Unofficial translation

Heading
101 Ia 521

82. Decision of 12 December 1975 in the case of Provenda S.A versus Alimenta S.A and Geneva, Court of Justice

Summary

Enforcement of foreign arbitral awards. Swiss Public Policy. Reasoning of awards.

1. It belongs to the enforcement judge to decide whether a foreign judgment regarding a cash payment is enforceable in Switzerland, pursuant to an international agreement (recital 1a).
2. If enforcement is based on an international agreement, the Federal Tribunal freely assesses its interpretation and application and it freely reviews the facts; however, it is bound by the grounds raised by the parties, which may submit new arguments (recital 1b).
3. Enforcement in Switzerland of awards rendered in Great Britain and for which no reasoning is provided, is not contrary to public policy (recital 4).

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Provenda S.A having its registered office in Don (France), brought an action against Alimenta S.A, domiciled in Geneva, for payment of amounts awarded in two arbitral awards rendered in Great Britain, by arbitrator S Acke of the "Grain and Feed Trade Association" and by the "Board of Appeal" of that same association. As the debtor objected, the creditor requested that the Geneva Tribunal of First Instance dismiss the objection. The Tribunal, in essence, refused for two reasons: first, that the arbitration clause was invalid pursuant to Art. 1 para. 2 letter a of the 26 September 1927 Geneva Convention on the Enforcement of Foreign Arbitral Awards (hereafter: the Convention) and second, that the arbitral awards did not provided reasons, which is contrary to Swiss public policy, pursuant to Art. a para. 2 letter e of the Convention.
As Provenda S.A filed an appeal, the Court of Justice held that the arbitration clause was valid, but that the absence of reasons in the award was contrary to Swiss public policy, and thus the Tribunal of First Instance did not breach the law by not granting dismissal.
Through a public law appeal, Provenda S.A requested that the Federal Tribunal set aside the Court of Justice's decision and remand the case to that authority in order for it to grant final dismissal. It alleges, in particular, that the Geneva Convention of 26 September 1927 was breached.

Recitals

In law:

1. a) The foreign decisions upon which the appellant relies regard a financial payment. They must thus be enforcement in accordance with the provisions of federal law on debts and bankruptcy (Art. 38 LP). According to Federal law, the court examining the request for dismissal has jurisdiction to decide whether a foreign judgment regarding a cash payment may be enforced in Switzerland, by virtue of an international convention (Art. 81 para. 3 LP; RO 98 Ia 532 recital 1 and cited decisions). Thus

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the respondent wrongly accuses the appellant of having chosen a procedure—summary dismissal procedure—"the very nature of which rendered impossible a serious assessment of the issues".

As the Federal Tribunal mentioned on various occasions (RO 61 I 277 *et seq.* with citations from doctrine and case law), the fact that a summary cantonal procedure is not the most suitable (in particular as far as taking evidence is concerned) procedure for enforcement is not a determinant factor: the procedure during which enforcement of a foreign decision is sought is not only governed by cantonal law, but also, and above all, by Federal law. When federal law provides certain procedural requirements because of the nature of the decisions that need to be made, cantonal law must adapt to federal law and not the contrary (RO 76 I 126; see also, Message

of the Federal Council of 18 September 1964 regarding the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards, FF 1964 II 639).

b) The situation is no different when it comes to the enforcement of an arbitral award and not a judgment of a domestic court (RO 76 I 126, 61 I 279). According to constant case law, private awards rendered in Switzerland are equated to judgments under Art. 80 and 81 LP, on condition that both the canton in which they are rendered equates them to arbitral awards as regards *res judicata* and enforceability, and that the arbitral tribunal provide the guarantees required by federal law, especially with respect to the independence of the parties (RO 81 I 325, 76 I 92). Foreign arbitral awards can be enforced in Switzerland, depending on the existence of an international convention. If there is no agreement, the issue will be decided solely in accordance with cantonal law, which the Federal Tribunal, examining a public law appeal of a cantonal decision, can only examine from the narrow point of view of arbitrary application. If, however, enforcement is based on an international agreement, the Federal Tribunal freely assesses its interpretation and application - contrary to what the respondent believes - and also freely reviews the facts (RO 98 Ia 532 recital 1 and cited decisions); it is however

bound by the grounds raised before it by the parties (RO 98 Ia 541 recital 2 and 553 recital 1c); but, as prior exhaustion of cantonal proceedings is not required in this matter (see, Art. 86, para. 3 OJ), the parties may submit new grounds and new evidence (RO 99 Ia 86, 98 Ia 553 recital 1c), even if they have exhausted all cantonal proceedings (RO 98 Ia 553 recital 1c).

