Unofficial translation

Federal Tribunal

{T 0/2}
4P.173/2003 /ech

Decision of 8 December 2003
1st Civil Chamber

Members of the Court:
Mr Corboz, Presiding Judge, Mr Klett and Favre, judges
Clerk: Mr Carruzzo

Parties
A._____ SA, appellant,

versus

B._____ Co Limited,
C._____ SA,
respondents,
both represented by Mr. Jean-Luc Herbez,
1st Section of the Court of Justice of the Geneva Canton, place Bourg-de-Four 1, post box 3108, 1211 Geneva 3.

Object
Art. 9 Cst; enforcement of foreign arbitral award;

public law appeal against a decision of the 1st Section of the Court of Justice of the Geneva Canton of 19 June 2003.

Facts:
A.
A.a In an agreement dated 6 October 1999, A._____ SA, in Geneva, sold to B._____ Co Ltd, in Tortola, British Virgin Islands, 20,000 tonnes of granular urea, which was to be sent to C._____ SA in Ecuador. The agreement contained an arbitration clause providing for arbitration under the Arbitration Rules of the International Chamber of Commerce (ICC) and for London as the seat of arbitration.

A dispute arose between the parties, leading the respondents to file a request for arbitration against the appellant before a sole arbitrator under the auspices of the ICC. In a first award, rendered on 18 May 2001, the sole arbitrator, dismissing the objection raised by the appellant on this point, upheld his jurisdiction over the dispute. The appellant challenged the award and the Paris Court of Appeal held the action to be inadmissible by an order issued on 11 October 2001.

On 2 May 2002, the sole arbitrator rendered a partial arbitral award in which he ordered the appellant to pay the respondents £ 12,838.53 with interest as of 18 May 2001 to cover the costs of the award on jurisdiction, and £ 9,927.85 with interest as of 9 December 2001 for fees covering the period of 1 May to 22 November 2001, as well as to reimburse US$ 24,000 with interest as of 4 April 2001 to cover the respondent's down payment of fees.
A.b On 24 September 2002, the respondents requested that the Geneva Bureau of Court Cases notify the appellant of the order to pay in case no. ... (hereafter: Action A), the equivalent in Swiss francs of the amounts awarded in the partial arbitral award of 2 May 2002. This payment order was challenged.

The respondents then had a second payment order notified to the appellant in case no. ... (hereafter: Action B) for the equivalent in Swiss francs of FF 25,000 and € 795.61 which had been awarded to them by the Paris Court of Appeal for fees and costs. The appellant appealed this payment order.
A.c On 23 December 2002, the sole arbitrator rendered a final award in which it ordered the appellant to pay the respondents US$ 636,023.20 and US£ 48,000 in arbitration costs, from which any amount paid since the partial award of 2 May 2002, would be deducted. The appellant, having received notification of said award on 29 January 2003, had recourse to the Commercial Court, High Court of Justice, Queen's Bench Division, London, on 26 February 2003. These proceedings are still pending.
B.
By a request of 22 January 2003, in a sole action filed before the Tribunal of First Instance of the canton of Geneva, the respondents sought the recognition and enforcement of the partial arbitral award dated 2 May 2002

and the Paris Court of Appeal's order dated 11 October 2001, in order to obtain a final dismissal of the objections to the above-mentioned payment orders. The appellant requested the dismissal of the request.
In a decision of 17 March 2003, the Tribunal of First Instance granted an enforcement order for the partial arbitral award and the French order, as well as final dismissal of the objection to the two payment orders.

In a ruling dated 19 June 2003 following the appellant's appeal, the Geneva Court of Justice upheld the first instance decision. In essence, the court held that the production of a copy of the arbitration clause, and the original produced during the appeal proceedings, met the requirements of Art. III, sentence 2 of the New York Convention (RS 0.277.12), unless an excessively strict formalistic stance is adopted. The partial award of 2 May 2002 was binding pursuant to Art. 30 ch. 2 of the ICC Arbitration Rules, as the action against the final award of 23 December 2002 had no effect on its binding nature. As it constituted title on which the definitive dismissal of the objection to the payment of the debt could be granted, this partial award could be enforced. The same applied to the order of 11 October 2001 rendered by the Paris Court of Appeal. In both cases, the debtor could not raise any of the grounds contained in Art. 81 para. 1 *in fine* LP.
C.
Filing a public law appeal, A._____ SA requested that the Federal Tribunal set aside the aforementioned decision. Repeating its previous arguments, it alleged a breach of Art. IV and V of the New York Convention, as well as arbitrary application of Art. 80 LP. The respondents request that the action be dismissed, to the extent that it is admissible. The Court of Justice referred to the recitals of its decision.
By order of 20 October 2003, the president of the 1st Civil Chamber ruled that that the challenge would suspend enforcement of the award.

