5A_942/2017[1]

Judgment of September 7, 2018

Second Civil Law Court

Federal Judge von Werdt, Presiding,
Federal Judge Escher (Ms.),
Federal Judge Marazzi,
Federal Judge Schöbi,
Federal Judge Bovey,
Clerk of the Court: Mr. Monn

A._____ Limited, Guernsey,
represented by Dr. Martin Bernet and/or Dr. Urs Hoffmann-Nowotny,
Appellant

v.

Republic of Uzbekistan,
represented by Mr Georg Friedli,
Respondent

Appeal from decision of Cantonal Court of Schwyz, Appellate Chamber, of October 27, 2017 (BEK 2017 41).

Facts:

A.
A._____ Limited, a company domiciled in Guernsey, wishes to obtain an attachment against a property located in Switzerland that belong to the Republic of Uzbekistan. The property in question is the parcel registered under cadastral number [redacted], folio number [redacted], of the Land Registry of U._____. By its attachment, A._____ Limited wishes to obtain security for enforcement of an arbitral award issued on December 17, 2015, in Paris, France under the rules of the United Nations Commission on International Trade Law (UNCITRAL), in a dispute between the English company B._____ and the Republic of Uzbekistan. A._____ Limited accepted the assignment of the judgment proceeds from the arbitration proceedings under English law.

B.
B.a. On August 2015, 2016, A._____ Limited requested an attachment from the judge at the March District Court. The judge granted the request. On August 29, 2016, the judge attached the above-referenced property for a claim amount of CHF 9'954'973.26, accrued interest of CHF 2'514'697.88 for the period from 2004 to December

[1] Translator's Note: Quote as A._____ Limited *v.* Republic of Uzbekistan, 5A_942/2017.
The decision was issued in German. The original text is available on the website of the Federal Tribunal, www.bger.ch.

31, 2015, and interest (at the rate of LIBOR+2%), compounded annually, on the total amount of CHF 12'469'671.13 as from January 1, 2016.

B.b. By written submission dated September 30, 2016, the Republic of Uzbekistan filed an objection. The Republic of Uzbekistan asked the court to dismiss the attachment request and to set aside the order of attachment; in the alternative, it requested an order requiring A._____ Limited to deposit its own attachment security of CHF 1 million. By order of February 8, 2017, the judge upheld the of the objection. He set aside the order of attachment of August 29, 2016, and enforcement thereof.

B.c. A._____ Limited thereupon filed an appeal with the Cantonal Court of Schwyz. It requested that the order of February 8, 2017 be set aside, the objection to the attachment be dismissed, and the order of attachment confirmed. By decision of October 27, 2017, the Cantonal Court rejected this appeal.

C.
C.a. By appeal brief dated November 23, 2017, A._____ Limited (hereafter, the Appellant) filed an appeal to the Federal Tribunal. It requested that the Court "completely set aside" the decision of the Cantonal Court and confirm the order of attachment; in the alternative, it requested that the Federal Tribunal remand the matter to the lower court for a new decision. In procedural terms, the Appellant submitted a request to grant suspensory effect to the appeal, without granting a hearing to the Republic of Uzbekistan (hereafter, the Respondent). By provisional order dated November 24, 2017, the Federal Tribunal granted this request. Following the exchange of correspondence, the presiding judge confirmed the order (order dated December 12, 2017).

C.b. After being invited to comment on the appeal, the Respondent submitted a request to the Federal Tribunal to dismiss the appeal to the extent the matter is capable of appeal (written submission of April 3, 2018). The Cantonal Court of Schwyz submitted a waiver of its right to submit comments (letter dated March 1, 2018). The responses to the invitation to submit comments were forwarded to the Appellant in order to preserve its right to be heard. On April 18, 2018, the Appellant submitted a statement in reply, in which it maintained its request for the legal remedies sought.

Reasons:

1.
The Appellant, within the prescribed time limits (Art. 100(1) BGG[2]), raises an objection to the decision of a final cantonal appellate court (Art. 75 BGG). The dispute relates to a debt collection and bankruptcy matter (Art. 72(2)(a) BGG). The statutory threshold of CHF 30'000 is met (Art. 74(1)(b) BGG). The decision under appeal under Art. 278(3) SchKG[3] is a final decision within the meaning of Art. 90 BGG (Judgment 5A_650/2011 of January 27, 2012, at 1, with references). Accordingly, the subject-matter in dispute is subject to a civil law appeal.

[2] Translator's Note: BGG is the most commonly used German abbreviation for the Federal Law of June 6, 2005, organising the Federal Tribunal [Rs 173.110].

[3] Translator's Note: SchKG is the most commonly used German abbreviation for the Federal Law on Debt Collection and Bankruptcy of April 11, 1889 [LP; Rs 281.1].

