is a sufficient nexus to Switzerland if the legal relationship underlying the award for which the attachment is sought was established in Switzerland, if it is to be fulfilled in Switzerland or if the foreign state has at least performed acts in Switzerland so as to establish Switzerland as a place of performance. However, it is not sufficient that assets of the foreign state are located in Switzerland or that the claim was awarded by an arbitral tribunal with its seat in Switzerland. In the present case, the investor was not able to demonstrate a sufficient nexus of the matter with Switzerland.

Comment

This is the first time that the Swiss Supreme Court has confirmed that the requirement of a nexus with Switzerland, which stems from case law relating to the enforcement of awards under the New York Convention, applies when enforcement is sought against the assets of a foreign state based on the ICSID Convention.

The court relied on the fact that the ICSID Convention expressly reserves the contracting states' right to apply their own rules on enforcement and state immunity from execution, and essentially found that the Swiss nexus requirement falls within the ambit of those rules. The decision is in line with what appears to be the majority view amongst Swiss legal commentators.

It will, in many cases, be difficult for the party seeking enforcement against foreign state assets to demonstrate the existence of a Swiss nexus. Interestingly, in a decision handed down by the Swiss Supreme Court only five days after the case discussed here, such a nexus was found to exist (*Decision 5A_469/2022*). In that case, the state of Uzbekistan had signed a document declaring that it recognised a claim arising from an arbitral award against an Uzbek company as a debt and that it would pay that debt in case the company were to default on its obligations. The document was signed on Uzbekistan's behalf by a representative located in Switzerland and expressly provided that the creditor was entitled to attach the assets of the Republic of Uzbekistan located in Switzerland.

Case

[Decision 5A_406/2022 \(17 March 2023\)](#) (German language).

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