

Christoph Müller | Antonio Rigozzi (Eds)

New Developments in International Commercial Arbitration 2013

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Schulthess § 2013

Bibliographic information published by the Deutsche Nationalbibliothek
The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed
bibliographic data are available in the Internet at <http://dnb.d-nb.de>.

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© Schulthess Juristische Medien AG, Zurich · Basel · Geneva 2013
ISBN 978-3-7255-6921-2

www.schulthess.com

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The Enforcement of Foreign Arbitral Awards in Switzerland under the New Code of Civil Procedure and Debt Enforcement Act

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I. Introduction

In 2010, the departure from 26 Cantonal codes of civil and criminal procedure was a remarkable step towards a uniform application of procedural regulations. Specifically, the new

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Federal codes now allow the highest Swiss Courts to set nationwide procedural standards which prior to this were possible, in principle, in conjunction with violations of fundamental legal principles of constitutional character only.

Simultaneously, Switzerland enacted rules to govern domestic arbitration and gave up the existing inter-cantonal convention. To date, however, domestic arbitration, unlike in other countries such as the U.S. and China, represents a negligible number of cases only. The main case load of arbitration in Switzerland stems from transnational disputes.

The enforcement of foreign arbitral awards in Switzerland is, according to Article 194 of the Swiss Private International Law («PILA»), governed by the New York Convention («NYC»).

The influence of the new Code of Civil Procedure («CCP») and the revised Debt Enforcement and Bankruptcy Act («DEBA») on the topic is, therefore, limited. However, the revisions of the CCP and DEBA may prompt additional necessary changes of the PILA. This paper will not only review possible impacts of CCP and DEBA, but also look at issues related to the enforcement of interim measures in Switzerland and desirable changes in the upcoming revision of the PILA.

In the following section, we will first review enforcement issues of monetary awards (II.), followed by enforcement issues of non-monetary awards (III.). We will then turn to the enforcement of interim measures in Switzerland (IV.) before making some brief concluding remarks (V.).

II. Enforcement of Monetary Awards (DEBA)

In the following section, we will briefly outline the commonly employed methods of seeking enforcement in Switzerland when a party is awarded monies in international arbitration and wishes to enforce the foreign arbitral award in Switzerland.

A. Enforcement procedure

The party which has been awarded a sum of money in international arbitration («creditor») may commence enforcement proceedings by request for debt collection according to Article 67 DEBA. Ordinarily and according to standard practice, the debt collection office at the place of the debtor's domicile is competent to issue the payment order and serve it onto the debtor. The debtor can, at that time, either pay the requested sums or file an objection within 10 days (Art. 69 DEBA). If the debtor objects, the creditor may commence summary court proceedings to obtain an order setting aside the opposition based on the foreign arbitral award it has obtained (Art. 80 DEBA).

In summary proceedings, the court is to examine whether the prerequisites of the NYC for the recognition and enforcement of the foreign award are met. In addition, so long as it is raised by the debtor, the court will examine whether the debt has been paid, deferred, or is time-barred (Art. 81(1) DEBA).

The court will decide on the enforceability of the award on a preliminary basis. The decision will not have *res judicata* effect for other proceedings.¹

¹ GIRSBERGER/VOSER, *International Arbitration in Switzerland*, 2nd edition, Zurich/Basel/Geneva 2012, N 1159.

If the prerequisites of the NYC for the recognition and enforcement of the award (Articles IV and V NYC) are fulfilled, the court will set aside the debtor's objection. This decision may be appealed in the Canton where enforcement is sought and, finally, with appeal in civil matters to the Swiss Federal Tribunal.²

Alternatively, the creditor is in a position to initiate separate exequatur proceedings to have the foreign arbitral award declared enforceable. Such court declaration has *res judicata* effect. As a consequence, the enforceability will not be re-examined in subsequent debt collection proceedings.