2.
The continuation notice with respect to the objection to the attachment is deemed to constitute a provisional measure within the meaning of Art. 98 BGG (BGE 135 III 232 at 1.2, p. 234). For this reason, the Appellant is entitled to only assert the violation of constitutional rights before the Federal Tribunal. This applies, as an initial matter, to the application of federal law, which, under Art. 98 BGG, is reviewed only for arbitrariness (Judgment 5A_261/2009 of September 1, 2009 at 1.2, unpublished in: BGE 135 III 608). In addition, the question of making corrections to or supplementing the findings of fact will only be relevant if the Cantonal Court has violated constitutional law (BGE 133 III 585 at 4.1, p. 588). The strict grievance principle [*strenge Rügeprinzip*] applies to all submissions regarding the violation of constitutional rights (Art. 106(2) BGG). The party seeking to enforce rights must precisely state which constitutional right was violated by the challenged cantonal decision and must describe in detail what the violation consisted of (BGE 133 III 439 at 3.2, p. 444). The Federal Tribunal does not deal with grievances which are not sufficiently substantiated or with purely appellate criticisms to a challenge decision (BGE 143 II 283 at 1.2.2, p. 286; 134 II 244 at 2.2, p. 246; 133 II 396 at 3.1, pp. 399-400).

3.
It is disputed whether the Appellant, who obtained the arbitral Award of November 17, 2015 (see findings of fact at A), is in possession of a 'definitive enforcement title' [*definitiver Rechtsöffnungstitel*] within the meaning of Art. 80(1) SchKG, which would justify an attachment under Art. 271(1)(6) SchKG. The Cantonal Court found that it did not. The Cantonal Court found that the foreign arbitral award is not enforceable in Switzerland. In terms of the reasons for its judgment, the Cantonal Court recalled that a foreign state is only subject to domestic jurisdiction when acting "*iure gestionis*" [in a commercial capacity, as a merchant]. However, pursuant to the jurisprudence of the Swiss Federal courts, foreign assets located within Switzerland are subject to compulsory enforcement on condition that the claim to be enforced demonstrates a sufficient domestic connection with Switzerland. Where such connection is lacking, then there is no need to deny foreign state immunity for "*acta iure gestionis*". The Cantonal Court went on to state that sovereign immunity falls within the scope of public international law, which is a reserved matter under Art. 30(a) SchKG. The prerequisite of sufficient domestic connection is a Swiss legal practice derived from public international law, was established by the Federal Tribunal almost one hundred years ago, has always been confirmed and further developed in Swiss law, and has become a part of Swiss law by custom. According to the challenged decision, the result of waiving the requirement of a domestic connection in the realm of enforcement would be that a country would always be deemed to waive its immunity in enforcement matters if it participated in adversarial proceedings in a foreign country. That, the Court said, is in conflict with the principle that a waiver of immunity in adversarial proceedings on its own does not entail such a waiver in enforcement proceedings. In addition, the lower court made it clear that the element of a sufficient connection of the claim with Switzerland under Art. 271(1)(4) SchKG only envisages a weighing of the interests of the debtor and creditor. By contrast, the requirement of a domestic connection as derived from sovereign immunity permits a court to include the "interests of Switzerland" in its weighing-of-interests exercise, which applies not only to the main proceedings but also to enforcement proceedings. Accordingly, the court stated that the domestic connection doctrine should be "applied more restrictively" in the realm of sovereign immunity than the 'sufficient connection' under Art. 271(1)(4) SchKG.

Finally, the lower court rejects the objection raised by the Appellant that domestic connection requirement violates Art. V of the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (hereafter "New York Convention" or "NYC"; SR 0.277.12). The court stated that it is true that the New York Convention also applies to arbitral awards issued against a state, a state-controlled entity or a state-controlled organisation and that it is correct that the Convention contains an exhaustive list of grounds for refusing enforcement, such that recognition and enforcement cannot be refused for reasons that are not set out in Art. V NYC. According to the lower court, prior to the date upon which the disputed decision was issued, the Federal

Tribunal had never yet dealt with the question of what Swiss law provides in the context of the obligations arising out of the New York Convention regarding the principle of sovereign immunity for purposes of enforcement and the related Swiss practice on the 'domestic connection'. The Cantonal Court cited the author Tarkan Goksu (*Schiedsgerichtsbarkeit*, Zurich/St. Gallen 2014, p. 730). It is, the court said, that author's "general" view that enforcement should be refused if the legal relationship in question does not demonstrate a sufficient domestic connection with Switzerland. The lower court found that the domestic connection doctrine had already "co-existed" with the New York Convention, which had entered into force in Switzerland on August 30, 1965. There were, the court said, no new serious and substantive grounds in the case at hand which, from today's perspective, would constitute persuasive arguments under the New York Convention for departing from the domestic connection doctrine.

Based on these considerations, the Cantonal Court reached the conclusion that the prerequisite of domestic connection should be applied here. As a justification for its assessment that the domestic connection was not present in this specific case, the lower court referred to the correct remarks made by the court of first instance. In light of this interim conclusion, the court left open the question of whether there was in fact an action in this case constituting "*iure gestionis*". The challenge decision thereupon delved into the Appellant's theory that the Respondent had waived its immunity. The Cantonal Court did not find any waiver of immunity, holding as the result of its deliberation that the arbitral Award of December 17, 2015, was not enforceable in Switzerland.