2. a) It is not contested that the international agreement applicable in this case is that which was entered into in Geneva on 26 September 1927 (Convention on the Enforcement of Foreign Arbitral Awards, RS 12 p. 358), which Great Britain also signed, as well as France and Switzerland - the countries under which jurisdiction the appellant and respondent respectively come. The Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (known as the New York Convention), which both France and Switzerland have signed does not apply as Great Britain is not party to it; Switzerland used the possibility - contained in Art. 1 para. 3 of said Convention - to not only apply it to awards rendered within another contracting state (AF of 2 March 1965, ROLF 1965, p. 797).
b) For enforcement to be authorised in one of the countries having contracted the Geneva Convention, the award must have been rendered following a submission agreement or a valid arbitration clause, depending on the applicable law Art. 1 para. 2 letter a of the Convention), in this case in accordance with the "Protocol on Arbitration Clauses" of 24 September 1923, signed by all three countries. While the First Instance Tribunal did not recognise that this condition had been met, the Court of Justice did. In its reply to the public law appeal, the respondent does not, on this point, criticise the challenged decision and thus this court has no further need to examine the issue (RO 98 Ia 541 98 I 54 recital 2, 85 I 44).

3. Before the Court of Justice the respondent objected that the award was contrary to Swiss public policy (pursuant to Art. 1 para. 2 letter e of the Convention) as it was rendered by a tribunal organised by an association of which it was not a part. The Court of Justice dismissed

this claim. In its reply to the public law appeal, the respondent once again raised an argument; it added that the procedural rule, applied in this case, according to which the judges must decide unanimously or with only one vote against in order for an appeal decision to modify the first instance decision, is also contrary to public policy.
While it had nothing to gain from a public law appeal against the Court of Justice which mostly found in its favour, the respondent could, nonetheless, criticise the points of the decision which were unfavourable (see, RO 89 I 523 and cited decisions). But it did not provide reasons for its claims in accordance with Art. 90 letter a OJ, similarly applicable to the statement of defence in a public law appeal. It notably did not take up any position on the reasons adopted by the Court of Justice on the impartiality of arbitrators and party equality. The claims raised are thus inadmissible.
But even if these claims could be examined, they would have to be dismissed. Alimenta S.A freely accepted the possibility of arbitration when the "GAFTA 100" clause was inserted into the contract, providing for arbitration. The procedure for appointing arbitrators, set forth in this clause, is not to be criticised. The respondent entered the proceedings without any substantive reservations—at least it does not claim the contrary—and it filed an appeal; it

did not concretely question the arbitrators' independence, capacity and impartiality. If not identical, the situation is very similar to that of the *Egetran* case (RP 93 I 49 et seq.). The procedural rule whereby an award rendered during the first instance can only be modified on appeal by a qualified majority of the appeal arbitrators, is not in breach of Swiss public policy; the inter-cantonal concordat itself provides, Art. 31 para. 2 and 11 para. 4, that an arbitration agreement may require the award to be rendered unanimously or with a qualified majority.

4. In holding enforcement of an award without reasons to be contrary to public policy, the Court of Justice did not disregard the Federal Tribunal's opposite decision in Roth, on 9 October 1936 (RO 62 I 143); but it considered that, due to progress made in Swiss public law since 1936, this case law could not be maintained, at least not in this case.