B. Interim measures to secure enforcement

If the conditions set forth in Article 271 DEBA are met, the enforcement of a monetary arbitral award can be secured, *i.e.*, the debtor's assets may be attached. Prior to the revision of the DEBA, the most frequently invoked ground for attachment was the provision set forth in Article 271(1) No. 4 DEBA. According thereto, attachment could be sought based on a foreign arbitral award if the debtor was domiciled outside of Switzerland, no other ground for attachment was available, and the claim had a sufficient connection to Switzerland. Interim measures against debtors domiciled in Switzerland were, on the contrary, not (or, at least, not easily) available.

The revised DEBA, which entered into force on January 1, 2011, now provides for a new ground to request an attachment. According to Article 271(1) No. 6 DEBA, attachment is to be granted if the creditor is entitled to definitively set aside the debtor's objection («*titre de mainlevée définitive*», «*definitiver Rechtsöffnungstitel*»).

² Art. 319 CCP; Art. 72(2)(a) Swiss Federal Tribunal Act.

There has been some controversy over whether Article 271(1) No. 6 DEBA should also apply to foreign arbitral awards. Some authors have argued that this should not be the case, as the provision should apply only to foreign court judgments subject to the Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters concluded in Lugano on October 30, 2007 (Lugano Convention or «LC»). However, many authors have argued that this view stands in contrast to the wording of Article 271(1) No. 6 DEBA which does not provide for any such limitation.³

In the meantime, the Swiss Federal Tribunal has rendered a decision upon this issue which shall be summarized in the following section.

C. The Swiss Federal Tribunal's decision of December 21, 2012

With its decision dated December 21, 2012 (referred to as DFT 139 III 135) the Swiss Federal Tribunal set an end to the controversy. In this case, which is almost one year old and does not bear any breaking news character, the creditor sought civil attachment according to Article 271(1) No. 6 DEBA based on a foreign arbitral award.

With its request, the creditor submitted a certified copy of the award, a copy of the confirmation of the arbitration court that the award had been served upon the defendants, and an affidavit declaring that the award was final and enforceable («*définitive et exécutoire*»). The Attachment was granted based on these documents.

³ For more detailed arguments on both positions, see MEIER-DIETERLE, *Ausländische «nicht LugÜ-Entscheide» als Arrestgrund?*, in: Jusletter 18. Juli 2011.

Thereafter, the debtor objected to the attachment. It claimed that, since the award had not been declared enforceable, it did not fulfil the conditions set forth in Article 271(1) No. 6 DEBA. It could, consequently, not serve as a basis for any attachment. The objection was admitted and the attachment was annulled. Then, the creditor appealed the decision to the Cantonal Court of Vaud which confirmed the original attachment.

This decision was, finally, appealed to the Swiss Federal Tribunal by the debtor. The Swiss Federal Tribunal had to decide whether it was arbitrary to find that the attachment judge could preliminarily decide on the enforceability of a judgment from a State that is not a party to the Lugano Convention or a foreign arbitral award within attachment proceedings. In other words, the question was whether a non-LC foreign decision or a foreign arbitral award could serve as a basis for an attachment in the sense of Article 271(1) No. 6 DEBA.

The analysis of the Swiss Federal Tribunal can be summarized as follows: the Swiss Federal Tribunal first reviewed the wording of Article 271(1) No. 6 DEBA which refers to a *«title to definitively set aside the debtor's objection in the debt enforcement proceedings»* (*«definitiver Rechtöffnungstitel»*, *«titre de mainlevée définitive»*). The term *«title to definitively set aside the objection»* is defined in Article 80(1) DEBA and includes an enforceable decision. Neither Article 271(1) No. 6 nor Article 80(1) DEBA, in fact, distinguish between Swiss and foreign decisions or between LC or non-LC decisions.⁴

The Swiss Federal Tribunal continued by drawing a comparison to the situation existing before the revision of the DEBA. Based on Article 271(1) No. 4 DEBA, a creditor could, at that time, attach assets of a debtor domiciled

⁴ DFT 139 III 135, consideration 4.2.

outside of Switzerland based on an enforceable decision, including any non-LC decision or a foreign arbitral award. The attachment judge preliminarily examined the enforceability without any necessity for separate exequatur proceedings. The final decision on enforceability was, thereafter, made in the validation proceedings of the attachment.⁵

