

# Enforcement against State Assets and Execution of ICSID Awards in Switzerland: How Swiss Courts Deal with Immunity Defences

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How to turn a judgment or an award into tangible assets can often be a conundrum. This is particularly the case in the event of enforcement of a decision against assets of a State or its instrumentalities, including the execution of awards rendered on the basis of the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “ICSID Convention”). In fact, the State whose assets are targeted will invariably and often successfully raise immunity defences.

Recent decisions of the Swiss Federal Supreme Court provide some guidance on the treatment of such immunity defences. In two decisions dated 12 July 2010<sup>1</sup> and 22 November 2011,<sup>2</sup> the Swiss Federal Supreme Court examined the immunity of State assets entrusted to an International Organisation and the threshold test to examine whether such immunity privilege was abusive. In a more recent decision issued on 23 November 2011,<sup>3</sup> the Swiss Federal Supreme Court considered for the first time Swiss law on immunity in relation to enforcement and execution of ICSID awards.

Before turning to the facts of the cases considered and the lessons that can be drawn from them, it is useful to briefly recall Swiss rules on State immunity as well as the rules governing the execution of ICSID awards.

## Swiss Law on State Immunity

There is very little Swiss domestic legislation on the issue of State immunity. The matter is mostly governed by case law, in particular that of the Swiss Federal Supreme Court. In addition, Switzerland is also party to a number of international conventions addressing issues of sovereign immunity.<sup>4</sup>

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<sup>1</sup> ATF 136 III 379, 5A\_360/2010 dated 12 July 2010, ASA Bull 4/2012, p. 825.

<sup>2</sup> ATF 137 I 371, 2C\_764/2011 dated 22 November 2011.

<sup>3</sup> Decision 5A\_681/2011 dated 23 November 2011 – The published decision is redacted but mentions the date of the ICSID award and the defendant State, ASA Bull. 4/2012, p. 819.

<sup>4</sup> Switzerland is party to a number of international treaties that apply directly such as the 1972 European Convention on State Immunity, the 1972 Additional Protocol to the Convention for the

Since the beginning of the 20<sup>th</sup> century, the Swiss Federal Supreme Court has consistently applied the concept of State immunity restrictively.<sup>5</sup> Accordingly, it distinguishes between matters involving foreign States acting in their sovereign capacity, i.e. *de iure imperii*, and those involving foreign States acting in a private capacity, i.e. *de iure gestionis*. Where the State acted *de iure imperii*, sovereign immunity applies and the State cannot be a party to proceedings before Swiss courts.

On the other hand, where the State acted *de iure gestionis*, sovereign immunity from jurisdiction may be lifted, provided the matter has an ‘appropriate’ connection with Switzerland (in German: “*Binnenbeziehung*”; in French “*rattachement suffisant*”).<sup>6</sup> This threshold requirement has been developed by the Swiss Federal Supreme Court.<sup>7</sup> Such connections are deemed to exist where the claim originated or had to be performed in Switzerland, or when the debtor performed certain acts in Switzerland. Importantly, neither the mere location of assets or the claimant’s domicile in Switzerland, nor even the existence of an award rendered by an arbitral tribunal seated in Switzerland can create such a connection.<sup>8</sup>

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Establishment of a European Court for State Immunity, as well as to the 2004 UN Convention on Jurisdictional Immunities of States and Their Property (“UN Immunity Convention”), ratified by Switzerland on 16 April 2010 (but with entry into force only once ratified by 30 States, Switzerland being the ninth contracting party). Although the UN Immunity Convention is not yet in force, it has already served as the basis for recent decisions as it is considered as a codification of customary international law regarding immunity from jurisdiction (ATF 136 III 575, 5A\_286/2010 dated 7 October 2010; Decision 4A\_542/2011 dated 30 November 2011). Switzerland is also a party to special multilateral instruments which have a bearing on the regime of immunity from jurisdiction such as the 1961 and 1963 Vienna Conventions on Diplomatic Relations, respectively, on Consular Relations or the 1958 Convention on High Seas. Furthermore, Switzerland is the home of many international organisations with which it has entered into headquarters agreements, most of them containing provisions relating to immunity. The 2007 Federal Act on the Privileges, Immunities and Facilities and the Financial Subsidies granted by Switzerland as a Host State (the “Host State Act”) as well as its corresponding Ordinance set out *inter alia* the possible beneficiaries of privileges, immunities, and facilities within the framework of international law.