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This court cannot agree with this opinion; on the contrary, a second assessment of this case law leads to its confirmation.
a) The Federal Tribunal considered, in *Hoepffner* on 21 January 1959 (RO 85 I 47 recital 4a) that the public policy reservation can be raised not only against a foreign arbitral award for which enforcement is sought in Switzerland, but also against proceedings from which it arose. This case law has since been constantly upheld (see, RO 98 Ia 533 recital 3 and cited decisions).
The Swiss public policy reservation has a narrower scope in the recognition and enforcement of foreign arbitral awards than in the application of foreign law by Swiss tribunal. Regarding the merits, that means that enforcement must not necessarily be denied when the court decides that, if it were to directly apply the foreign law itself pursuant to a rule of reference, it could refuse to do so due to this law's incompatibility with Swiss public policy (RO 98 Ia 533 recital 3 and cited decisions); regarding procedure, said limitation means that a procedural fault does not necessarily lead to a refusal to enforce the foreign award, even though such fault would lead to the setting aside of the award rendered in Switzerland: it has to be a case of breach of fundamental principles of Swiss public policy, which is intolerably contrary to Swiss law (see, RO 98 I 391, 87 I 193 and cited decisions). On this subject, it must be noted that the more detailed formal conditions to which enforcement of arbitral awards is subjected, the narrower the scope of the public policy reservation—whether express or tacit: this reservation must not allow for the exclusion, by alternative means, of the application of international agreements signed by Switzerland and which are part of Swiss law, and thus the exclusion of the application of Swiss law (RO 94 I 362 *et seq.* 81 I 231 recital 5, 81 II 179); it must not, in the end, lead to a breach of the treaty, of which the objective is to recognise the existence of different legal systems and to coordinate them (see, also STEIN-JONAS, Kommentar zur Zivilprozessordnung, 19th ed., Tübingen 1970, Anhang zu § 1044, A II **Art. 1, II 5**).

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b) According to the inter-cantonal concordat on arbitration of 27 March 1969, applicable in the canton of Geneva since 12 January 1971, arbitral awards must provide reasons (Art. 33 para. 1 letter e); even though this provision is held mandatory by the concordat (Art. 1 para. 3) and its breach voids the award (Art. 37), parties may nonetheless expressly waive it, according to Art. 33 letter e of this same text. Also, if the action to set aside the award has merit, it does not necessarily lead to setting aside an award which does not contain reasons, as, where appropriate, the court examining the action may remand the award to the tribunal and give it a deadline for rectifying or completing it (Art. 39). Lastly, even a flawed award can be enforced by the relevant court under Art. 3 of the concordat, not only when parties have formally agreed to it, but even where no action to set aside was brought within the thirty day period following notification (Art. 4 letter a et b).
From the provisions of the concordat—which the Tribunal freely examines (RO 100 Ia 422 recital 3)—it is clear that the obligation to provide reasons does not have the broad scope that the Court of Justice attributes to it: first, a breach of this obligation is only a potential ground for setting aside and second, and most importantly, parties may waive this obligation, if they do so expressly. As the requirement of reasons for awards is up to the discretion of the parties, it cannot be considered a right that cannot be waived nor, consequently, can it be held to form part of public policy. Nor can the requirement that this waiver be express be considered a public policy provision: a law allowing for tacit waiver, by conclusive facts (e.g. implicit acceptance of arbitration rules of a private or public institution—see Art. 1 para. 2 of the concordat—exempting arbitrators from the requirement of reasons) would not be an intolerable affront to justice.

In addition, concordat law has not yet been adopted in all the cantons; to this day, only ten cantons and four half-cantons have contracted the concordat of 27 March 1969. Thus, the rules of concordat law cannot