With the revised DEBA in place, the alternative wording regarding any debt «*based on an enforceable decision*» was deleted by the legislator in Article 271(1) No. 4 DEBA. In such cases, the new ground for attachment of Article 271(1) No. 6 DEBA⁶ is to apply, which makes it unnecessary to prove the additional conditions of No. 4 of the same provision.⁷

Finally, the Swiss Federal Tribunal concluded that it was not arbitrary to find that the attachment judge was in a position to examine the enforceability of a non-LC decision or a foreign arbitral award as a preliminary matter. Such preliminary examination is, furthermore, in line with the summary nature of attachment procedures. Accordingly, the grounds for attachment need only be credibly shown, but not fully proven. To require separate exequatur for non-LC decisions and foreign arbitral awards would mean to deviate from this principle, a proposition which was rejected by the Swiss Federal Tribunal.

Based on these considerations, the Swiss Federal Tribunal dismissed the complaint brought by the debtor and upheld the decision of the cantonal court in Vaud.

⁵ DFT 139 III 135, consideration 4.3.1.

⁶ Attachment based on a title to definitively set aside the debtor's objection.

⁷ DFT 139 III 135, consideration 4.3.2.

D. Consequences of the Swiss Federal Tribunal's decision

The decision of the Swiss Federal Tribunal confirmed that the new ground for attachment, *i.e.*, Article 271(1) No. 6 DEBA, also applies to foreign arbitral awards. The new DEBA has thereby improved the situation of creditors seeking enforcement of a foreign arbitral award in Switzerland.

Before the implementation of the new Article 271(1) No. 6 DEBA, a creditor trying to attach assets in Switzerland had to prove certain requirements, such as a sufficient connection of the claim to Switzerland or a certain immediate risk for his financial interests, to obtain an attachment.

Moreover, the attachment of assets belonging to debtors domiciled in Switzerland was utterly difficult, as the most frequently claimed ground for attachment, Article 271(1) No. 4 DEBA, was not available. With the new ground for attachment under the revised DEBA, the situation has significantly improved for the creditor. The creditor is now in a position to successfully request an attachment, irrespective of where the debtor is domiciled, if he has an enforceable award. Moreover, the debtor does not have to prove any additional requirements apart from the enforceability of the award on which he is relying.

Further, it is not necessary to have the award declared enforceable by a Swiss court before attachment can be sought (which is, again, time efficient and allows the creditor to obtain the attachment *ex parte*). It is sufficient to demonstrate on a *prima facie* basis that the foreign arbitral award is enforceable under the NYC.⁸ The creditor has to plausibly substantiate («*rendre vraisemblable*») the facts on

⁸ LAZOPOULOS, *Arrestrecht - die wesentlichen Änderungen im Zusammenhang mit dem revidierten LugÜ und der Schweizerischen ZPO*, AJP 2011, p. 612.

which the enforceability is based.⁹ For this purpose, it was held sufficient to present a certified copy of the award, a copy of the confirmation of the arbitration court that the award had been served upon the defendants, and an affidavit declaring that the award was final and enforceable.

As a result, the Swiss Federal Tribunal did not insist on the fulfilment of all formal requirements set forth in Article IV of the NYC to obtain an attachment. In particular, the attachment was granted without the requesting party having presented the original arbitration agreement or a duly certified copy thereof.

In this matter, decided by the Cantonal Court of Vaud and, subsequently, by the Swiss Federal Tribunal, the debtor, in its objection against the attachment, did not contest the authenticity of the arbitral award or the arbitration clause reproduced therein.¹⁰ This fact is of importance for the following reasons:

If the authenticity of the arbitration agreement and the award are not disputed, the lack of full compliance with the formal requirements of Article IV NYC does not raise an issue.¹¹ Since, however, an attachment is granted *ex parte*, the judge will ordinarily not know whether the debtor disputes (or has disputed) the authenticity of the arbitration clause or the arbitral award.

