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## Recognition and Enforcement of Foreign Arbitral Awards Requirements Pursuant to the New York Convention

With only two instances in the last twenty years, in which enforcement of a foreign award (i.e. awards rendered in international arbitral proceedings conducted outside Switzerland) was denied, Switzerland's track record is quite impressive. It qualifies as an attractive pro-enforcement jurisdiction, since it has a large volume of financial assets held by foreign parties in Swiss banks.

### 1. Applicable Law

According to Article 194 of the Swiss Private International Law Act, the recognition and enforcement of a foreign arbitral award is governed by the UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards, concluded in New York on June 10, 1958 ("NY Convention"). Since its ratification in Switzerland in 1965, the NY Convention applies directly with respect to any arbitral award rendered by an arbitral tribunal seated in a country other than Switzerland, even if that country is not a contracting state to the NY Convention.

At the heart of the NY Convention is the undertaking of the contracting states to recognize and enforce foreign arbitral awards. Each state, including Switzerland, has to recognize and enforce foreign arbitral awards in accordance with both the procedural rules of its jurisdiction and the conditions laid down in the NY Convention.

### 2. Proceedings

Proceedings for the recognition and enforcement of foreign arbitral awards differ depending on (i) whether the losing party of the foreign arbitral award (the "debtor") has domicile in Switzerland or not, and (ii) whether the award adjudicates a monetary claim or orders specific performance, restitution of a chattel, or an award or right in real property.

## 2.1 Recognition and Enforcement of Foreign Monetary Arbitral Awards against Debtors with Domicile in Switzerland

Foreign arbitral awards adjudicating a sum of money are usually enforced in accordance with the provisions of the Federal Debt Collection and Bankruptcy Act of April 11, 1889 (“DCB Act”). The party awarded a sum of money (the “creditor”) can commence debt collection proceedings by requesting the issuance of a summons to pay (*“Zahlungsbefehl”* / *“commandement de payer”* / *“pre-cetto esecutivo”*) from the competent debt collection office (*“Betreibungsamt”* / *“office des poursuites”* / *“ufficio d’esecuzione”*), against the debtor.

Upon receipt of the summons to pay, the debtor can either pay the requested amount within 20 days or object within 10 days. If the debtor objects to the summons to pay (*“Rechtsvorschlag”* / *“opposition”* / *“opposizione”*), the creditor needs to file an action in summary proceedings with the competent cantonal state court in order to set aside the objection and have the foreign arbitral award recognized and declared enforceable in Switzerland.

If the creditor in his complaint only requests to set aside the objection, the court will decide the recognition and enforceability of the foreign arbitral award incidentally, i.e. the recognition and declaration of enforceability will not be part of the decision. If the creditor wants to have the foreign arbitral award recognized and declared enforceable in the judgment’s decision a separate motion (*“Rechtsbegehren”* / *“conclusions”* / *“domanda”*) is required in the complaint. We recommend adding such separate motion in cases where the arbitral award contains non-monetary decisions, e.g. a declaration that a specific contract is valid (which will allow the creditor to pursue any future claims).

The cantonal state court will declare the monetary arbitral award enforceable and set aside the objection, if

- (i) the debtor cannot successfully invoke the statute of limitations or prove that since the arbitral award was rendered the debt has been discharged or deferred;
- (ii) the creditor can prove that the requirements of Article IV NY Convention are fulfilled;
- (iii) the debtor cannot prove that one of the grounds for refusal listed in Article V(1) NY Convention applies; and
- (iv) there is no ground for refusal pursuant to Article V(2) NY Convention.

The cantonal state court’s decision is subject to appeal to the upper state court of the canton where the collection proceedings have been commenced. The decision of the upper cantonal state court is subject to appeal before the Swiss Federal Supreme Court.

Once the objection is set aside, the creditor can proceed with the debt collection proceedings and request the seizure and liquidation of the debtor’s assets.

## **2.2 Recognition and Enforcement of Foreign Monetary Arbitral Awards against Debtors without Domicile in Switzerland**

If the debtor is not domiciled but has assets in Switzerland, the procedure is the same as shown in para. 2.1 before, except that, as a preliminary step, the creditor must first obtain a freezing order pursuant to the DCB Act from the cantonal state court where the assets are located. Whereas this preliminary step is necessary against debtors without domicile in Switzerland, a creditor that is afraid his debtor with domicile in Switzerland might get rid of his Swiss assets, can also first apply for a freezing order to secure the debtor's assets.