be considered generally applicable in all of Switzerland. As in *Vegetable Oil Products Cy v. Elmassian* of 11 November 1959, the Geneva canton could, despite the local requirement that awards be reasoned, be forced to grant enforcement to an arbitral award rendered in a canton which has not signed the concordat and the procedural law of which does not require reasons for awards.
c) Far from being obsolete, the liberal case law in *Roth* (RO 62 I 143), confirmed in the *Vegetable Oil Products Cy* decision of 1959, complies with recent case law in other countries where such requirement exists, such as France and the Federal Republic of Germany.
In Federal Germany, an award not containing reasons may be set aside, unless the parties agree otherwise (Art. 1041 para. 1 ch. 5 and para. 2 ZPO). However, Art. 1044 ZPO, regarding the enforcement of foreign awards, does not mention a lack of reasons as a ground for refusing enforcement. And, according to doctrine and case law (STEIN-JONAS *op.cit.* para. 1044 III B 2a *et seq*., and the decision it cites: LG Berlin KTS 66, 182), lack of reasons is not contrary to public policy under para. 2 Art. 1044 ZPO (see also, WALKER, Die freie Gestaltung des Verfahrens vor einem internationalen Schiedsgericht durch die Parteien, thesis Zurich 1968, p. 51).
As for France, where case law requires awards rendered in the country to provide reasons, such requirement is not imposed on foreign arbitral awards, in particular, those rendered in Great Britain (*Cour de cassation*, in *Broutchoux v. Elmassian* on 14 June 1960, published in Revue de l'arbitrage, 1960, p. 97; see also the appeal decision in the same case, published in the same journal, 1958, p. 122). Doctrine approves of this case law (see, PH. FOUCHARD, L'arbitrage commercial international, Paris 1965, n. 529-531 p. 346 *et seq.*). The Netherlands seem to have also adopted similar case law (P. SANDERS, Arbitrage international commercial, Paris 1956, p. 22 and 404).
d) The Convention on international commercial arbitration, signed in Geneva on 21 April 1961, codifies a similar solution.

Under the heading "Reasons for awards", Art. VIII established the assumption that parties wish awards to be reasoned, unless they have expressly waived the requirement, or if they have "submitted to an arbitration procedure in which it is not usual to reason awards and to the extent, in that case, that all or one of the parties does not expressly request reasons before the end of the hearing, or if there is no hearing, before the award is written up".
Even though Switzerland is not party to this convention, it is not unusual to refer to a solution adopted by experts in order to solve a delicate problem caused by the coexistence, on an international level, of different legal systems and various traditions - a solution similar to that opted for by the Federal Tribunal almost 40 years ago. At that occasion already, the Federal Tribunal had held that it was common not to provide reasons for awards in Great Britain (CURTI, Englands Zivilprozess, p. 105 *et seq*.; see, SANDERS, in Arbitrage international commercial, Paris 1956 p. 22 and MACASSEY, same work, p. 82). It had come to the conclusion that Switzerland, which knew of this fact when it entered into the Geneva Convention of 1927, of which Great Britain is a signatory and which does not expressly make enforcement of a foreign award contingent on it containing reasons, had implicitly accepted that a lack of reasons could not be raised as a ground to refuse enforcement of awards rendered in Great Britain (RO 62 I 145 *et seq*.)
This essential argument, based on the need to respect international agreements and sharing the objectives of said Convention, is still very relevant today. There are even fewer reasons to review this case law as the arbitration law in force in England and Wales (Arbitration Act of 1950) grants ordinary domestic courts very broad powers to intervene in arbitral proceedings (see, MACASSEY, *op.cit.*, p. 66; FOUCHARD, *op.cit.*, p. 346 n. 529, with citations from case law).
e) The aforementioned case law cannot be said to make the task harder for courts examining enforcement requests, having to review whether the content of an arbitral award breaches public policy, due to the lack of reasons. But such a risk, which is not serious given

the powers of intervention of ordinary British courts, weighs on the party which freely accepted, in exchange for other advantages, to submit to an arbitral tribunal in a country where it is not customary to give reasons for awards. Moreover, a party can easily avoid such a risk by expressly requesting that the award be reasoned, a request which arbitrators may not refuse, especially when the award is to be enforcement in a country where reasons are a legal requirement (see, MACASSEY, *op.cit* p. 82).