Consequently, one must question whether, with respect to attachment matters following the issuance of an arbitral award, the attachment judge may issue an attachment order

⁹ DFT 139 III 135, consideration 4.5.2.

¹⁰ Decision of the Cantonal Court of Vaud (Case No. KE11.02840) of April 12, 2012, consideration II.c), available at: www.vd.ch/jurisprudence-tc. For a discussion of the Cantonal Court's decision see STUCKI/BURRUS, *Sentence arbitrale étrangère, sequestre et exequatur Note sur l'arrêt du Tribunal fédéral 5A_355/2012 du 21 décembre 2012*, ASA Bull Vol. 31 No. 2, p. 433 et seq.

¹¹ Decision of the Federal Tribunal 4A_124/2010 of October 4, 2010, consideration 4.2; STUCKI/BURRUS, p. 434.

without insisting on the prior and strict fulfilment of the formal requirements set forth in Article IV NYC.¹²

In the view of the authors, the strict fulfilment of the formal requirements set forth in Article IV NYC is not necessary and is not in line with the prerequisites of summary proceedings which govern attachment proceedings. First, an attachment order does not, as such, lead to the enforcement of the award, but rather is utilised only to secure the future enforcement of that award by safeguarding monies or legal rights. Therefore, it is not necessary to strictly apply the standards of Article IV NYC.

To the contrary, as expressly confirmed by the Swiss Federal Tribunal, the attachment judge is to examine the enforceability of the award on a *prima facie* basis. Therefore, an attachment order does not require full proof of the enforceability of the award. It is, thus, sufficient that the enforceability be plausibly substantiated.¹³

With regard to the fact that an attachment may have considerable consequences for the debtor, the judge should, nevertheless, examine the enforceability carefully and not grant the attachment based on mere allegations of the requesting party. At the same time, the judge should not be overly strict with regard to the formal requirements of Article IV NYC. The objection against (and following) the attachment according to Article 278 DEBA entitles the debtor to request the annulment of an attachment order in a simple manner.¹⁴ Accordingly, the debtor's legal rights and position seem to be fairly protected, whereas, to the contrary, the creditor's position may be at risk if the attachment was not granted.

¹² For a discussion of the question see also STUCKI/BURRUS, p. 435 et seq.

¹³ BGE 139 III 135, consideration 4.5.2.

¹⁴ AMONN/WALTHER, *Grundriss des Schuldbetreibungs- und Konkursrechts*, 8th edition, Berne 2008, § 51 N 40; STUCKI/BURRUS, p. 435 et seq.

Moreover, the court's decision on the enforceability of the award rendered at the attachment stage is not binding upon the court in subsequent debt enforcement proceedings.¹⁵ If the debtor raises an objection, the court will have to examine the prerequisites of Articles IV and V of the NYC before the creditor's request for setting aside the objection can be granted. Thereby, the debtor's rights should be adequately protected. If, however, an attachment required the strict fulfilment of the Article IV NYC formal requirements, an additional examination would appear to be unnecessary.

For these reasons, a request for attachment should not be denied based on overly strict formal requirements. In particular, the non-fulfilment of Article IV NYC should not be of any detriment, as long as the creditor can otherwise demonstrate that the existence of an enforceable award is plausible.

III. Enforcement of Non-monetary Awards (CCP)

In the following section, we will briefly outline the commonly employed methods of seeking enforcement in Switzerland when a party is awarded a non-monetary award in international arbitration and wishes to enforce it in Switzerland.

A. Enforcement procedure

Non-monetary awards may be orders requiring a party to carry out or to refrain from a specific action, such as, for example, paying a certain amount into an escrow account or refraining from publishing certain information. Articles 335 et

¹⁵ BSK SchKG II-REISER, Art. 278 N 5; LAZOPOULOS, p. 613.

seq. CCP, which govern the enforcement of non-monetary court judgments, also apply to non-monetary foreign arbitral awards insofar as the proceeding is not regulated by the NYC or the PILA (Article 225(2) CCP).¹⁶

The creditor may choose to either have the award declared enforceable in separate exequatur proceedings or to have the court decide on enforceability in enforcement proceedings.¹⁷ In this respect, the situation is the same as with the enforcement of monetary awards. That is, the creditor may directly request the enforcement of the foreign arbitral award by the competent court without obtaining a separate declaration of enforceability. The court will, in such matters, determine the enforceability of the award under the NYC as a preliminary matter.¹⁸

B. Interim measures to secure enforcement

To the extent the NYC is silent about the conditions and procedures for securing the enforcement of a non-monetary award, Articles 335 et seq. CCP and, in particular, Article 340 CCP, apply.