4.
The Appellant argues that it has identified an arbitrary application of the law "in the realm of Art. V NYC". As the Appellant itself correctly notes, pursuant to the consistent jurisprudence of the Federal Tribunal, a decision will not be deemed arbitrary merely because another outcome appears arguable or even more correct. Rather, arbitrary application of the law will only be deemed to have occurred where the challenged decision is manifestly untenable and in clear conflict with the facts, or represents a gross violation of a norm or undisputed legal principle, or runs counter to and offends notions of justice; what is required in this respect is that the decision is found to be arbitrary not merely in terms of its reasoning, but also in terms of its outcome (BGE 141 I 149 at 3.4, p. 53; 140 III 16 at 2.1, pp. 18-19;; 167 at 2.1, each with references).

5.
The Appellant initially criticises the reasoning in the challenged decision as arbitrary. The Appellant is troubled by the fact that the Cantonal Court referred only to a single author and does not mention any of the opposing opinions cited by the Appellant. In saying this, the Appellant is not criticising the way in which the lower court applied the law, but rather the way the Cantonal Court justified its decision. The Appellant overlooks the fact that a judicial body does not have a duty to comment in depth on all of the points raised (*see* BGE 134 I 83 at 4.1, p. 88; 133 III 439 at 3.3, p. 45). The Appellant does not claim that it could not have been held to account for the scope of the lower court's ruling (Judgment 5A_382/2013 of September 12, 2013 at 3.1). It then criticises the "co-existence" of the New York Convention and the aforementioned jurisprudence on domestic connection "which the lower court had relied upon" as being "absolutely meaningless". However, it cannot be said that, in doing so, the Cantonal Court had placed itself in an "irreconcilable contradiction". By referring to the aforementioned citation, the lower court provided an explanation for the above-referenced "co-existence" it found, and it expressed – with sufficient legal clarity – its legal view that the requirement of a domestic connection applies "generally", *i.e.* including under the New York Convention. This application of the law would be arbitrary in the court's reasoning if the Cantonal Court had thereby untenably put itself into manifest contradiction with a clear norm or undisputed principle of law. There is no suggestion of this in the appellate brief, as far as the Appellant's objections to the reasoning in the challenged decision are concerned. The Appellant is unable to gain any ground with its complaint that the stringency of the

first instance court's reasoning left much to be desired. The foregoing applies analogously to the Appellant's objection that the lower court was demanding "new" reasons for "departing" from the principle of the domestic connection in the realm of the New York Convention. The Appellant submits that no "new" reasons are needed as arguments against applying this principle. Accordingly, it argued, it was not "logical" to speak of any "departure." Continuing the objections discussed above, the Appellant limits itself to juxtaposing its own view of matters against the arguments put forward by the lower court. However, as the Appellant itself seems to have understood, with regard to the accusation of the arbitrary application of law it is solely a matter of determining whether there are compelling legal reasons that would militate against applying the criterion of the domestic connection.

6.
The Appellant also considers the challenge decision to be arbitrary as to its outcome.

6.1. The Appellant points out that the Federal Tribunal introduced the criterion of the domestic connection outside the scope of the New York Convention, as a prerequisite for granting attachment against a sovereign state arising out of domestic law, which goes beyond Switzerland's obligations under international law, and the Federal Tribunal has never applied it in a case concerning enforcement of an arbitral award under the New York Convention. The application accuses the Cantonal Court of having failed to deal with the question of whether the criterion of the domestic connection should play any role at all in the context of the New York Convention. Thus, the Cantonal Court overlooks the fact, the Appellant says, that the New York Convention "simply leaves no room" for the application of this criterion. Subsequently, with reference to a judgment of the Swiss Federal Tribunal and a number of scholarly opinions, the Appellant recalls that the grounds for refusal set out in Art. V NYC are exhaustive. Accordingly, the Appellant argues, additional grounds for refusal under domestic law are not permitted, a point which is also uncontroversial amongst scholars. This "compels" the conclusion, the Appellant argues, that, in particular, the criterion of a domestic connection is likewise inadmissible in the context of applying the New York Convention. In support of this view of the law, the Appellant quotes lengthy passages from the writings of "numerous well-known authors," which are printed verbatim in its statement of claim. In the view of the Appellant, Switzerland is not in compliance with its international legal obligations under the New York Convention to enforce international arbitral awards if it refuses to enforce an arbitral award based on an objection (which is not provided for under the New York Convention) that no domestic connection was present. The Appellant concluded that such a violation of law would be "untenable". In its Statement in Reply, the Appellant takes the view that the prerequisite of a domestic connection is also incorrect as a general matter, *i.e*. is outside the scope of the New York Convention. It also claims, in addition, that the prerequisite of a domestic connection is likewise a violation of Art. III NYC. Furthermore, the Appellant argues that it would constitute a violation of Art. III NYC to limit enforcement of arbitral awards against foreign states by applying a domestic connection requirement.