In addition, nothing prevents parties against whom enforcement is sought from using other means to prove that the content of the award is contrary to Swiss public policy. However, if it could purely and simply rely on the lack of reasons in order to object to enforcement of an award rendered in application of a procedure which was freely accepted, that would often amount to protecting an attitude contrary to good faith (see, Message of the Federal Council of 26 August 1929, FF 1929 II 159; FOUCHARD, *op.cit.*, p. 348 n. 530).
The fact that the reasons are expressly required by many cantons for state authorities' decisions and that this can, under certain conditions, be considered a constitutional requirement stemming from Art. 4 Cst (see, RO 98 Ia 464 *et seq.*), does not mean that these same principles should necessarily apply to arbitration, where party freedom is much more important and which is chosen freely because of other advantages and does not necessarily have to provide the same guarantees as ordinary domestic courts.
f) Thus, in confirmation of case law, a lack of reasons in an arbitral award rendered in Great Britain is not sufficient to refuse enforcement on the ground that public policy was breached.

5. Before the Court of Justice, the respondent did not claim that the award had been made by an arbitral tribunal not provided for in the arbitration clause or of which the composition did not comply with party wishes or with the legal rules applicable to the arbitration procedure (Art. 1 para. 2 letter c of the Convention), nor that the award had not become

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final in Great Britain pursuant to letter d of the same provision. The Court of Justice thus held that the requirements of these provisions were met. Nonetheless, in its reply to the public law appeal, the respondent contended that the appellant did not prove that the conditions pursuant to letters e and d of Art. 1 para. 2 were met, even though it had a duty to do so pursuant to Art. 4 of the Convention; the respondent concludes that enforcement should be refused.
If new arguments are accepted during a public law appeal which is not subject to the requirement of prior exhaustion of cantonal instances (RO 99 Ia 86 recital 3b), then it must be admitted that the respondent, which had nothing to gain from an appeal against a decision in its favour, can also raise new grounds, should the Federal Tribunal overturn said decision, holding the appellant's claims to be founded (see, RO 86 I 225 *et seq.*; see also, RO 89 I 523). But the respondent's arguments must also meet the conditions of Art. 90 OJ, applicable by analogy to the reply to the public law appeal.
However, in this case, the respondents merely alleged that the conditions put forth under letters c and d of Art. 1 para. 2 of the Convention were no longer met, without providing any further reasons for its allegations, nor any proof, such that the claims raised on this point were inadmissible.
But even if this court could examine these claims, it would have to admit that the appellant supplied the required proof, as we will see.
a) The new grounds that the appellant may raise in a public law appeal not subject to prior exhaustion of cantonal proceedings must be submitted within thirty days, pursuant to Art. 89 OJ (see, RO 90 I 250 *et seq.*). But although the production of such grounds is made necessary by new claims raised by the respondent in its reply, this production may occur during the rebuttal. Such is the case here of additional documents produced by the appellant in its rejoinder as proof of the claims raised by the respondent in its reply.
The respondent, wrongly, claims in its rebuttal that the exhibits produced by the appellant were never

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communicated to it; these exhibits were produced as appendixes to the rejoinder, which was communicated to the respondent in the event of an eventual rebuttal; it could, if it felt it useful or necessary, request that the Federal Tribunal examine the exhibits; if it did not do so, it had only itself to blame.
b) The exhibits produced by the appellant showed that there is no reason to doubt that the arbitral awards where rendered by arbitrators provided for in the arbitration clause and that their appointment occurred in compliance with the law applicable to procedure (Art. 1 para. 2 letter c of the Convention). Thus the requirement of Art. 4 para. 1 ch. 3 of the Convention was manifestly met; yet this requirement was not absolute as said exhibits were

only to be produced “if necessary”, i.e. if there are doubts on that particular point, in particular, if the existence of the conditions for enforcement of Art.1 para. 1 and 2 letters a and c is challenged, with reasons in support of the challenge, by the party against whom enforcement sought.
It was also proven, notably by the certificate of custom of 14 August 1975, that the arbitral awards had become final in Great Britain; moreover, the respondent does not claim either that they were appealed or challenged before English courts. Thus, the requirement of that same Art. 1 para. 2 of the Convention is also met.

Operative part

For these reasons, the Federal Tribunal: Admits the appeal and sets aside the challenged decision.