Unofficial translation

Heading
110 Ib 191

32. Excerpt from a decision of the 1st Civil Court dated 14 March 1984 in the case of Denysiana S.A. versus Jassica S.A. (pubic law appeal)

Summary

Request for enforcement in Switzerland of an arbitral award rendered in France (Art. 16 of the Franco-Swiss Convention of 15 June 1869; Art. V and VII of the New York Convention of 10 June 1958).
In the event of competing provisions in the bilateral Franco-Swiss Convention and the multilateral New York Convention, the party seeking enforcement of an arbitral award may rely on the most favourable provision (Art. VII ch. 1 of the New York Convention; recital 2a-b).
Art. V para. 1 letter (e) of the New York Convention: it is on the party opposing the request for enforcement to prove that the award has not yet become binding or been set aside or suspended (recital 2c).

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Jassica S.A. requested the Tribunal of First Instance Canton of Geneva to grant enforcement of the arbitral award rendered on 8 September 1980 in Paris, in a dispute between itself and the trading company Denysiana S.A. It produced the arbitral award, the ruling of the Paris Court of Appeal dismissing an action to set aside the award brought by Denysiana S.A. and a letter dated 9 March 1983 from its counsel informing it that the Cour de cassation, in a ruling of 14 February 1983, had dismissed Denysiana S.A.'s appeal on cassation.
The Tribunal held the award to be enforceable in a decision of 29 August 1983, which was upheld on 10 November 1983 by the Geneva Canton Court of Justice.
The Federal Tribunal dismissed Denysiana S.A.'s public law appeal against the decision of the Court of Justice.

Recitals

Excerpt from Recitals:

2. France and Switzerland are bound by the Convention between France and Switzerland on Jurisdiction and the enforcement of Judgements in Civil Matters, of 15 June 1869 (hereafter: Franco-Swiss Treaty), and by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards signed in New York on 10 June 1958 (hereafter: New York Convention), which both contain provisions on the enforcement in one States of arbitral awards rendered in the other. Their application is not conditional on the nationality or domicile of the parties (Art. I of the New York Convention, Art. 15 of the Franco-Swiss Treaty).
a) In this case, only the formalities with which the applicant must comply in order to obtain a decision to enforce the arbitral award rendered in France in Switzerland are in dispute.
Art. 16 of the Franco-Swiss Treaty on this point requires the production of:
"1) the original copy of the judgment or decision certified by the respective envoys, or by the authorities of each country;
2) the original delivery notice of the judgment or ruling or any other document which, in that country, proves notification of the decision;

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3) a certificate issued by the registrar of the court where the judgment was rendered, stating the absence of challenge, appeal or other recourse against that decision.
Art. IV of the New York Convention provides that the applicant provide:
"a) the duly authenticated original award or a duly certified copy thereof;
b) the original agreement referred to in Art. II. or a duly certified copy thereof."

According to Art. V para. 1 letter (e) of the New York Convention, the other has to prove "that the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made".
b) Art. VII para. 1 of the New York Convention governs relations with other bilateral or multilateral treaties, stating that its provisions "shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States".
It is clear from this provision that the New York Convention provides Contracting States with the possibility of departing from its rules, by adopting more or less stringent rules. In order to ascertain whether two (or more) States have departed from the New York Convention requires interpreting their bilateral (or multilateral) law rather than the New York Convention. The cantonal court alludes to the principle of the "hierarchy of norms" and seems to infer that multilateral agreements prevail over bilateral agreements; which would amount to disregarding the fact that both stem from the law of international agreements and that the fact that more than two states have contracted a convention does not modify its status as an international agreement.
The New York Convention was entered into (almost a century) after the Franco-Swiss Treaty. Moreover, it was created to facilitate the recognition and enforcement of international arbitral awards. When it was entered into and approved, no representatives of France and Switzerland expressed their desire, in the bilateral relations between their two countries, to subject the recognition and enforcement of arbitral awards to rules more stringent than those set forth in the Franco-Swiss Treaty. On the contrary, in its message to the federal chambers regarding the approval

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of the New York Convention, the Federal Council expressed the opinion that, as was already the case under the Geneva Convention, the applicant could rely on the most favourable provision (FF 1964 II 639 639). Absent any contrary reason, there is no reason to assume that the two States would, in their bilateral relations, deprive parties from advantages which they have in their relations with all other States which had already entered could still enter, into the New York Convention. Thus, it can be presumed that France and Switzerland intended for their parties, in bilateral situations too, to benefit from conditions more favourable than the New York Convention, in the matter of recognition and enforcement of awards.
This solution falls under the rule known as that of maximum effectiveness, which the cantonal court rightly recalled. According to this rule, when there are competing provisions in agreements on the recognition and enforcement of arbitral awards, priority is given to the provision in favour of or facilitating recognition or enforcement, either because of more liberal substantive conditions or due to the existence a simplified procedure, in accordance with the objectives of bi- or multilateral conventions on the matter, which includes facilitate as much as possible the recognition and enforcement of arbitral awards; parties must therefore not be deprived of the possibility to obtain recognition or enforcement of an award, when that possibility stems from an international agreement in force (see, on this subject, MAJOROS, Les conventions internationales en matière de droit privé, II p. 472; VAN DEN BERG, The New York Arbitration Convention of 1958, p. 90 et. seq., 105 et. seq., 113, 118 et. seq.; see also BERTHEAU, Das New Yorker Abkommen vom 10. Juni 1958, über die Anerkennung und Vollstreckung ausländischer Schiedssprüche, thesis Zurich 1965 p. 98 et. seq.; SCHLOSSER, Das Recht der internationalen privaten Schiedsgerichtsbarkeit, I p. 81, 119 et. seq.; SCHWAB, Schiedsgerichtsbarkeit, 3rd edition, p. 330 et. seq.; HAHN, L'arbitrage commercial international en Suisse face aux règles de concurrence de la CEE, thesis Lausanne 1983, p. 17).
c) Regarding the application of the New York Convention, the appellant holds that only one condition is not met: it does not contest that the French Cour de cassation dismissed its petition, but argues that that decision is not binding on it, according to French law, to the extent that it was not properly served to it;

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in support of its argument it cites decision **ATF 46 I 458** and argues that it had still not been served the Cour de cassation ruling when the Tribunal of First Instance rendered its decision.
According to Art. V para. 1 letter (e) of the New York Convention, and contrary to what is provided in many treaties on the recognition and enforcement of foreign judgments, the party opposing the enforcement must prove that the award has not yet become binding or been set aside or suspended, pursuant to the law governing the arbitration (see **ATF 108 Ib 90** s.).
However, the appellant in no way demonstrates that the arbitral award had not yet become binding pursuant to French law in force at the time the enforcement order was granted, in particular as the appeal to the Cour de

cassation would suspend the award until such time as the Court's decision was served. The decision cited, **ATF 46 I 458**, has no connection to the matter.
It is thus unnecessary to examine whether the behaviour of the appellant, which admits that the highest French authority dismissed its appeal, is compatible with the rules of good faith (see **ATF 105 Ib 41**).