



Insolvency Law Newsletter Switzerland

Federal Council Confirms Immunity of Argentina's Deposits With the Bank for International Settlements From Attachments

Introduction

According to a press release of the Federal Justice and Police Department dated October 17, 2012, two US funds have - pursuant to a decision of a New York Court - acquired claims against Argentina amounting to roughly one billion dollars. In 2009 the funds requested the competent local insolvency authorities in Basel to attach the balance in favor of Argentina with the Bank for International Settlements ("BIS").

By decision rendered on July 12, 2010, the Federal Supreme Court ruled that the cash deposited with BIS cannot be subjected to sequestration, without the consent of BIS, since Switzerland grants immunity to BIS under the agreement entered into between the Swiss Confederation and BIS, dated February 10, 1987 (SR 0.192.122.971.3) ("Headquarter Agreement").

Subsequently the funds filed a petition with the Department of Foreign Affairs, requesting measures against BIS to coerce BIS to consent to the attachment. This request was denied by the Department of Foreign Affairs. The funds then appealed the decision with the Federal Administrative Court which declined jurisdiction and submitted the matter to the Federal Council.

Reasoning

The Federal Council refused to suspend immunity of BIS in this case. It recalled that it is the very purpose of BIS to accept funds from central banks and that it was not the duty of the Swiss authorities to supervise the asset management activity of the BIS, in particular the criteria applied by BIS for accepting deposits from a central bank.

The Federal Council found no abuse of the immunity guaranteed to BIS pursuant to the Headquarter Agreement.

Hence, it found no need to initiate proceedings under the Headquarter Agreement, since this neither is a dispute between the Federal Council and the BIS nor between the funds and the BIS, but rather a dispute between the funds and Argentina.

Comment

According to Article 4 para. 4 of the Headquarter Agreement, all deposits entrusted to BIS, all claims against BIS and the shares issued by BIS shall, without the express prior agreement of BIS, wherever located and by whomsoever held, be immune from any measure of execution (including seizure, attachment, freeze or any other measure of execution, enforcement or sequestration, and in particular of attachment within the meaning of Swiss law). The funds deposited by Argentina with BIS fall squarely within this clause.

According to Art. 22 of the Headquarter Agreement BIS and the Swiss authorities shall cooperate at all times to facilitate the satisfactory administration of justice, to ensure the observance of police regulations and to prevent any abuse of the privileges, immunities, facilities and exemptions provided for in the Headquarter Agreement. We share the view of the Federal Council, that this is not the case of abuse of the privileges granted to BIS under the Headquarter Agreement.

In any event, it is not on the Federal Council to unilaterally suspend immunity. Any such decision would need to be resolved between the Swiss Confederation and BIS according to the arbitration procedure set out by Article 27 of the Headquarter Agreement.

The decision of the Federal Council not to engage in proceedings which might lead to the suspension of BIS's immunity in this particular case of a dispute



between a foreign state and a third party is therefore most welcome.

If Switzerland were to seek the suspension of immunity by permitting the attachments of funds deposited by central banks with BIS in disputes between private investors and sovereign countries, the proper functioning of the BIS could be severely jeopardized. And, the consequence would inevitably be for BIS to seek headquarter in another jurisdiction.

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