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ENFORCING ARBITRAL AWARDS

Financier Worldwide canvasses the opinions of leading professionals around the world on the latest trends in enforcing arbitral awards.

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Respondents

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Q. Could you provide an overview of recent arbitration activity in Switzerland? Are there any common themes among the types of cases you are seeing?

A. Enforcement issues do not feature prominently in our court practice; they represent only a small proportion of the jurisdiction of the Swiss Federal Supreme Court compared to challenges against arbitral awards rendered by arbitral tribunals in Switzerland. This may be due, on the one hand, to the fact that Swiss companies losing in arbitration proceedings generally comply with the arbitral award or, on the other hand, to the fact that the Swiss Federal Supreme Court interprets the grounds for refusal of enforcement pursuant to Article 5 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards restrictively. While we can observe a clear tendency toward an increased challenge of arbitral awards before the Swiss Federal Supreme Court, this does not apply to the same extent to objections against enforcement requests against foreign arbitral awards. Hence, no common themes can be identified that have emerged in recent years – except, perhaps, that the successful prevention of the enforcement of an arbitral award in Switzerland remains limited to blatant cases of violation of Article 5 of the New York Convention.

Q. What strategies might be used by a losing party to challenge an arbitral award and frustrate the enforcement process? To what extent are 'tactical' challenges becoming more common?

A. The New York Convention provides for a limited number of grounds of refusal to recognise or enforce a foreign arbitral award. According to Article 5(1)(e) of the New York Convention, recognition and enforcement of an award may be refused if the award has not yet become binding on the parties. Therefore, a party may frustrate immediate enforcement by an appeal to a state court in the country of origin of the arbitral award if the court follows the request to temporarily suspend the effect of the award. Given the limited grounds of refusal and, in most cases, the lack of suspensive effects of the challenge of the arbitral award, appealing an arbitral award in Switzerland does not, in most

cases, lead to the possibility of frustrating the enforcement process.

Q. Have there been any recent legal or judicial developments in Switzerland, which impact the process of enforcing arbitral awards?

A. On 1 January 2021, the revised Swiss Arbitration Law came into force. Pursuant to Article 185(a) of the Federal Act on Private International Law, a foreign arbitral tribunal as well as the parties to foreign arbitral proceedings, can now directly seek the assistance of Swiss state courts for the execution and enforcement of interim measures. This also applies to the taking of evidence if the interim measures are to be enforced in Switzerland or if the taking of evidence is to take place in Switzerland.

Q. How are courts in Switzerland dealing with challenges to arbitral awards? What insights can we draw from recent cases?

A. Arbitral awards can only be challenged before the Swiss Federal Supreme Court and only for certain grounds exhaustively listed in Article 190 of the Federal Act on Private International Law, filed within 30 days of the communication of the award. The proceedings are very streamlined and a decision is to be expected usually within about six months from the date of the arbitral award. Due to the very limited grounds for challenge and the arbitration-friendly policy of the Swiss Federal Supreme Court, the success rate in set-aside proceedings in Switzerland is very low. The revised Article 189a of the Federal Act on Private International Law now explicitly states that arbitral tribunals may correct typographical and accounting errors in the award, explain specific parts or issue a supplementary award in relation to claims made in the proceedings that were not considered in the award upon request of either party. However, such a request does not affect the deadline for filing appeals with the Swiss Federal Supreme Court.

Q. When it comes to enforcing arbitration awards, what strategies can companies deploy to enhance their chances of success?

A. Recognition and enforcement can be refused if the arbitral award has been

set aside by a competent authority of the country in which, or under whose law, the arbitral award was handed down, according to Article 5(e) of the New York Convention. By excluding setting aside proceedings in the arbitration clause, parties may seek to avoid challenges of awards before state courts and speed up the process of enforcing arbitral awards in other countries. In Switzerland, it is possible to order a seizure by means of a foreign arbitral award which may enhance the chances of success for a later enforcement of an arbitral award.

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Q. When negotiating and drafting business agreements, what steps can parties take to ensure that contractual arbitration clauses are clear and valid? How important is this to facilitating award enforcement down the line?

A. Parties can and usually should use a model arbitration clause from a well-known arbitral institution, such as the Swiss Arbitration Centre or the ICC, to ensure that the arbitration clause is clear and valid. This is the easiest and best way for parties who do not have very specific arbitration know-how. In addition, parties

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should always make sure that they do not agree to general terms and conditions of the other contract party that may contradict an arbitration clause agreed in the specifically negotiated provisions of the contract.

Q. Going forward, what trends do you expect to see around arbitral award enforcement? What predictions would you make for the months ahead?

A. It is to be expected that Swiss courts, and particularly the Swiss Federal Supreme Court, will continue their arbitration-friendly policy. If the requirements of enforcement according to the New York Convention are met, arbitral awards will most likely be recognised and enforced relatively rapidly by the Swiss courts without following a formalistic approach interpreting the New York Convention. ❑

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