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## Enforcing ICSID Arbitral Awards Against States in Switzerland – the Immunity Challenge

Enforcing an arbitration award against a state presents unique challenges. The Swiss Federal Supreme Court recently confirmed that an award creditor seeking to attach assets belonging to a foreign state in Switzerland must demonstrate, among others, that the matter has a “sufficient connection” with the country. This requirement is not new and, in a [decision](#), dated March 17, 2023, published last week (in German), the Federal Supreme Court confirmed that the principle applies to any awards including those rendered under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of March 18, 1975 (“ICSID Convention”).

### THE BACKGROUND

At the end of an ICSID arbitration, the claimant in a dispute against Spain was awarded a sum of money in a final award. It located assets in Switzerland belonging to Spain and worth CHF 33 million (patents, trademarks, real estate, bank accounts and safety boxes) and sought to attach these assets pursuant to the Swiss Debt Enforcement and Bankruptcy Act. The Regional Court of Bern-Mittelland and the High Court of Bern (the canton where the assets are located) refused to grant the attachment application on the grounds that (i) the debtor had not provided a decision on the recognition and enforcement of the ICSID final award; and (ii) the dispute lacked a “sufficient connection” to Switzerland. The award creditor appealed to the Swiss Federal Supreme Court.

### THE SUPREME COURT DECISION

The Supreme Court first confirmed that no separate *exequatur* decision is required to enforce an ICSID award. Switzerland is a member of the ICSID Convention and in application of this treaty, an interested party must only submit a copy of the award certified by the Secretary General of ICSID to demonstrate its authenticity to enforce it. Switzerland shall recognize ICSID awards as binding and enforce the pecuniary obligations



imposed in them within its territories as if the awards were final judgments rendered by Swiss domestic courts. Similarly, ICSID awards shall be recognized as if they were final decisions of Swiss domestic court. Swiss courts have consequently no power to review an ICSID award, not even on the ground of public policy.

On the second argument, the Supreme Court confirmed the application of its existing case law on state immunity to ICSID awards. A party bringing an enforcement action against a State in Switzerland must show that three cumulative requirements are satisfied.

- First, the state must have acted in its private (commercial) capacity and not in its sovereign capacity.
- Second, the targeted assets are not allocated, earmarked or intended for the state’s exercise of sovereign power (“*iure imperii*”), but are used for the performance of the state’s commercial activities (“*iure gestionis*”).
- Third, the underlying relationship must have a “sufficient connection” to Switzerland. The domestic nexus has been found to exist if the claim originated or was intended to be performed in Switzerland, or if the state performed certain acts in Switzerland.

Although the ICSID Convention provides that contracting states shall enforce ICSID awards as domestic judgments, it also reserves the contracting states’ domestic rules on sovereign immunity – and in Switzerland, this includes the “sufficient connection” requirement.

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