

FOREIGN ARBITRAL AWARDS

Enforcing foreign arbitral awards effectively in Germany
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A recent decision of the OLG (High Court) in Frankfurt has clarified the requirements for the beneficiary of a foreign arbitration award to obtain an order for preliminary enforcement of the award against the assets of the losing party in Germany.

The preliminary enforcement order, which can be obtained without notice to the debtor, allows the amount of the arbitration award to be secured while the main enforcement proceedings take place.

BACKGROUND TO THE DISPUTE

A French company and a Swiss company entered into a contract relating to the marketing and support of a software product. In the contract, the parties agreed that disputes would be resolved by arbitration in Sweden under the rules of the Stockholm Chamber of Commerce.

A dispute arose and the Swiss company commenced arbitration proceedings against the French company in Sweden. In the final arbitration award, the tribunal ruled against the Swiss company by denying its claims in their entirety, while also ordering it to pay a considerable amount to the French company.

In order to obtain payment under the award, the French company needed to have the arbitration award declared

enforceable in Germany and Switzerland, which were the countries where the assets of the Swiss company were. Exequatur (or recognition and enforcement) proceedings were started in both countries. In particular, the French company attempted to obtain an order for preliminary enforcement against the Swiss company's German assets.

ENFORCEMENT IN GERMANY

Unlike other important European jurisdictions (for example, Switzerland), German law allows assets in Germany to be preliminarily secured in the course of exequatur proceedings under a foreign arbitral award without prior service of the award and without allowing the debtor a prior hearing. The German Civil Procedure Code¹ gives a presiding judge in the competent high court (OLG) the discretion, upon an application by the beneficiary of an award, to order that enforcement of the amount owing under the award is permitted for the purpose of securing the amount of the award before the debtor is served with the main application to obtain a certificate of enforceability. In order to obtain such an order of preliminary enforceability, the beneficiary of the award needs to establish in court that there is a risk it will not be possible to enforce the award.

¹ § 1063 para. 3 ZPO

THE ORDER OF OLG FRANKFURT

The recent order of OLG Frankfurt² provided that it is sufficient to establish such risk if the beneficiary of the award, or creditor, can show the debtor only has assets located in Germany that could easily be relocated out of the jurisdiction, in particular bank account balances or outstanding customer claims. OLG Frankfurt ruled that the creditor is not under an obligation to have already searched the entire country for other assets (in particular, real estate) and to provide proof of such a search in court. Instead, the court considered it sufficient for the managing director of the creditor (who in this case had known the debtor's managing director for several years) to render an affidavit that "*to the best of the creditor's knowledge*" no other immovable assets of the debtor were located in Germany.

PRACTICAL EFFECTS

On the basis of a preliminary certificate of enforceability, the creditor may apply for securing measures, in particular freezing of bank account balances. Further, while generally a different court than the OLG would have jurisdiction to hear the subsequent application for securing measures, the OLG Frankfurt has ruled that the OLG in charge of the exequatur proceedings shall also be competent to issue the freezing order³. This speeds up the process for the creditor to obtain the freezing order.

In practice, enforcement of a foreign arbitration award will only be successful if the debtor's tangible assets remain available in the jurisdiction while the arbitration award is being declared enforceable in exequatur proceedings, which may be lengthy. If the assets of the debtor are dissipated or transferred elsewhere during enforcement proceedings, the beneficiary of the award will be left with nothing to enforce the award against. For parties seeking to enforce arbitration awards in Germany, obtaining an order of preliminary enforceability has proven to be an effective tool to ensure the assets remain available. The order provides a creditor with the benefit of surprise, since the debtor is not alerted in advance by service of the main application and, hence, has no reason to relocate tangible assets away from Germany.

This almost unique procedural authority of the German courts to grant a preliminary enforceability order for foreign arbitration awards allows the creditor to preliminarily secure the available assets of the debtor and makes Germany a forum of first choice for effective enforcement of foreign arbitration awards.

¹ Case no. 26 SchH 12/09, order dated 23 November 2009

² OLG Frankfurt, case no. 26 SchH 12/09, order dated 08 December 2009

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