6.2. In essence, the Respondent raises two arguments in opposition to the appeal. First, the Respondent recalls that the prerequisite of a domestic connection is a prerequisite for attachment against a sovereign state even if recognition and enforcement of a foreign judgment is not possible under, for example, Art. 27 PILA[4] (SR 291), Art. 34 *et seq.* of the Convention on Jurisdiction and Recognition and Enforcement of Judgments in Civil Matters (Lugano Convention; SR 0.275.12) or Art. 53 *et seq.* of the Convention on Settlement of Investment Disputes Between States and Nationals of Other States of March 18,1865 (SR 0.975.2). In terms of the points of interest here, Art. V NYC has no variance of content to the analogous norms contained in the quoted decrees. Accordingly, there is no reason to treat the NYC any differently from those other decrees (in terms of the domestic connection

[4] Translator's Note: PILA is the most frequently used English abbreviation for the Federal Statute on International Private Law of December 18, 1987.

requirement) as a legal text aimed at recognising and enforcing foreign judgments. The second argument of the Respondent is that the attachment is a security measure and that Art. V NYC does not deal with measures which are aimed at security. If, based on the New York Convention, there was no claim for interim security measures, then it could not constitute a violation or, indeed, an arbitrary interpretation of Art. V NYC to premise the issuance of attachment measures against a sovereign state on a domestic connection requirement. Rather, it remains the case that the prerequisites to an attachment will be assessed exclusively under domestic law.

6.3.
6.3.1. Pursuant to Art. 271(1)(2) SchKG, the creditor must provide *prima facie* evidence of the existence of grounds of attachment. If a creditor refers to the fact that he holds a definitive enforcement title against the debtor (Art. 271(1)(6) SchKG), then he must also provide *prima facie* evidence, in the case of a decision from abroad, that there is nothing which would prevent recognition and enforcement of that foreign enforcement title. A more detailed examination of the prerequisites to granting recognition and of the prerequisites to refusing recognition under Art. 25 *et seq.* PILA (in cases of foreign arbitral awards, under Art. V NYC) is undertaken in the proceedings on the objection to the order of attachment (Art. 278 SchKG; BGE 139 III 135 at 4.5.2, p. 141). Throughout the entire course of attachment proceedings (*i.e*. including the objection proceedings) the judge examines the enforceability of the decision on which the attachment creditor relies as the grounds of attachment under Art. 271(1)(6) SchKG *solely* from the perspective of a *prima facie* showing. A *res judicata* decision on enforceability will only be issued in the proceedings to validate the attachment [*Arrestprosequierung*] (Art. 279 SchKG); in cases involving the grounds of attachment under Art. 271(1)(6) SchKG, this will normally be done in the context of examining a request for a definitive enforcement title under Art. 80-81 SchKG (Nicolas Jeandin, *Point de situation sur le séquestre à la lumière de la Convention de Lugano*, in: SJ 2017 II 27 *et seq.*, 35-36).

6.3.2. If a creditor wishes to attach assets of a foreign state located in Switzerland, then, pursuant to the case law of the Federal Tribunal, the requirement of a sufficient "domestic connection" comes into play. This affects cases in which the foreign state has not acted as a sovereign ("*iure imperii*") in the legal relationship which underlies the attachment claim (because then it would have immunity for that reason) but has acted as the holder of private rights ("*iure gestionis*"). In such cases, a levy of execution against a foreign state is subject to the prerequisite that the legal relationship in question has a sufficient domestic connection with the territory of Switzerland. There must be circumstances present that tie the legal relationship so closely to Switzerland that there is a good justification for proceeding before the Swiss authorities against the foreign state (BGE 134 III 122 at 522, pp. 128-129, 570 at 2.2; 124 III 382 at 4a, p. 388; 120 II 400 at 4b, pp. 406-407; 106 Ia 142 at 3b and 5, pp. 148 *et seq.*, with references). This prerequisite will, in particular, be considered to be met if the obligation from which the disputed attachment claim is derived was established in Switzerland or was to be performed in Switzerland, or if the foreign state has undertaken some acts in Switzerland by which it established Switzerland as the place of performance. However, it is not sufficient that assets of a foreign state are located in Switzerland or that the claim was the subject of an award by an arbitral tribunal with its seat in Switzerland (BGE 134 III 122 *op cit.*; *see e.g.* BGE 56 I 237 at 3, p. 251). In one case concerning enforcement measures (including an order of attachment) against the State of Libya, based on an arbitral award made in Switzerland, the Federal Tribunal found that the requirement of a sufficient domestic connection arose not out of international law but rather was an expression of Swiss national law (BGE 106 Ia 142 at 3b, pp. 148-149). In BGE 56 I 237, the Swiss Federal Tribunal looked at how enforcement measures against foreign states are handled in other countries. It delved, *inter alia,* into a number of decisions from the then-Kingdom of Italy, in which domestic jurisdiction against foreign states was deemed present. One may infer from the cited Federal Tribunal decision that this Italian jurisprudence referred throughout to facts based not only on "*iure gestionis*" by the foreign state, but – going beyond that requirement – the legal relations in question were connected

with the country, *i.e*. with Italy, in terms of their origin and substance, that made it therefore appear to be subject to the Italian legal system (BGE *op cit.* at p. 249).