According to Article 340 CCP, the enforcement court may order protective measures, if necessary, without hearing the other party. Specifically, Article 340 CCP aims at securing the enforcement of a decision or award. Accordingly, only protective and conservatory measures may be granted (*e.g.*, an order to refrain from disposing the goods in dispute, an order to deposit the goods in dispute, or an order to refrain from drawing a letter of credit).

¹⁶ BERNET/MEIER, in: Geisinger/Voser (eds.), *International Arbitration in Switzerland: A Handbook for Practitioners*, 2nd edition, 2013, p. 204.

¹⁷ STAEHELIN, in: Sutter-Somm/Hasenböhler/Leuenberger (eds.), *Kommentar zur Schweizerischen Zivilprozessordnung*, 2nd edition, Zurich/Basel/Geneva 2013, Art. 338 N 16.

¹⁸ BERGER/KELLERHALS, *International and Domestic Arbitration in Switzerland*, 2nd edition, Berne 2010, N 1865.

To obtain protective measures, an enforceable decision or award is required. Unless the applicant requests an *ex parte* order (*i.e.*, without hearing the other party), he/she is not required to show that the protective measure is necessary to secure enforcement. However, if the court is to order *ex parte* protective relief, the applicant must provide *prima facie* evidence that the enforcement would be frustrated without the *ex parte* order.¹⁹

In enforcement proceedings, the court is to examine the enforceability of the decision or award *ex officio* (Article 341 CCP). The applicant is to prove the requirements of enforceability and provide the necessary documents (Article 338(2) CCP).

Article 340 CCP is, in case of protective measures granted *ex parte*, the corresponding provision to Article 271(1) No. 6 DEBA.²⁰ Both provisions secure the enforcement of an award. As under Article 271(1) No. 6 DEBA, a measure under Article 340 CCP should not require a prior and separate decision on the recognition and enforceability of the foreign award. It is sufficient that the applicant plausibly substantiates that the award is enforceable.

In this respect, the question may be asked again whether it is necessary to fulfil the formal requirements set forth in Article IV NYC to plausibly substantiate the enforceability of the foreign award and to obtain a protective measure under Article 340 CCP.

As the measures provided in Article 340 CCP are only protective, it is not expected that the party affected by the measure should suffer irreparable harm by the issuance of the measure. Similarly to an attachment, the protective

¹⁹ BERNET/MEIER, p. 208.

²⁰ BK ZPO-KELLERHALS, Art. 340 N 9; BOMMER, *Schweizerische Zivilprozessordnung (ZPO)*, Berne 2010, Art. 340 N 3; BSK ZPO-DROESE, Art. 340 N 3; ROHNER/JENNY, *DIKE-Komm-ZPO*, Art. 340 N 7.

measure will uphold the *status quo* only for the limited period during which the final decision on the enforcement is still outstanding.

A protective measure will, therefore, generally not be more intrusive than an attachment, allowing for the same standards to be applied in the case of protective measures for the enforcement of both monetary and non-monetary awards.

In light of the above cited decision of the Swiss Federal Tribunal on the new ground for attachment in Article 271(1) No. 6 DEBA,²¹ the requirements of Article IV NYC should, in the view of the authors, not be applied too strictly with respect to protective measures. The enforceability is examined on a *prima facie* basis only. This standard is to be applied not only for attachments according to Article 271(1) No. 6 DEBA, but also for protective measures according to Article 340 CCP.

Even if the formal requirements of Article IV NYC are not (yet) fulfilled, the court is in a position to grant protective measures to secure a party's right. This allows the creditor to gather the documents necessary for enforcement of the award without running the risk that the debtor in the meantime makes arrangements to avoid the enforcement.