The Federal Tribunal held, in law:
1.
1.1 According to Art. 194 PILS, recognition and enforcement of foreign arbitral awards are governed by the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (RS 0.277.12). As it is an international agreement, cantonal decisions rendered pursuant to said Convention may be subject to a public law appeal on the grounds of breach of an international agreement (Art. 84 para. 1 let. c OJ), but no other means of recourse may be had (Art. 84 para. 2 OJ; **ATF 126 III 534** recital 1a and the other cited decision).
1.2 Due to the requirements of reasons set forth in Art. 90 para. 1 let. b OJ, the appellant, relying on the challenged decision, should have stated which treaty provisions had, in its opinion, been breached, specifying how the treaty had been breached (**ATF 126 III 534** recital 1b and cited decisions).
1.3 When examining an appeal based on Art. 84 para. 1 let. c OJ, the Federal Tribunal freely assesses, within the bounds of the grounds raised, whether an international agreement has been breached (**ATF 108 Ib 85** recital 2a); when the challenged decision was handed down by a judicial body, the Tribunal may only assess whether the examination of the facts was arbitrary, and no new arguments may therefore be admitted (**ATF 129 I 110** recital 1.1).

In accordance with these principles, the Federal Tribunal shall freely assess whether the decision, rendered by the high court of the Geneva Canton, breached the New York Convention, as the appellant claims. However, it shall only examine the cantonal court's factual findings to ascertain whether they were arbitrary, if the appellant raises objections to such findings.
2.
Pursuant to Art. IV ch. 1 let. (b) of the New York Convention, in conjunction with Art. II of the same treaty, a party relying on an arbitral award may only obtain its recognition and enforcement if it produces the original copy of the arbitration clause or the submission agreement between the parties, or a copy thereof meeting all the requirements for its authenticity.

In the present case, the respondents provided the Tribunal of First Instance tribunal with a photocopy of the arbitration clause which was not in compliance with this provision. However, on appeal, they produced the original agreement of 6 October 1999 containing the arbitration clause in dispute. The respondents thus produced the document required by the aforementioned provision.

Whether the original arbitration clause could be produced during the appeal, while only a copy of the agreement including the clause was produced during the first instance proceedings, is an issue governed by cantonal procedural rule. The Court of Justice recognised that the production of new exhibits on appeal is not admissible under Geneva procedural law. However, it held that it would be excessively formalistic to deny production of the aforementioned exhibit when its authenticity is not contested and a copy had been produced in the first instance proceedings. The application of cantonal law is naturally limited by the prohibition of excessive formalism. The

appellant does not contend that Constitutional law prohibiting excessive formalism was wrongfully applied in this case and thus the matter does not require further examination (Art. 90 para. 1 let. b OJ).

The cantonal court, in possession of the original agreement containing the arbitration agreement, failed to grant an enforcement order, in breach of Art. IV ch. 1 let. (b) of the New York Convention.
3.
3.1 Pursuant to Article V ch. 1 let. (e) of the New York Convention, enforcement of an arbitral award must be refused if the party objecting to enforcement provides proof that the award has not yet become binding on the parties or was not set aside or suspended by a competent authority in the country in which, or pursuant to which law, it was rendered. An enforcement order will thus not be granted if ordinary recourse against the award before a domestic court is still available, if it is set aside in the state of origin or if an action to set aside the award was made suspensive by order of a competent authority (for more details see, inter alia, Paolo Michele Patocchi/Cesare Jermini, in Commentaire bâlois, n. 116 ss ad art. 194 LDIP). The party objecting to enforcement must provide proof of one of the grounds on which to refuse enforcement, pursuant to the aforementioned provision (**ATF 110 Ib 191** recital 2c p. and the cited decisions; Andreas Bucher Die neue internationale Schiedsgerichtsbarkeit in der Schweiz, p. 156 n. 437). To this effect, where necessary, it will have to establish the content of the foreign law (**ATF 108 Ib 85** recital 3 p. 88; Patocchi/Jermini, op. cit., n. 114 ad art. 194 LDIP). For an award to be granted enforcement it does not necessarily have to be enforceable in the country of origin; it suffices if it may be enforced in the country where enforcement is sought, the New York Convention sought to avoid "double exequatur" (**ATF 108 Ib 85** recital 4e p. 91 and references; Frédéric-Edouard Klein the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, in: RSJ 57/1961, p. 248 n. n. 15; Andreas Bucher, op. cit., p. 160 n. 451).
3.2 In this case, the cantonal court stated that the effects of the partial award of 2 May 2002 were not suspended by the arbitral authority. Moreover, it underscores the fact that the challenge against the final award of 23 December 2002 did not affect the binding nature of the previous partial award, adding that the appellant did not demonstrate that said challenge had a suspensive effect on the award. In support of its objection, the appellant merely argued that English law allows for challenges to arbitral awards and that such challenge ipso jure prevents an award from entering into force. However, it does not provide the slightest proof of this theory. In particular, it does not show the least proof that recourse before an English domestic court would be regular, or that an English court examining the action would have given it a suspensive effect.