6.3.3. In order to obtain an attachment against a foreign state on the basis of Art. 271(1)(6) SchKG, a creditor must therefore furnish *prima facie* evidence (Art. 271(1) SchKG) that the obligation forming the basis of the order dismissing the objection and in which the foreign state is involved as a debtor in a non-sovereign matter bears a sufficient connection with Switzerland within the meaning of what we have described above. The Federal Tribunal regularly addresses the requirement of a domestic connection as an aspect of sovereign immunity of foreign states from Swiss jurisdiction (BGE 135 III 608 at 4.4, p. 612; 134 III 122 at 5, pp. 127 *et seq*., 570 at 2.2; 124 III 384 at 4a, p. 388; 113 Ia 172 at 2, p. 175; 82 I 75 at 7, p. 85), *i.e.* cases in which the Court is called upon to examine whether a foreign state should be held to account by the Swiss authorities in substantive proceedings or enforcement proceedings (BGE 106 Ia 142 at 3b, p. 148; *confer* BGE 86 I 23 at 2, pp. 27-28; 82 I 75 at 7, p. 85). Pursuant to Swiss jurisprudence, where this prerequisite is not met, the Swiss authorities are not empowered to decide the dispute in question (*see* BGE 120 II 400 at 4b, p. 406: "pour que la Suisse puisse connaître du litige"). The fact that the requirement of a sufficient domestic connection is a limit on jurisdiction also comports, in particular, with the view of those authors who take a critical view of this requirement (*see* Michael E. Schneider/Joachim Knoll, *Enforcement of Foreign Arbitral Awards against Sovereigns - Switzerland*, in: R. Doak Bishop (Eds.), *Enforcement of Arbitral Awards against Sovereigns*, New York 2009, p. 338; Daniel Staehelin/Lukas Bopp, *Wider das Erfordernis der Binnenbeziehung beim Staatenarrest*, in: Peter Breitschmid *et al*., Tatsachen, Verfahren, Vollstreckung, FS für Isaak Meier, 2015, p. 730; Jolanta Kren Kostkiewicz, *Staatenimmunität im Erkenntnis- und im Vollstreckungsverfahren nach schweizerischem Recht*, Habil. Bern 1998 [citing to *Staatenimmunität*], p. 460; Dieselbe, *"Binnenbeziehung" und Staatenimmunität: Ein Phänomen der schweizerischen Rechtsprechung*, in: Rolf Dörig et al. (Eds.), *Versicherungsbranche im Wandel*, FS für Moritz W. Kuhn, Bern 2009 [citing to 'domestic connection'], p. 297). The latter-cited author, who is also the author of the party-commissioned expert opinion obtained by the Appellant, is of the view that the lack of a domestic connection merely forecloses the international jurisdiction of the Swiss courts, but does not have any effect on the ability of the foreign state to function, and therefore should not be used as a criterion for determining jurisdiction (Kren Kostkiewicz, *Binnenbeziehung*, pp. 296-297; for greater detail Kren Kostkiewicz, *Staatenimmunität*, pp. 462 *et seq.*). She recalls BGE 106 Ia 142 at 3b, pp. 148-149, stating that "by issuing rules on the territorial jurisdiction of its authorities", each state determines the limits of its own jurisdictional rules in disputes arising out of non-sovereign acts of foreign states (Kren Kostkiewicz, *Binnenbeziehung*, p. 297; Kren Kostkiewicz, *Staatenimmunität*, p. 465, with Fn. 1559; *see also* Pierre Lalive, *Note sur la jurisprudence suisse en matière d'immunité des Etats*, in: Chronique de jurisprudence suisse, Journal du droit international 114 [1987], p. 1003).

According to a more recent decision, the question of immunity from jurisdiction does not need to be examined as the lack of jurisdiction on the part of the Swiss courts results from the lack of a sufficient domestic connection (Judgment 4C.379/2006 of May 22, 2007, at 4). The question of whether the requirement of a sufficient domestic connection is one on jurisdiction or of (international) jurisdiction may be left to one side here. This is shown by the following reasoning. This jurisdiction (including the question of immunity) is a prerequisite which must be determined *ex officio* (BGE 133 III 539 at 4.2, p. 542; 130 III 430 at 3.1 p. 433; I24 III 382 at 3b, p. 387). This is also acknowledged by the above-referenced authors (Kren Kostkiewicz, *Binnenbeziehung*, p. 288; Staehelin/Bopp, *op cit.*, p. 730) and comports with the prevailing opinion in scholarly literature (*see e.g.* Anne Peters, *Völkerrecht*, Allgemeiner Teil, 4th ed. 2016, p. 174; Gerhard Walter/Tanja Domej, *Internationales Zivilprozessrecht der Schweiz*, 5th ed. 2012, p. 86; Alexander Zürcher, in: Thomas Sutter-Somm *et al*. [Eds.], *Kommentar zur Schweizerischen Zivilprozessordnung* [ZPO], 3rd ed. 2016, N 66 with respect to Art. 59 ZPO; Fabienne Hohl, *Procédure civile*, Vol. I, 2nd ed. 2016, margin no. 591; François Bohnet, in*: CPC, Code de procédure civile commenté*, 2011, N 17-18

with respect to Art. 59 ZPO; *Bernard Dutoit*, *Droit international privé suisse*, *Commentaire de la loi fédérale du 18 décembre 1987*, 5th ed. 2016, N 22 in respect of Art. 1 PILA). If this procedural prerequisite is not met, then Swiss jurisdiction will not be present. The action or the request will be inadmissible, and the litigation must be closed with a decision of the court to dismiss the application. (BGE 134 III 570 at 3.2, p. 575; 111 Ia 52 at 5d, p. 62; Zürcher, *op cit.*; *see also* Helmut Kreicker, *Völkerrechtliche Exemtionen*, *Grundlagen und Grenzen völkerrechtlicher Immunitäten und ihre Wirkungen im Strafrecht*, Vol. I, Berlin 2007, p. 50). The consequence of this manner of closing proceedings is that the court in which the matter is filed will not issue any judgment at all on the merits which could become a substantive *res judicata* decision (*see e.g.* Simon Zingg, in: *Berner Kommentar, Schweizerische Zivilprozessordnung*, Vol. I, 2012, N 3 *et seq.* with respect to Art. 59 ZPO; with regard to sovereign immunity: BGE 111 1a 52 *op cit.*). This applies analogously where the requirement of a sufficient domestic connection is not treated as a question of domestic jurisdiction, in accordance with the above-referenced scholarly views, but rather is dealt with from the perspective of international jurisdiction; (international) jurisdiction is likewise a prerequisite for filing an action (Art. 59(2)(b) ZPO). The lack thereof will give rise to a decision to dismiss the application (*see* Kren Kostkiewicz, *Binnenbeziehung*, p. 289, Fn. 10), provided that the defendant foreign state does not establish international and domestic jurisdiction of the Swiss courts (despite a lack of domestic connection) by failing to express any reservation when filing a reply in the action to validate the attachment at the Swiss place of attachment (Art. 4 PILA) (Art. 6 PILA; *see* BGE 123 III 35 at 3b, pp. 45-46, with references).

6.3.4. As regards matters covered by the scope of the New York Convention, Art. V NYC will exclusively govern the question of whether a foreign arbitral award should be denied recognition and enforcement (BGE 135 III 136 at 2.1, p. 139). However, an examination of potential grounds of refusal does require that the proceedings in which such a review will take place are procedurally admissible. In this context, the Federal Tribunal has pointed out that the rule governing proceedings for recognition and enforcement under the New York Convention is, as a general principle, governed by domestic law (Judgment 4A_124/2010 of October 4, 2010 at 3.1, with references). In Art. III NYC, the New York Convention itself makes clear that each signatory state permits arbitral awards to be enforced in line with the procedural requirements of the sovereign territory in which enforcement of the arbitral award is being sought.

6.4.
6.4.1. In the current case, the Appellant focuses on the hypothesis that the criterion of the domestic connection is not intended as a ground of refusal by the New York Convention and that, by applying this criterion, Switzerland fails to comply with its obligations under international law (see 6.1). As such, *i.e.* without regard to the question of whether the domestic connection requirement is compatible with the New York Convention, the Appellant does not call that requirement into question in its appeal, nor does it deny the finding by the lower court holding that a domestic connection of this kind is not present here. To the extent that, in its Statement in Reply, the Appellant argues against the requirement of a domestic connection, we do not agree. The Statement of Reply is allowed for purposes of commenting on one's opponent's written submissions. By contrast, one is not permitted to supplement an appellate brief by way of a Statement in Reply (BGE 143 II 283 at 1.2.3, p. 286, with references). The Appellant does not appear to refer to any specific argument of the Respondent. Its objection that it had already criticised the domestic connection requirement as such in the cantonal proceedings does nothing to change this fact. Moreover, in its appellate brief, the Appellant limits itself to reproducing scholarly views opining that international law does not leave the structure of immunity under international law to each individual state (Kurt Siehr, in: *Zürcher Kommentar zum IPRG*, 2nd ed. 2004, N 17 with respect to Art. 194 PILA) or that the requirement of a sufficient domestic connection does not constitute a general rule of international law (Bernhard Berger/Franz Kellerhals*, International and Domestic Arbitration in Switzerland*, 3rd. ed. 2015, p. 719). However, by merely citing or by copying scholarly citations, the Appellant is unable to cast doubt on the holding of the Federal Tribunal that a state is permitted to

impose certain limitations on itself with regard to admitting litigation against foreign states in matters constituting "*iure gestionis*" under domestic law (BGE 106 Ia 142 at 3b, p. 148). In particular, the Appellant likewise does not claim that (irrespective of the requirements of the New York Convention) a state would, based on general principles of international law, be obliged to allow an injunction or enforcement proceedings against a foreign state for non-sovereign matters without any further prerequisites, thus that the requirement of a sufficient domestic connection constitutes an arbitrary violation of international law. Likewise, the Appellant does not assert that a foreign state is unable to rely on its immunity in enforcement proceedings before the Swiss authorities merely because it submitted to arbitration in proceedings relating to its private rights.