IV. Enforcement of Interim Measures

A. Current situation

Whether an arbitral tribunal has jurisdiction to order interim relief is dependent on the applicable arbitration law, the relevant arbitration rules, and the agreement of the parties.

²¹ DFT 139 III 135.

Many arbitration laws provide the arbitral tribunal with the authority to order interim measures.²²

Moreover, many arbitration rules, such as Article 26 Swiss Rules, Article 23(1) ICC Rules, or Article 26 UNCITRAL Rules provide for the arbitral tribunal's power to issue interim measures or do, at least, not exclude such power.

Consequently, arbitral tribunals will, in many cases, have jurisdiction to order interim measures.

Despite the above, there are, currently, hardly any decisions on the enforcement of interim measures granted by foreign arbitral tribunals in Switzerland. One of the reasons may be that parties voluntarily comply with the arbitral tribunal's orders on interim measures. Accordingly, enforcement is, in effect, unnecessary.

One can, however, not always rely on voluntary compliance. In this case, it becomes important to know how orders on interim measures can be enforced to ensure the effectiveness of the arbitral process.

Additionally, with the inception of the emergency arbitrator, which was recently established in some arbitration institutions,²³ the question of the enforcement of interim measures will likely gain importance. Thus, it seems necessary to clarify various uncertainties in connection with the enforcement of interim measures granted by foreign arbitral tribunals in Switzerland.

²² See for example § 1041 of the German CCP. The revised UNCITRAL Model Law («UNCITRAL ML»), in its Article 17, provides: «*Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures*». Similarly, Article 183 of the PILA provides that the arbitral tribunal may, on request of one party, order provisional or conservatory measures, unless the parties have agreed otherwise.

²³ For example, Article 29 of the ICC Rules, Article 32 of the SCC Rules, Schedule 1 of the SIAC Rules.

B. No enforcement under the NYC

The NYC concerns the recognition and enforcement of arbitral awards. An arbitral award in the sense of the convention is a binding decision made by an arbitral tribunal.²⁴ It is possible to enforce interim measures under the NYC only if such interim measures qualify as an award in the sense of the convention.²⁵

According to part of the legal doctrine, provisional measures are not capable of enforcement under the NYC because they do not contain a binding decision on the merits of the case.²⁶ They only have an interim function²⁷ and can be revoked or altered by the arbitral tribunal at any time.

Other scholars argue that provisional measures should be, and are, enforceable under the NYC.²⁸ This solution is rather pragmatic and based on the practical necessity to enforce interim measures in international arbitration.

The prevailing view in Switzerland remains that interim measures are not enforceable under the NYC, irrespective of the form in which they are granted.²⁹ A party requesting interim relief from an arbitral tribunal, therefore, cannot rely

²⁴ BERNET/MEIER, p. 200; DUNMORE, *Interim Measures by Arbitral Tribunals: The Enforceability Conundrum*, in: Asian International Arbitration Journal 2012, p. 224.

²⁵ VON SEGESSER/BOOG, in: Geisinger/Voser (eds.), *International Arbitration in Switzerland: A Handbook for Practitioners*, 2nd edition, 2013, p. 122.

²⁶ BERGER/KELLERHALS, N 1869; GIRSBERGER/VOSER, N 839; von SEGESSER/BOOG, p. 122.

²⁷ GIRSBERGER/VOSER, N 841.

²⁸ BORN, *International Commercial Arbitration*, Vol. II, 2009, p. 2023; KOJOVIC, *Court Enforcement of Arbitral Decisions on Provisional Relief - How Final is Provisional?*, Journal of International Arbitration 2001, Vol. 18 No. 5, p. 521 et seq.; VAN DEN BERG, *The 1958 New York Arbitration Convention Revisited*, ASA Special Series No. 15, 2001, p. 139 et seq.

²⁹ BOOG, *Die Durchsetzung einstweiliger Massnahmen in internationalen Schiedsverfahren*, Zurich/Basel/Geneva 2011, p. 133 et seq., summarizing the views of several Swiss and international authors.

on the assumption that the measure can be enforced in Switzerland under the NYC.

