Unofficial translation

Heading

110 II 54

Judgment of the 1st Civil Court of 7 February 1984 in the case of Tradax Export S.A versus Amoco Iran Oil Company (action to set aside treated as an appeal)

Summary

Art. II of the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards.
A general reference to the terms and conditions of a charter party, including an arbitration clause, contained in a maritime bill of lading signed by a maritime transporter and freighter on behalf of a company—specialized in the oil trade—included in the same group as the charterer, is a valid arbitration agreement (recital 3).
Facts from page 54

A.- On 8 November 1978 in New York, a charter party ("Tanker Voyage Charter Party" based on the "Asbatankvoy" model) was entered into, whereby Amoco Transport Company, having its registered office in

BGE 110 II 54 S. 55

Bermuda (hereafter: Amoco Transport) mandated Tradax Export S.A, a company incorporated under Panamanian Law, having its registered office in Panama City (hereafter: Tradax) to transport oil on the "Carlantic" (in short) from North America to the United States. This agreement contained, on the same page as the signatures, the following clause k:
"The place of General Average and arbitration proceedings to be London/New York (strike out one)."
In this agreement, "London" had been struck. In addition, the agreement referred to the Terms and Conditions on the back of the agreement ("Part II"); Art. 24 of Part II, under the heading "ARBITRATION", determined the terms of the arbitration, in particular.
On 7 December 1978, when the tanker was loaded, two bills of lading were drawn up in the name of the Amoco Texas Refining Company, having its registered office in the state of Texas (hereafter: Amoco Texas). These bills were signed by the ship's captain and by the freighter, the Compagnie des transports par pipelines au Sahara, which in this case was acting on behalf of the Compagnie franco-tunisienne des pétroles and and by Sonatrach, on behalf of Total Algeria. Delivery of the oil at the port of arrival was promised "in exchange for payment of the cargo in accordance with the conditions of the charter party... including the negligence clause which should be incorporated into the present bill of lading".
When unloading at Houston (Texas, USA) from 29 December 1978 to 1 January 1979, a loss of 6,192.43 barrels of oil occurred.

B.- On 4 December 1980, Amoco Overseas Oil Company (hereafter: Amoco Overseas), which then became Amoco Iran Oil Company, having its registered office in Chicago (Illinois) (hereafter: Amoco Iran), sued Tradax before the Tribunal of First Instance of Geneva—where the headquarters of its Swiss subsidiary are located—for payment of CHF 175,000 with interest at 5% as of 1 January 1979. Relying on the arbitration clause in the charter-party, the respondent objected to the Court's jurisdiction.
In a decision of 23 September 1982, the Tribunal dismissed the objection and upheld its jurisdiction. This decision was then confirmed by the Court of Justice in a decision dated 20 May 1983.

C.- In parallel to a public law appeal, the respondent also filed an action to have the aforementioned decision set aside. It requested that the decision be set aside and that the case be remanded to a Cantonal authority,

BGE 110 II 54 S. 56

and, in the alternative, that the Court hold that the Geneva courts do not have jurisdiction and that the claimant be remanded to pursue justice elsewhere.
The respondent in the appeal requested that the action de dismissed.
The Federal Tribunal accepted the appeal.

Recitals

on the following grounds:

1. Relying on **Art. 68 para. 1 letter a OJ**, the appellant challenged the cantonal courts for having applied cantonal public law (Concordat intercantonal sur l'arbitrage) to the dispute, instead of federal law, i.e. the New

Unofficial translation

York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (RS 0.277.12), in particular Art. II which governs the form of arbitration agreements.
a) An action to set aside the decision may only be brought where an appeal is inadmissible (**Art. 68 para. 1 OJ**). Contrary to what the appellant thinks, the application of cantonal law instead of federal law also constitutes a breach of federal law within the meaning of **Art. 43 *et seq.* OJ** (**ATF 82 II 561**/2, **ATF 81 II 308**/9; BIRCHMEIER, p. 82 and cited decisions; WURZBURGER, in RDS 1975 II p. 82). Second, the dispute in its merits is a civil matter whose value exceeds CHF 8,000. Moreover, the challenged decision is a preliminary ruling on material jurisdiction which can be challenged separately (**Art. 49 OJ**). Lastly, the law on which the appellant relied was a rule of federal law on material jurisdiction (see **ATF 86 I 331**). It is part of a treaty that the Confederation entered into and which is directly applicable (see, regarding prorogation clauses in treaties, **ATF 99 II 279**, **ATF 98 II 90**), and determines whether disputes should be brought before the ordinary courts or arbitral tribunals. It matters little whether the matter falls under procedural law and not civil law (**ATF 103 II 76**, **ATF 101 II 170** and cited decisions). To the extent envisaged, Art. II of the New York Convention obliges Contracting States to recognize the validity and the effect of an arbitration agreement; in so doing, it restricts and defines ordinary courts' subject-matter jurisdiction.
The action to set aside the decision must thus been treated as an appeal, of which it meets the conditions (**ATF 93 II 356**).
b) In the appeal, the Federal Tribunal is bound by the facts acknowledged by the highest cantonal court, except in exceptional cases set forth by legislation (**Art. 63 and Art. 64 OJ**). In particular, the

BGE 110 II 54 S. 57

production of a new exhibit, as the appellant suggested, is inadmissible (Art. 55 para. 1 letter c OJ).

2. According to Art. II of the New York Convention

"1. 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.
2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters of telegrams.
3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."
This provision does not—contrary to the other provisions of the Convention—relate directly to the enforcement and recognition of foreign arbitral awards, but obliges Contracting States to recognize, in certain conditions, arbitration agreements themselves; the effect of which is to deprive ordinary courts of jurisdiction over matters governed by such agreement. Regarding the relationship between the States bound by the Convention, Art. II was to replace the Geneva Protocol on Arbitration Clauses of 24 September 1923 (see, on this matter, Art. VII ch. 2 of the New York Convention, FF 1964 II 625, 629/630; P SANDERS, Arbitrage international commercial, vol. II p. 292 *et seq.*, esp. 304; KLEIN, La Convention de New York..., RSJ 1961, p. 229 *et seq.*, esp. p. 232).
As both the United States of America and Switzerland are signatories to the New York Convention, Art. II governs this dispute between the parties. The appellant may thus legitimately rely on these provisions, stating that the cantonal authority did not take them into consideration.

3. The appellant argues that, due to the reference to the charter party, the bills of lading in dispute contain written arbitration agreements which meet the formal requirements of Art. II of the New York Convention.
a) It results from the text of the Convention itself—and the prevailing view accepts—that Art. II contains rules which must be applied in a uniform manner which, within the scope of the Convention,

BGE 110 II 54 S. 58

replace domestic law (FF 1964 II 631; KLEIN *op.cit.*, p. 235; SANDERS, *op.cit.*, p. 308; SCHLOSSER, Das Recht der internationalen privaten Schiedsgerichtsbarkeit, vol. I, p. 332 *et seq.*; FOUCHARD, International Commercal Arbitration, p. 80 *et seq.* (with reservation); SCHWAB, Schiedsgerichtsbarkeit, 3rd edition, p. 345 *et seq.*; BERTHEAU, Das New Yorker Abkommen vom 10. Juni 1958 über die Anerkennung und Vollstreckung ausländischer Schiedssprüche, thesis Zurich 1965, p. 30; VAN DEN BERG, The New York Arbitration Convention of 1958, p. 170 *et seq.*). Thus, the issue of the validity of the disputed clause may only be decided n light of this provision of the Convention.
b) The requirement that the agreement be in writing, contained in Art. II of the New York Convention in the first line of the second paragraph implies that the arbitration agreement must be signed "by the parties", *i.e.* the persons

bound by said arbitration agreement, in other words by all those who decide to submit to it, thus waiving the guarantee of the natural judge.
In this case, the two bills of lading drawn up when the tanker was loaded were signed by the Captain (representing Tradax) and the freighter (the Compagnie des transports par pipelines au Sahara "Trapsa") and in addition, they are made out to Amoco Texas. Although the latter's signature does not appear on the bills as beneficiary, it must be recognized—given the meaning of the transaction—that the freighter, to whom a bill of lading was delivered, acted on behalf of Amoco Texas, which thus gained ownership rights over the goods, with some restrictions (regarding the requirement that it be in written form and the joint signatures of the captain and the freighter, see SCHLOSSER, *op.cit*., I p. 345 No 351).
Moreover, the fact that the bills of lading in dispute met the other requirements for a written agreement is not challenged. Irrespective of the issue of effectiveness (see, arguments hereafter), the reference clause in dispute thus meets the writing form required by the Convention.
c) Now, it must be ascertained whether the signed bills of lading, and in particular the terms and conditions which it contained, referring to the terms of the charter party, constitute the parties' acceptance of an arbitration agreement. In this respect, the charter party itself undoubtedly contains a valid arbitration clause.
aa) Generally speaking, when it comes to agreements referring to separate agreements which, in the terms and conditions,

BGE 110 II 54 S. 59

define the subject-matter of an arbitration agreement, the foreign case law and doctrine seem to accept the validity of such agreement, when there is a specific reference to an arbitration clause. However, when the reference to the separate agreement is general, there are diverging opinions as to the validity of the arbitration clause. While some courts and authors generally consider such reference to be insufficient, others hold the agreement to be valid when both parties are aware of the terms and conditions, for example, if they have received a copy of it or if they have a sustained business relationship (see, on this matter VAN DEN BERG *op.cit*., p. 208 *et seq.* esp. p. 217 ss; SCHLOSSER, *op.cit*., I p. 339 *et seq.*, No 347 *et seq.*; SCHWAB, *op.cit*., p. 346).
Similar differences of opinion are seen more specifically regarding the validity of a reference to the clauses of a charter party contained in a bill of lading (see, VAN DEN BERG, *op.cit.*, p. 220); SCHLOSSER, *op.cit.*, I p. 343 *et seq.*; REITHMANN, Internationales Vertragsrecht, 3rd ed., Nos. 469, 470, p. 398/9).
bb) The text of Art. II of the New York Convention remains silent as to whether, in order to be effective, a reference to conditions stipulated in another document must contain a specific reference to an arbitration clause. Thus the provision must be interpreted in accordance with its objective and the interests which it manifestly seeks to protect. The aim of the Convention is to facilitate dispute resolution by arbitration, in light of the specific needs of international commerce. Nonetheless, the requirement that the agreement be in written form set forth in Art. II of the Convention intends to protect parties from arbitrary commitments including the waiver of the forum and ordinary courts. From the point of view of the interests concerned, the validity of arbitration agreements must be assessed in light of the circumstances of each particular case. Thus, whether it was entered into by business professionals or inexperienced individuals will be taken into consideration; similarly, one could require a different degree of attention for signatories depending on whether the agreement refers to the clauses of another known agreement or to terms and conditions which may or may not be known.
cc) In this case, Amoco Texas and Tradax can be considered to be considered to be professional companies accustomed to transactions involving the trade and transport of hydrocarbons. They thus are assumed to be familiar with the usual wording of the charter party, based on the "Asbatankvoy" model, used for the transport of oil.

BGE 110 II 54 S. 60

Moreover, while the beneficiary of the bill of lading is not necessarily the freighter, the charter party and the bill of lading for the same transport operation are nonetheless narrowly linked. The owner of the goods could not obtain its property at the scheduled place and under the agreed upon conditions unless the transport agreement was properly performed; it is thus understandable that the parties would have intended to define the rights of the owner (holder of the bill of lading) within the limits of the transport agreement. Thus one could expect them to submit a dispute regarding faulty performance to the same judge, irrespective of whether the claimant relies on a transport agreement of the bill of lading.
Lastly, in this particular case, the bill of lading refers to all the clauses and conditions of the charter party, including the arbitration clause, even that was not expressly stated.
In such circumstances, Tradax has a right to consider that the other contracting party in the bill of lading, acting on behalf of Amoco Texas, agreed to the arbitration agreement contained in the charter party entered into with Amoco Transport. It could start off from the fact that Amoco Texas, part of the Amoco group, was or should have

been familiar with the conditions of the transport agreement—including the usual arbitration agreement—and that, by referring to these conditions, it also agreed to be bound by them. It matters little that the date of the charter party was not mentioned in the bill of lading, as long as the reference to the document complied with the nature of the bill of lading.

dd) That said, it is unnecessary to ascertain whether, irrespective of the freighter and the beneficiary of the bill of lading belonging to the same group of companies, the validity of the arbitration clause is not established due to the general reference in the bill of lading to the conditions of the charter party, due to the organic ties between the two.

d) the objection is thus founded, and it is not necessary to examine further the appellant's other grounds, in particular that regarding a supposed relationship of representation between Amoco Transport and Amoco Texas.