Unofficial translation

Heading

111 Ib 253

48. Excerpt from a decision of the 2nd Civil Chamber dated 5 November 1985 in the case of Tracomin S.A. versus Sudan Oil Seeds Co Ltd (pubic law appeal)

Summary

Arbitration agreement in accordance with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards signed in New York on 10 June 1958.
1. Any arbitration agreement set forth in writing and accepted orally or tacitly does not comply with Article II, para. 2 of the New York Convention. Not only must the proposal to submit a pending dispute to arbitration be in writing, but the other party must also provide a written acceptance of such proposal which it shall communicate to the party having made it. The arbitration clause or submission agreement may also result from an exchange of faxes (recital 5).
2. The existence of an *ad hoc* arbitration agreement, entered into when a dispute arises, exonerates the courts from ascertaining whether the agreement could be based on a prior arbitration clause and whether the said clause complied with the formal requirements set forth in Art. II, para. 2 of the New York Convention (recital 6).

Recitals from page 254

BGE 111 Ib 253 S. 254

Excerpt from recitals:

5. According to Art. II of the New York Convention (RS 0.277.12), each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration. An "agreement in writing" refers to an arbitration clause contained in a contract or a submission agreement signed by the parties or contained in an exchange of letters or telegrams.
This text states that the written agreement whereby parties decide to arbitrate may be either an arbitration clause (*clause compromissoire*) or submission agreement (*compromis*). An arbitration clause provides for arbitration in the event of a dispute which has not yet arisen, but which could arise from a legal relationship into which the parties may enter. A submission agreement, on the other hand, is a contract into which parties enter when a conflict arises and provides for settlement of the existing dispute by arbitrators (see VAN DER BERG, The New York Arbitration Convention of 1958, p. 171, 190, 202).
Both arbitration clauses and submission agreements must be set forth in writing as provided for in Art. II para. 2 of the New York Convention. This text prevails over domestic law and constitutes a standard law governing the form of arbitration clauses and submission agreements (VAN DER BERG, p. 173, 177). The condition for recognizing an arbitration agreement shall be no more and no less than the criterion defined by Article II, para. 2 of the Convention (VAN DER BERG, p. 177-179). Naturally, pursuant to Art. VII of the New York Convention, parties may still avail themselves of broader conditions for recognition, to the extent that they may rely on the legislation or treaties of the countries in which recognition of the award is sought. In the case at hand, however, Article VII of the New York Convention is not applicable, as the parties rely on no legal rule other than the New York Convention, and the Court may not consider grounds which the parties have not raised.
Absent the signature of one or the other party, the arbitration clause or submission agreement may result from an exchange of letters or telegrams. An exchange of faxes is equated to an exchange of telegrams (VAN DER BERG, p. 204, p. 195 with reference to the Geneva Court decision found in Recht 1968, p. 56, No. 19; SCHLOSSER, Das Recht der internationalen privaten Schiedsgerichtsbarkeit, no. 343, p. 335; COHEN, De la validité formelle des clause compromissoires conclues par telex, in RSJ 1979, p. 259).
In any event, there must be an exchange of messages. If a submission agreement is proposed in writing or by telegram and accepted orally or tacitly, the requirements of Art. II, para. 2 of the New York Convention are not met (VAN DER BERG, p. 196; RSJ 1968, p. 56, No. 19. SCHLOSSER criticises this decision, *op.cit* p. 340, arguing that in the case at hand the written acceptance of the other contracting party was sufficient. The criticism thus regards a different point.) On the contrary, not only must there be a written proposal of arbitration, but the other party must provide written acceptance of it and communicate such acceptance to the party having proposed arbitration (VAN DER BERG, p. 199-203).
In the case at hand, Sudan Oil Seeds Co Ltd (SOS) made a proposal to Tracomin to submit to arbitration a dispute stemming from the delayed issuance of a letter of credit to cover expected deliveries pursuant to Agreement no.

10-80/81 of 6 December 1980, by fax of 18 May 1981, by letter of 4 July 1981 and then by fax of 16 July 1981. Tracomin declared in a fax of 21 July 1981 that it appointed an arbitrator in the dispute of which it was informed, as it expressly referred to other party's fax of 16 July, in reply to the fax of 18 May and letter of 4 July. It has thus manifested

that it accepted the arbitration in compliance with the requirements of Art. II, para. 2 when it appointed its own arbitrator in the said dispute. We must thus admit that the parties expressed, in writing, their wish for the dispute which arose between them in the performance of Agreement. No. 10-80/81 of 6 December 1980 to be submitted to FOSFA arbitration. This dispute was submitted to arbitrators and resolved by award No. 2542 of which enforcement is sought.

6. The appellant's entire argument rests on the assertion that agreement No. 10-80/81 of 6 December 1980 contained no valid arbitration clause pursuant to Art. II of the New York Convention, as the agreement did not expressly refer to the possibility of arbitration as a means of resolving disputes arising from its performance. This is an open issue as, even though no arbitration agreement was signed when the Agreement was entered into, a submission agreement was concluded by an exchange of written documents and the conflict arose and was accurately defined in Sudan Oil Seeds' messages dated 18 May, 4 July and 16 July to which Tracomin referred in its reply of 21 July. In such circumstances, it is irrelevant to rule on the basis of a case published in **ATF 110 II 54** and to ascertain whether the decision is based on an arbitration agreement by reference or whether, due to the specific circumstances of the case, the arbitration agreement arose from all documents signed by the parties or their representatives. The existence of an *ad hoc* submission agreement, entered into at the time a dispute arose, exonerates the courts from ascertaining whether the agreement could be based on a prior arbitration clause and whether said clause complies with the formal requirements set forth in Art. II, para. 2 of the New York Convention SCHLOSSER *op.cit.*, no. 340, p. 334).