C. Enforcement under the PILA?

Procedural laws of different countries have different approaches in dealing with the enforcement of interim measures. For example, according to Article 17 H of the revised UNCITRAL Model Law, interim measures issued by an arbitral tribunal are to be recognized as binding and enforced upon application to the competent court, irrespective of the country in which the measures were issued. Following this approach, some national arbitration statutes provide for a special enforcement mechanism for provisional measures.³⁰

The PILA provides for an enforcement mechanism in the form of State courts' assistance. If the parties do not voluntarily comply with the arbitral tribunal's orders granting interim measures, an arbitral tribunal may, pursuant to Article 183(2) PILA request the assistance of the competent State court judge. The judge will apply his own law.

The Swiss judge will examine whether there is a valid arbitration agreement and whether the arbitral tribunal is validly constituted and competent to order interim measures.³¹ The judge should not, however, review the substance of the arbitral tribunal's order, but examine only whether the order is in line with Swiss public policy.

One of the existing uncertainties with regard to Article 183(2) PILA is the question of who exactly is entitled to apply to the State court for judicial assistance.

According to Article 176 PILA, its Chapter 12 applies to international arbitrations if the arbitral tribunal is seated in

³⁰ cf. GIRSBERGER/VOSER, N 841.

³¹ BSK IPRG-BERTI, Art. 183 N 18.

Switzerland. Therefore, it can be argued that judicial assistance should not be available for arbitral tribunals seated outside Switzerland.

The prevailing view, however, is that the assistance of the competent State court according to Article 183(2) PILA should be available irrespective of where the arbitral tribunal ordering provisional measures is seated.³² This should, at least, be the case if the Swiss court would have jurisdiction to grant interim measures if the requesting party directly applied to it instead of reverting to the arbitral tribunal.³³

The revision of the PILA offers the opportunity to clarify this point. It can either declare that arbitral tribunals can, irrespective of the country in which they are seated, request judicial assistance under Article 183(2) PILA, or include a separate provision on the enforcement of foreign awards and orders on interim measures.

Furthermore, the wording of Article 183(2) PILA only grants the arbitral tribunal the right to request such assistance, but neglects to grant this same right to the party benefitting from the interim measure. The question arises whether Article 183(2) PILA should, against its wording, be interpreted as granting the right to request the court's assistance in enforcing an interim measure not only to the arbitral tribunal but also to the parties.

According to one view, the party who obtained interim relief is itself entitled to request the enforcement of the order.³⁴ Another view is that a party should be entitled to apply to the courts for assistance only if it has the arbitral tribunal's prior approval.³⁵ And according to yet another opinion, the

³² GIRSBERGER/VOSER, N 842; BOOG, p. 151 with further references.

³³ VON SEGESSER/BOOG, p. 122 et seq.

³⁴ BSK IPRG-BERTI, Art. 183 N 16.

³⁵ VON SEGESSER/BOOG, p. 120, applying Article 374(2) CCP which governs domestic arbitration by analogy.

clear wording of Article 183(2) PILA does not leave room for an individual right of the parties to request State court assistance.³⁶

It is questionable whether it is practicable to only allow the arbitral tribunal, but not the party who obtained provisional relief in arbitration proceedings, to revert to the State court for assistance. It is indeed counter-intuitive that an arbitral tribunal has to file a request for assistance ultimately and *de facto* on behalf of the party to which it had granted the interim relief. In other words: once a request for assistance is filed with the State court, the role of the applicant must inevitably revert to the party who obtained the provisional relief. It is the applicant who ultimately benefits from the court's assistance.

While the enforceability of interim measures is important for the effectiveness of arbitration proceedings, the arbitral tribunal has no individual interest in enforcing the measures it has granted. The fact that the arbitral tribunal actively participates in the enforcement of measures against one of the parties can, furthermore, be perceived as an undue partial act of the arbitral tribunal.³⁷

Therefore and, at least, *de lege ferenda*, the party which obtained an interim measure in its favour from a foreign arbitral tribunal should be allowed to request assistance from a Swiss court in enforcing the granted measure.