6.4.2. If the requirement of a sufficient domestic connection in the challenged decision is upheld, the fact that Art. V NYC contains an exhaustive list of grounds for refusing recognition and enforcement of a foreign arbitral award will not matter in terms of the outcome of the present dispute. Comments to this effect were made not only by Patocchi/Jermini who prefaced their commentary on the grounds of refusal under Art. V NYC by referring to the principle that foreign arbitral awards can only be enforced against a foreign state within Switzerland (*inter alia*) if a domestic connection is present (Paolo Michele Patocchi/Cesare Jermini, in: *Basler Kommentar, Internationales Privatrecht*, 3rd ed. 2013, N 36 with respect to Art. 194 PILA). Similarly, the Appellant itself does not dispute that the requirement of a sufficient domestic connection relates to the question of the jurisdiction of the Swiss authorities over a foreign state and thus constitutes a procedural prerequisite. If, in a dispute regarding approval of attachment against a foreign state, there is a lack of a sufficient domestic connection, as in this case (see 6.4.1), then a *prima facie* showing of grounds for attachment (Art. 272(1)(2) SchKG) will already fail under Art. 271(1)(6) SchKG, because the enforcement judge will, in all likelihood, decline even to commence proceedings for enforcement of an attachment or an action brought to validate the attachment by the foreign state (Art. 279 SchKG); due to the lack of jurisdiction over the defendant foreign state, the judge will refuse to deal with the enforcement dispute.

The question of whether the foreign arbitral award which is being invoked as an enforcement title is enforceable in Switzerland under the New York Convention will constitute a preliminary question in the enforcement proceedings. The Appellant does not claim (and rightly so) that this preliminary question is not itself part of the legal dispute, but rather (in the sense of a prerequisite) must be reviewed as a part of the admissibility of the legal remedy being sought for enforcement. The Appellant is likewise equally unable to explain why the requirement of a sufficient domestic connection has to be treated (specifically in the scope of applying the New York Convention) not as a procedural prerequisite but as a substantive prerequisite to recognition and enforcement, and why the New York Convention would not leave any room for this view even under the heading of the public policy reservation (Art. V(2)(b) NYC). The mere reference to scholarly opinions which appear to express a view in this direction (Berger/Kellerhals, *op cit.*; Andreas Bucher, *Die neue internationale Schiedsgerichtsbarkeit in der Schweiz*, 1989, pp. 168-169) are not sufficient. Like the Appellant, these authors say nothing regarding the established procedural concept that a Swiss court, when called upon to examine enforceability of a foreign arbitral award in the context of attachment proceedings (by way of preliminary question), cannot even express any view regarding Art. V NYC if, as a result of a lack of a domestic connection, the court is compelled to find that it lacks jurisdiction over the defendant foreign state and must therefore dismiss the application. The scholarly views cited in the Statement of Appeal do nothing to change this, where they refer to the priority of international agreements (Art. 1(2) PILA) and conclude on that basis that the domestic connection requirement, as a rule of Swiss domestic law, cannot restrict the impact of the New York Convention (Schneider/Knoll, *op cit.* p. 344; Berger/Kellerhals, *op cit.*; Bucher, *op cit.*, p. 168). These passages, too, imply that a Swiss court seized of the matter is deemed to take up the recognition and enforcement case on its merits.

However, if the result remains that the court deals with the question of domestic connection as a procedural prerequisite to jurisdiction, *i.e*. that it deals with the question as one of procedure and not of the merits themselves, then Art. III NYC and Swiss Federal jurisprudence would represent an obstacle to this theory of the primacy of international treaty law. Art. III NYC and Swiss federal jurisprudence hold – precisely – that proceedings for recognition and enforcement are, as a fundamental matter, subject to national law, even under the authority of the New York Convention (see 6.3.4). The Appellant, in its Statement of Appeal, likewise fails to deal with this question. In its Statement in Reply, it refers to two citations opining that Art. III NYC only permits the application of procedural rules that are aimed at recognition of arbitral awards, but not to procedural rules which oppose such recognition (Dimitri Santoro, *Forum Non Conveniens, A Valid Defense under the New York Convention?,* in: ASA Bulletin 2003 pp. 723-734) or that Art. III NYC relates only to how recognition proceedings operate and not to the question of whether recognition should be granted at all (William W. Park/Alexander A. Yanos, *Treaty Obligations and National Law: Emerging Conflicts in International Arbitration*, in: Hastings Law Journal 58 [2006], p. 256). We must leave to one side the question of what all of this means. As the Appellant correctly notes, the grievance of a violation of Art. 9 BV[5] relates solely to Art. V NYC. In its Statement in Reply, the Appellant now also complains that it would constitute a violation of Art. III NYC to limit the possibility of "attachment under a judgment title" (Art. 271(1)(6) SchKG) against a foreign state by imposing a domestic connection requirement. Quite apart from the fact that the Appellant has not asserted in this context that the challenge decision violates its constitutional rights (*see* section 2), it is likewise not apparent why it would not have been able to assert this grievance prior to the expiry of the period for filing an appeal. The mere opportunity to express its opinion, after receiving the comments of its opponent in connection with its Statement in Reply on the positions taken by its opponents, does not relieve the Appellant from the obligation to submit all of the grievances, by which it intends to dispute the challenged decision, to the Federal Tribunal at the time of filing its appeal (BGE 143 II 283 at 1.2.3, 286; *see also* 6.4.1).

6.4.3.
In the event that the criterion of the domestic connection is (also) applied under the New York Convention, the Appellant, referring to its party-commissioned expert opinion, argues that this criterion is "substantively alien" and "makes no sense" in the context of arbitral awards. It argues that, by concluding an arbitration agreement, the parties seek to "delocalise" any dispute they may have by intentionally choosing a place of arbitration which bears no relationship with their contract. This argument is likewise unpersuasive. As the Court has already explained, the fact that the seat of an arbitration is located in Switzerland is not a reason to find a sufficient connection with Switzerland (*see* Section 6.3.2, *supra*). Accordingly, the mere fact that the arbitral award against a foreign state is issued at a place which has no connection to the legal relationship underlying the attachment claim is not an obstacle to recognizing and enforcing the award in Switzerland. The determinative point is not the relationship with the place of the arbitration, but rather the relationship to the place of enforcement. The domestic connection requirement is no obstacle to delocalisation of the resolution of the dispute.

6.4.4
In view of the above, we may leave open the question of whether, in light of the lack of a domestic connection, the attachment judge could have found that he lacked jurisdiction and could have found the request for attachment inadmissible instead of (only) dealing with the question of the domestic connection in the context of examining the grounds of attachment invoked (Art. 271(1)(6) SchKG). The Federal Tribunal likewise does not need to deal with the Respondent's hypothesis that under Swiss law (Art. 271 *et seq.* SchKG), the attachment constitutes a pure security measure and, as such, does not fall within the scope of the NYC. This question may also remain open, after the cantonal authorities rejected the *prima facie* evidence of grounds of attachment in a non-arbitrary way,

[5] Translator's Note: BV is the German abbreviation for the Swiss Federal Constitution.

based on the grounds that the foreign arbitral award could not be enforced in Switzerland because the Respondent is not subject to Swiss jurisdiction, due to the lack of the requisite domestic connection.

In light of this outcome, the Appellant's view that the Federal Tribunal has never before applied the sufficient domestic connection requirement in connection with enforcing a foreign arbitral award under the New York Convention is hardly surprising. As our previous considerations show, there are most definitely legal reasons for the long-standing "co-existence" of the domestic connection jurisprudence and the New York Convention. Contrary to the view of the Appellant, the fact that the lower court did not address these reasons in detail does not mean that the challenged decision contravenes the prohibition on arbitrariness by the state (Art. 9 BV). The challenged decision is based on the legal view that the requirement of a sufficient domestic connection will also apply in the context of the New York Convention. The Appellant does not succeed in proving that the Cantonal Court has acted in an arbitrary way in assessing the legal situation in this manner. The question of what findings the Federal Tribunal would reach if it was called to rule upon an appeal from a *res judicata* decision on the recognition and enforcement of a foreign arbitral award made against a foreign state without limiting the power to review (*see* Section 2, *supra*) must thus remain open here.

7.
Thus, the challenged decision stands. The appeal is unfounded and must be dismissed. In light of this outcome of the proceedings, the Appellant has not prevailed. The Appellant shall therefore be liable to pay the costs of the case (Art. 66(1), 1st sentence, BGG) and must compensate the Respondent for the proceedings before the Federal Tribunal (Art. 68(1) and (2) BGG).

Therefore, the Federal Tribunal pronounces:

1.
The appeal is rejected.

2.
The judicial costs of CHF 40'000.00 shall be paid by the Appellant.

3.
The Appellant shall pay the amount of CHF 50'000.00 to the Respondent for the Federal proceedings.

4.
The decision shall be notified in writing to the Parties and to the Cantonal Court of Schwyz, Appellate Chamber.

Lausanne, September 7, 2018

In the name of the Second Civil Law Court of the Swiss Federal Tribunal

Presiding Judge:	Clerk of the Court:
von Werdt	Monn