<sup>5</sup> See generally Circular N° A 30 of the Surveillance Authority of the Canton of Bern to the Debt Collection Offices of the Canton of Bern regarding the Transmission of the Letter of the Federal Department of Justice and Police of 8 July 1986 on the Attachment of Foreign State Assets, B1SchK 1986, p. 134. See also Jolenta Kren Kostkiewicz, *Staatimmunität im Erkenntnis- und im Vollstreckungsverfahren nach schweizerischem Recht*, Bern 1998.

<sup>6</sup> ATF 106 Ia 142 (*Socialist People’s Libyan Arab Jamahiriya v. Libyan American Oil Company (LIAMCO)*).

<sup>7</sup> Michael Schneider & Joachim Knoll, *Enforcement of Foreign Awards against Sovereigns – Switzerland*, in: *Enforcement of Arbitral Awards against Sovereigns* (Doak Bishop edit.), New York 2009, p. 344.

<sup>8</sup> ATF 106 Ia 142 (*Socialist People’s Libyan Arab Jamahiriya v. LIAMCO*); ATF 5A.261/2009 of 1<sup>st</sup> September 2009.

The Swiss Federal Supreme Court generally views immunity as a single concept and, as a matter of principle, makes little distinction between immunity from jurisdiction and immunity from execution.<sup>9</sup> Yet, in addition to the general requirements set out above, immunity from execution is admitted if the assets targeted by execution measures are affected to the State's 'public' activities.<sup>10</sup> Under Article 92(1)(11) of the Debt Collection and Bankruptcy Act (the "DCBA"), "*assets belonging to a foreign State or a central bank and assigned to tasks which are part of their duty as public authorities*" are immune from execution measures. Such 'public' assets include for instance buildings used by diplomatic missions, the rolling stock of state railway companies and cultural centre/buildings run by foreign consulates in Switzerland. Most importantly, the Swiss Federal Supreme Court requires that monetary assets held by foreign States be clearly affected to concrete goals of public interest, which supposes that they can be distinguished from other assets. Under the current regime, therefore, foreign monetary assets are effectively not covered by State immunity, save for cases where the defendant State can prove that they were earmarked for specific public interest projects.<sup>11</sup>

### Execution of ICSID Awards

The ICSID Convention has been a landmark development for investors' protection abroad. In addition to establishing a specific arbitration mechanism to settle investment disputes, the ICSID Convention also provides for an automatic 'recognition and enforcement' mechanism of awards in Section 6 of Chapter IV. The situation is however different when it comes to the 'execution' of ICSID awards. While the ICSID Convention specifically insulates awards from review under the national laws at the 'recognition and enforcement' stage, the Convention defers to the national law on State immunity from execution at the 'execution' stage.<sup>12</sup>

More specifically, pursuant to Article 54, every Contracting State is required to recognise the award as binding and to enforce the pecuniary obligations imposed by the award as if it were a final decision of a domestic

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<sup>9</sup> ATF 124 III 322.

<sup>10</sup> CR LP-Michael Ochsner, ad art- 92 N 180 ff.

<sup>11</sup> ATF 124 III 322.

<sup>12</sup> Article 55 of the ICSID Convention. Lucy Reed, Jan Paulsson, and Nigel Blackaby, *Guide to ICSID Arbitration*, The Hague 2010, p. 184.

court.<sup>13</sup> Article 54 further refers to the domestic laws concerning execution in force in the State in whose territories execution is sought. In addition, Article 55 provides that the obligation of enforcement stated in Article 54 shall not “*be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.*” Article 55 thus specifies Article 54(3) by stating that the law on State immunity should be considered as part of the law of the State in which execution is sought.<sup>14</sup>

The Report of the Executive Directors on the Convention stresses the equality prevailing between ICSID awards and final judgments rendered by domestic courts. Accordingly, Article 54 does not require domestic courts to “*undertake forced execution of awards rendered pursuant to the Convention in cases in which final [domestic] judgments could not be executed.*”<sup>15</sup> The otherwise self-contained mechanism provided by the ICSID Convention therefore yields to the application of rules on State immunity from execution.