Moreover, prior approval of the arbitral tribunal should not be necessary for such a request. It is argued that prior approval is reasonable because, unlike the State court, the arbitral tribunal has detailed knowledge about the case and is,

³⁶ RÜEDE/HADENFELDT, *Schweizerisches Schiedsgerichtsrecht*, 2nd edition, Zurich 1993, p. 254; ZK IPRG-VISCHER, Art. 183 N 8.

³⁷ POUURET/BESSON, *Comparative Law of International Arbitration*, 2nd edition, London 2007, p. 574; cf. also BSK IPRG-BERTI, Art. 183 N 16.

therefore, in a better position to decide whether the enforcement should proceed immediately.³⁸

However, if the arbitral tribunal is of the opinion that a measure should not be enforced for the time being, it should not grant the measure on the ground that it is premature (rather than granting it to later refuse its approval for enforcement of its own interim measure). By granting the interim measure, the arbitral tribunal, impliedly, consents to the enforcement of the order in case of non-compliance.

Another argument in support of the necessity for the arbitral tribunal's prior approval can be seen in the possibility for the arbitral tribunal to ensure that the debtor is given a reasonable chance to voluntarily comply with the arbitral tribunal's order before it is enforced with State court assistance.

However, in cases where a party cannot obtain the arbitral tribunal's approval to request State court assistance, it has no possibility to enforce the tribunal's interim order. Since, unless the parties have agreed otherwise, the authority of the arbitral tribunal to order interim relief is not exclusive, the party would have the possibility to seek interim relief from a State court.³⁹ It can, however, not be excluded that the State court negates the applicant's interest in receiving interim relief, because the arbitral tribunal has already granted an interim measure. If so, the arbitral tribunal, by denying its approval for State court assistance, would not only frustrate enforcement of the measure it granted, but would also deprive the party of the possibility to obtain interim relief from a State court.

For this reason, the party who has obtained an interim measure in its favour from an arbitral tribunal should be in a

³⁸ BRUNNER, *DIKE-Komm-ZPO*, Art. 374 N 7.

³⁹ BSK IPRG-BERTI, Art. 183 N 16; GIRSBERGER/VOSER, N 850.

position to seek the State court's assistance independently, *i.e.*, without prior approval of the arbitral tribunal.

V. Conclusion

The revised DEBA has introduced the possibility to attach the debtor's assets in Switzerland based on the new ground for attachment set forth in Article 271(1) No. 6 DEBA. The Swiss Federal Tribunal has clarified that this ground is also available in the case of foreign arbitral awards. Furthermore, the attachment does not require a prior and express decision on the enforceability of the award.

Since, in attachment proceedings, the enforceability of the award is examined on a *prima facie* basis, the formal requirements set forth in Article IV NYC are not to be applied strictly for securing enforcement of foreign monetary arbitral awards.

In the case of *ex parte* protective measures, Article 340 CCP for non-monetary protective measures corresponds to Article 271(1) No. 6 DEBA for monetary protective measures. Consequently, the standard of proof required for granting a protective measure under Article 340 CCP is equivalent to the standard of Article 271(1) No. 6 DEBA. The strict fulfilment of Article IV NYC should, therefore, neither be required for securing enforcement of foreign non-monetary arbitral awards.

A party in need of an interim measure will have to decide whether to apply to the arbitral tribunal or to the competent State court. One important element for this decision is to assess whether an interim measure granted by the arbitral tribunal will be enforceable in the country where enforcement is to be sought. Because of remaining uncertainties with regard to the enforcement of interim measures under PILA, this question can, at least for the time

being, not be answered with certainty in the case of Switzerland.

The question will likely remain unclear, even after a possible revision of the PILA. However, at this point the requirement of prior approval from the arbitral tribunal before a party's right to seek assistance from a State court to enforce an interim measure, is not persuasive and may in fact be one of the reasons why Article 183(2) PILA remains a «dead» provision.