During such a freezing procedure, whether ex parte or followed by inter partes proceedings, the court will only review the compliance of the foreign arbitral award with the NY Convention on a prima facie basis (likelihood of a debt). Once the creditor obtains the freezing order, the award may be enforced against those assets through the normal debt collection procedure under the DCB Act as if the debtor was domiciled in Switzerland.

## **2.3 Recognition and Enforcement of Foreign Non-monetary Arbitral Awards**

Foreign non-monetary arbitral awards will be recognized and declared enforceable subject to the provisions of the Swiss Civil Procedure Code.

The party awarded a non-monetary claim must file an application for enforcement with the competent cantonal state court. The application has to show that all requirements for the enforcement of the foreign arbitral award are fulfilled, i.e. in particular, that all the prerequisites of the NY Convention are satisfied.

## **3. Requirements of Article IV NY Convention**

Article IV NY Convention sets out the formal requirements for an application to have an arbitral award recognized and declared enforceable by the courts.

In accordance with Article IV(1) NY Convention, the debtor shall supply with its application for recognition and enforcement:

- (i) the duly authenticated original award or a duly certified copy thereof; and
- (ii) the original arbitration agreement referred to in Article II NY Convention or a duly certified copy thereof.

If the arbitral award is made in a language other than the official language of the competent cantonal state court, the creditor needs to provide a translation of these documents certified by an official or sworn translator or by a diplomatic or consular agent (Article IV(2) NY Convention).

#### 4. Grounds for Refusal

Under the NY Convention enforcement of arbitral awards will only be denied, if one or more of the grounds for refusal set out in Article V are established, namely:

- (i) Invalidity of the arbitration agreement as defined in Article II(2) NY Convention (Article V(1)(a) NY Convention);
- (ii) Incapacity of a party (Article V(1)(a) NY Convention);
- (iii) Violation of due process, e.g. lack of proper notice of the proceedings or inability to present one's case (Article V(1)(b) NY Convention) pursuant to the law of the jurisdiction where recognition is sought, i.e. Switzerland (note: this ground for refusal does not prevent the recognition and enforcement of an arbitral award in default where the debtor failed to appear in the proceedings despite having been properly served);
- (iv) Award rendered outside the scope of the arbitration agreement or beyond the claims submitted to the arbitral tribunal (Article V(1)(c) NY Convention);
- (v) Violation in the composition of the arbitral tribunal or of the applicable arbitral procedure (Article V(1)(d) NY Convention);
- (vi) Non-binding or suspended award in the state of the arbitration seat (Article V(1)(e) NY Convention);
- (vii) Inarbitrability of the dispute (Article V(2)(a) NY Convention); and
- (viii) Incompatibility with public policy (Article V(2)(b) NY Convention).

Within this exhaustive list of grounds for refusal the NY Convention distinguishes between two types of grounds for refusal:

- (i) those to be examined further to the specific request of the defendant, i.e. the debtor (Article V(1) NY Convention); and
- (ii) those to be examined at the court's own inducement (Article V(2) NY Convention).

In cases where the debtor failed to raise any objections or reservations during the arbitration proceedings, the debtor will not subsequently be entitled to raise the related grounds for refusal during recognition and enforcement proceedings, in particular with respect to the defenses related to invalidity of the arbitration agreement, due process and violation of procedural rules.

## 5. Conclusion

To have a foreign arbitral award recognized and declared enforceable against a debtor (i.e. the losing party of the foreign arbitral award) with domicile in Switzerland, the creditor (i.e. the party awarded a sum of money) must

- (i) **request the issuance of a summons to pay** from the competent debt collection office against the debtor;
- (ii) **file an action to set aside the objection** in summary proceedings with the competent cantonal state court, if the debtor objects within 10 days upon receipt of the summons to pay; and
- (iii) proceed with the debt collection proceedings by **requesting the seizure and liquidation of the debtor's assets** once the objection is set aside and the arbitral award is recognized and declared enforceable by the cantonal state court (or the upper state court and the Swiss Federal Supreme Court upon appeal).

If the debtor has no domicile in Switzerland, the creditor must

- (i) first **obtain a freezing order** from the competent cantonal state court that will only review the compliance of the foreign arbitral award with the NY Convention on a prima facie basis (likelihood of the debt); and
- (ii) **enforce the award** against the frozen assets through the debt collection procedure as if the debtor was domiciled in Switzerland.

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