When reading Articles 54 and 55 of the ICSID Convention against the backdrop of Swiss law on State immunity, it can be concluded that a Swiss court seized with an application to execute an ICSID award would apply the three requirements existing under Swiss law regarding immunity from execution, namely: (1) the foreign State must have acted in a private capacity (*de iure gestionis*); (2) the transaction out of which the claim against the foreign State arises must have a connection to Switzerland (in German: “*Binnenbeziehung*”; in French “*rattachement suffisant*”); and (3) the assets targeted by the enforcement measures must not be assigned to tasks which are part of the foreign State’s duty as a public authority, and are therefore excluded from enforcement proceedings pursuant to Article 92(1) DCBA. Yet, so far no case law has confirmed this interpretation.

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<sup>13</sup> Contrary to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the ICSID Convention does not contain a list of grounds on which recognition and enforcement may be refused.

<sup>14</sup> Christoph H. Schreuer, Loretta Malintoppi, August Reinisch and Anthony Sinclair, *The ICSID Convention: A Commentary*, 2<sup>nd</sup> ed., Cambridge 2009, ad art. 55 N 1.

<sup>15</sup> Report of the Executive Directors of the International Bank for Reconstruction and Development on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, N 43.

## Recent Swiss Decisions

### **Immunity of International Organisations: Immunity from Jurisdiction and Execution of Assets Entrusted to the BIS**

In a decision dated 12 July 2010,<sup>16</sup> the Swiss Federal Supreme Court confirmed the immunity from jurisdiction and execution of the Bank for International Settlement (the “BIS”), an International Organisation seated in Basel. This decision is one of many rendered by courts in the aftermath of the Argentine financial crisis based on attempts by NML Capital Ltd and EM Limited to enforce a 2006 US judgment against the Argentine Republic concerning investments in Argentine bonds.

Based on this judgment, on 5 November 2009 NML Capital Ltd and EM Limited obtained two attachment orders from the Basel debt collection authority in the amount of approximately CHF 290 million and CHF 741 million against assets held with the BIS under the name of the Argentine Republic and the Central Bank of the Argentine Republic.

The BIS relied on the Agreement between the Swiss Federal Council and the BIS to determine the Bank’s legal status in Switzerland (the “BIS Status Agreement”) whereby the BIS was immune from any measures of execution in Switzerland in particular with respect to entrusted assets. The Swiss Federal Department of Foreign Affairs further confirmed the immunity of the BIS in Switzerland and underlined that any difference of opinion should be settled by arbitration between the BIS and Switzerland as provided by the BIS Status Agreement. NML Capital Ltd and EM Limited considered the application of immunity privileges abusive in view of the fact that the Argentine Republic, when defaulting on its payments, had notoriously transferred billions of assets to the BIS in order to escape creditors. They further requested that the question of the validity of the immunity privileges invoked by the BIS be decided by an independent judge alleging their right to a fair trial. Yet, on 23 April 2010, the Cantonal Surveillance Authority annulled the two attachments on ground of inadmissibility given the BIS’s immunity privileges.

Upon appeal from NML Capital and EM Limited, the Swiss Federal Supreme Court recalled that International Organisations enjoy an absolute immunity. It further held that the right to a fair trial, as invoked by the appellants, was not violated by the dispute resolution mechanism – namely arbitration – provided by the BIS Status Agreement since the appellants

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<sup>16</sup> ATF 136 III 379, 5A\_360/2010 dated 12. July 2010, ASA Bull 4/2012, p. 825.

could turn directly to the Swiss authorities, which, as party to the BIS Status Agreement, could defend the appellants' position. The Swiss Federal Supreme Court therefore concluded that the Swiss judicial authorities had no jurisdiction over the question of the abusive application of immunity privileges to the BIS and dismissed the appeal.

NML Capital Ltd and EM Limited followed the Swiss Federal Supreme Court's indication and requested Switzerland, represented by the Swiss Federal Department of Foreign Affairs, to intervene on their behalf before the BIS to authorise the execution of the attachment orders obtained against the assets entrusted by the Argentine Republic to the BIS. NML Capital Ltd and EM Limited's request was rejected and their appeal to the Swiss Federal Administrative Court was declared inadmissible. NML Capital Ltd and EM Limited went on to appeal before the Swiss Federal Supreme Court which also considered their appeal inadmissible for the reasons exposed below.<sup>17</sup>

Pursuant to Swiss procedural rules before the Swiss Federal Supreme Court (as well as before the Swiss Federal Administrative Court), decisions concerning matters pertaining to foreign affairs are not subject to appeal save for cases where international law grants a right of access to a judge for the matter considered.<sup>18</sup> Such a right can for instance result from Article 6(1) of the European Convention on Human Rights.

In the case at hand, the Swiss Federal Supreme Court considered that the matter pertained to foreign affairs since it concerned the relations between the BIS, an International Organisation, and the Swiss government. It further held that the BIS Status Agreement granted the Swiss government a discretionary power to resort to the dispute resolution mechanism provided by the Agreement, namely arbitration. Accordingly, NML Capital Ltd and EM Limited had no right as such to have the Swiss government intervene on their behalf. Consequently, the Swiss Federal Supreme Court dismissed their appeal on ground of inadmissibility.

As a last resort, NML Capital Ltd and EM Limited went on to appeal to the Swiss Federal Council but by decision of 17 October 2012, the Swiss Federal Council rejected their appeal holding that nothing in the case at hand could amount to an abuse of the immunity privileges granted to the BIS.

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<sup>17</sup> ATF 137 I 371, 2C\_764/2011 dated 22 November 2011.

<sup>18</sup> Article 83(a) of the Swiss Federal Supreme Court Act and Article 31(1)(a) of the Swiss Federal Administrative Court Act in relation to Article 72(a) of the Administrative Procedure Act.

Therefore, Switzerland refused to exercise their discretionary power in favour of NML Capital Ltd and EM Limited.<sup>19</sup>

These decisions highlight the difficulty encountered by claimants when faced with immunity defences. The first lesson that can be drawn from this case is the reminder that International Organisations benefit from an absolute immunity and that they are, as a rule, not subject to State court jurisdiction save for specific exceptions. In the present case, any issue related to an abuse of immunity privileges was to be settled by arbitration thus excluding State court jurisdiction on these issues and leaving the claimants to request Switzerland to intervene on their behalf. The second lesson is that foreign affairs remains an area largely withdrawn from legal action and it falls within the discretionary powers of a State to intervene or not in relation to possible abuses of immunity privileges.

### **Execution of ICSID Awards in Switzerland: Same Immunity Treatment as Domestic Judgments**

In a decision of 23 November 2011,<sup>20</sup> the Swiss Federal Supreme Court rejected an appeal of the Geneva Debt Collection Office's (the "DCO") refusal to attach assets held in Geneva by the International Air Transport Association (IATA) in the name of Kyrgyzaeronavigatsia, a Kyrgyz State company. The applicant (presumably the claimant in the underlying ICSID arbitration, Turkish company Sistem Muhendislik Insaat Sanayi ve Ticaret A.S) had sought the attachment in order to enforce an ICSID award issued on 9 September 2009 against the Kyrgyz Republic in connection to a hotel operation project.<sup>21</sup>

Initially, a Geneva Court had granted the attachment in the amount of CHF 11 million and asked the DCO to enforce it. The DCO, however, considered that the attachment was incompatible with Article 92 DCBA, which, as mentioned above, prohibits the seizure of assets of a foreign State or a foreign central bank intended for uses incumbent upon the foreign State in its exercise of its sovereign authority.

The DCO based its decision on a "verbal note" from the Kyrgyz Ministry of Transport and Communication to the Swiss Permanent Mission to

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<sup>19</sup> Decisions unpublished but announced by press release of 17 October 2012 by the Federal Department of Justice and Police available at: <http://www.ejpd.admin.ch/content/ejpd/fr/home/dokumentation/mi/2012/2012-10-170.html> (1st November 2012).

<sup>20</sup> Decision 5A\_681/2011 dated 23 November 2011, ASA Bull 4/2012, p. 816.

<sup>21</sup> *Sistem Muhendislik Insaat Sanayi ve Ticaret A.S. v. Kyrgyz Republic* (ICSID Case No. ARB(AF)/06/1) – The published Swiss decision is redacted but mentions the date of the ICSID award and the defendant State.



the United Nations dated 17 September 2010 stating that the amounts held by IATA were exclusively allocated to activities performed in the exercise of sovereign authority, namely the surveillance of airspace.

The applicant appealed this decision by contesting the evidentiary weight given to this Note. The DCO nonetheless confirmed its decision, relying on additional documents. These include a fax from the Kyrgyz Embassy in Switzerland dated 1<sup>st</sup> October 2010 stating that IATA was authorised by Kyrgyzaeronavigatsia to collect charges due for use of Kyrgyz airspace, and a letter of the official representative of the Government of the Kyrgyz Republic dated 22 October 2010 stating that Kyrgyzaeronavigatsia was an entity of the Kyrgyz Ministry of Transport and Communication and that its assets were all allocated to public authority activities and therefore immune.

By decision of 15 September 2011, the Cantonal Surveillance Authority rejected the appeal on the grounds that the documents produced by the Kyrgyz Republic showed that the assets held by IATA were exclusively allocated to activities related to the exercise of sovereign authority.

The applicant further appealed this decision before the Swiss Federal Supreme Court,<sup>22</sup> arguing that the facts of the case had been arbitrarily established. The Swiss Federal Supreme Court rejected the appeal. It found that, based on the facts and evidence supporting the case, it was not arbitrary to consider that the surveillance of national airspace was a task performed by a sovereign, and hence *de iure imperii*. Charges levied for this task were therefore exempted from attachments pursuant to Article 92 DCBA.

The Swiss Federal Supreme Court's application of Swiss domestic law on immunity from execution is consistent with Articles 54 and 55 of the ICSID Convention. While the decision considered did not specifically address each of the three conditions required for lifting the immunity from execution since only the last condition, i.e. the application of Article 92(1) DCBA was at issue, it implicitly shows however that a foreign State could rely on the same immunities and privileges against the enforcement of an ICSID award as it could against any other foreign decision or award, including those stemming from the requirement of a connection to Switzerland (in German: "*Binnenbeziehung*"; in French "*rattachement suffisant*").<sup>23</sup>

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<sup>22</sup> Decision 5A\_681/2011 dated 23 November 2011, ASA Bull 4/2012, p. 819.

<sup>23</sup> In another decision concerning the execution in Switzerland of an ICSID award (*CMS Gas Transmission Company v. The Argentine Republic* (ICSID Case No. ARB/01/8), the Zurich Court of First Instance also applied Swiss law concerning execution and rejected CMS Gas Transmission



## Conclusion

In a legal landscape with little case law and few statutory rules, the recent decisions of the Swiss Federal Supreme Court bring some welcome guidance regarding the enforcement against State assets and execution of ICSID awards in Switzerland.

While these decisions are in line with general rules of State immunity, they also show that immunity defences remain a difficult obstacle to be overcome and that even ICSID awards do not benefit from any favourable treatment when it comes to execution. As always, execution proceedings against a State remain a challenge.

Sandrine GIROUD, *Enforcement against State Assets and Execution of ICSID Awards in Switzerland: How Swiss Courts Deal with Immunity Defences*

### Summary

Three recent decisions of the Swiss Federal Supreme Court provide welcome guidance on the enforcement of ICSID awards against State assets in Switzerland. In the first two decisions, the Swiss Federal Supreme Court reiterated the general principle that State assets entrusted to an International Organisation enjoy absolute immunity. The Court went on to find that while in the case at hand the Swiss Government could initiate arbitral proceedings against the International Organisation concerned if it considered a defence of immunity to constitute an abuse of law, the Court could not review a decision by the Swiss Government not to use its power to initiate such arbitral proceedings since this decision pertained to foreign affairs. In the third, most recent, decision, the Swiss Federal Supreme Court for the first time considered Swiss law on immunity in the context of the enforcement and execution of an ICSID award. It confirmed that ICSID awards are subject to general rules of immunity under Swiss law, and do not therefore enjoy more favourable treatment in this respect than domestic judgments against States.

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Company's attachment request on assets belonging to the Province of Santa Cruz based on the principle of separate legal personality between the Province of Santa Cruz and the Argentine Republic (Decision *Bezirksgericht* Zurich of 25 March 2008 Nr EQ080051/U, unpublished).

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