The ground based on a breach of Art. V para. 1 let. e of the New York Convention must, therefore, be dismissed.
4.
The appellant also considers that Art. V para. 2 let. (b) of the New York Convention was breached, *i.e.* that Swiss public policy was breached, in that the sole arbitrator, rendering an award during the course of proceedings on 2 May 2002, ordered the appellant to bear some of the costs and to reimburse the respondents for their down payment of costs even before rendering a final award. Such behaviour amounts to prejudging the decision on the merits, renders all procedural acts following the partial award illusory and undermines "the most elementary principles of the legal order, including the right to be heard".
4.1 According to Art. V para. 2 let. (b) of the New York Convention, recognition and enforcement of an arbitral award can also be refused if the competent authority of the country where recognition and enforcement are sought holds that the recognition or enforcement of the award would be contrary to the public policy of that country.

As an exception clause, the public policy reservation is interpreted in a restrictive manner, especially in terms of recognition and enforcement of foreign judgments, where its scope is narrower than for the application of foreign law (mitigated effect of public policy: **ATF 116 II 625** recital 4a p. 630 and references). Public policy is breached when the recognition or enforcement of a foreign award would intolerably undermine the Swiss concept of justice. A foreign award may be incompatible with the Swiss legal order not only because of its material content, but due to the proceedings leading to it. In this respect, Swiss public policy requires that fundamental procedural rules stemming from the Constitution be upheld, such as the right to a fair trial and the right to be heard (**ATF 126 III 101** recital 3b p. 107/108; **122 III 344** recital 4a p. 348/349 and references). These principles also apply to the recognition and enforcement of foreign arbitral awards (**ATF 101 Ia 521** recital 4a and references).
4.2 In this case, the appellant challenges the cantonal court for having upheld the enforcement order for the partial award, thus disregarding its right to be heard. In ruling on fees and costs in said award, the sole arbitrator allegedly failed to grant it this right and prejudged the award on the merits. This argument is not convincing. First, it should be mentioned that the ICC Arbitration Rules expressly provide the possibility of rendering interim and partial awards (Art. 2 iii). Yet the appellant does not demonstrate how Art. 31 of the same rules prohibits ruling on the costs and fees in awards of this type.

In any event, it is clear that the amounts for fees and costs resulting from the jurisdiction issue have no effect on the solution on the merits of the dispute decided by the sole arbitrator. The reimbursement of the respondents'

down payment to the ICC International Court of Arbitration, imposed on the appellant and amounting to half of the costs, *i.e.* US$ 24,000, could suggest that the arbitrator was leaning towards a final award in favour of the respondents. This order to pay for the down payment of fees of US$ 24,000 only covers the appellant's share of the arbitration costs, which it did not pay and that the respondents paid so that the arbitration could proceed. To the extent that the arbitral authority ordered the other party to reimburse these costs during the course of proceedings and not to pay of the entire amount of arbitration fees of US$ 48,000, the partial award of 2 May 2002 cannot reasonably be interpreted to be a decision prejudging the outcome of the arbitration proceedings and the solution adopted in the final award, rendered on 23 December 2002. Thus, the procedural acts following the partial award of 2 May 2002 preserve their pertinence, especially for the appellant, which may not allege that its right to be heard was breached.

Thus, the Court of Justice did not disregard public policy pursuant to Art. V ch. 2 let. (b) of the New York Convention. The appellant's challenge on this point is thus unfounded.

5.

The appellant, lastly, contends that the decision made arbitrary application of Art. 80 LP.

In this particular case, the respondents had two separate payment orders notified: the first (Action A), for amounts awarded to them in the partial award of 2 May 2002; the second (Action B), for amounts awarded by the Paris Court of Appeal in an order issued on 11 October 2001. Subsequently, the respondents, in a sole action, requested that the challenges to each of the aforementioned payment orders be dismissed.

This request thus regards the procedure to dismiss objections, which is governed by cantonal law, where there are no specific instructions in federal law (Art. 25 para. 2 let. a LP; **ATF 123 III 271** recital 4b p. 272 and references).

The Court of Justice notes that, in their sole action, the respondents submitted different arguments for each of the two final dismissal requests relative to the different actions against the appellant; it adds that the latter does not argue that said conclusions were imprecisely worded. Before the Federal Tribunal the appellant does not state which provision of the procedural law of Geneva was breached or interpreted arbitrarily. To the extent that the argument complies with the requirements of Art. 90 para. 1 let. b OJ (**ATF 129 I 113** recital 2.1, p. 120 and cited decisions), it is without merit. Given the respondents' submissions, the appellant was able to determine exactly which point was affected by the final dismissal and to easily recognize that the dismissal applied to the amounts listed in the first payment order, for the partial award of 2 May 2002, and in the second, for the Paris Court of Appeal's order of 11 October 2001.

6.

The unsuccessful appellant shall pay the judicial fees (Art. 156 para. 1 OJ) and reimburse the respondent's costs (Art. 159 para. 1 OJ).

For these reasons, the Federal Tribunal:

1.

dismisses the action.

2.

The appellant is ordered to pay judicial fees of CHF 4,000.

3.

The appellant is to pay the respondents, creditors *in solido*, compensation of CHF 5,000 for the costs of the proceedings.

4.

Copies of the present decision are communicated to the 1st Section of the Court of Justice of the Canton of Geneva.

Lausanne, 8 December 2003

On behalf of the 1st Civil Chamber

of the Swiss Federal Court

The President: The Clerk: