Unofficial translation

Federal Tribunal

{T 0/2}
5A_427/2011

Decision of 10 October 2011
2nd Civil Law Chamber

Members of the Court:
Judge Hohl, President
Judges Escher and Herrmann
Clerk: Mr Fellay

Parties in the proceedings:
A.________,
represented by Mr Christophe A. Gal, attorney at law,
appellant,

versus

B.________,
represented by Mr Louis Gaillard, attorney-at-law,
respondent

Object
Definitive dismissal of objection to pay a debt

appeal against decision of the Civil Chamber of the Court of Justice of the Canton of Geneva of 20 May 2011.

Facts:

A.
A.a On 17 February 2001, the Syrian company, B.________, formerly known as C.________, and the Slovak company, A.________, entered into a contract for the delivery by the latter to the former of 7,350 cold-rolled laminated bands (aluminium) from Kazakhstan, amounting to US$ 2,285,850. On 20 May 2001, the Commercial Bank of Syria (hereafter: CBS), located in Damascus (Syrian Arab Republic), issued documentary letter of credit no. xxxx as a guarantee of payment of the agreed price, payable upon presentation of certain documents. On 4 October 2001, acting as confirming bank, the Union of Arab and French Banks SA (hereafter: UBAF) located in Neuilly (France), accepted the documents submitted by A.________ and paid US$ 2,264,992.87 into the latter's account with D.________ SA in Geneva.

Subsequently, C.________/B.________ had doubts as to the authenticity of the documents communicated by A.________ and alleged that it had not received the goods upon which they had agreed. In December 2001, it filed a request for arbitration before the Syrian Council of State in order for it to rule on the dispute between it and A.________. It relied on a pro forma invoice dated 22 February 2001, Art. 7 of which appointed the aforementioned authority to carry out the arbitration and stated that any dispute would be governed by Syrian law ("Arbitration: According to Syrian law and befor [sic] the Council of State in Damascus"). According to this arbitration, A.________ employed fraudulent means to obtain payment of the documentary credit letter by using a falsified inspection certificate and bill of lading. A.________ refused to proceed before Syrian authorities, alleging that the parties had modified their agreement and had agreed to have any dispute arbitrated by the Slovak Chamber of Commerce and Industry.

Moreover, UBAF filed a criminal complaint in 2001 on the grounds that A.________ had communicated documents which had allegedly been falsified in order to obtain payment.
A.b On 8 April 2003, C.________/B.________ requested and obtained from the Tribunal of First Instance of the Canton of Geneva seizure of A.________'s assets held by D.________ SA in the amount of CHF 3,684,237.40 (the equivalent of US$ 2,264,992.87 at the exchange rate on 15 October 2001). Upon its request, an order for

payment of the aforementioned amount, plus interest and costs relating to the minutes of the proceedings for seizure (case no. xxxx), was notified on 25 September 2003 to A.________, which objected to such order.
A.c On 29 May 2007, the Syrian Council of State rendered a decision which was upheld in an order issued by the High Administrative Court on 22 September 2008. In particular, it noted that the arbitral award was valid regarding its jurisdiction and C.________/B.________'s right to receive payment from A.________ of US$ 2,546,485.10, SYP 707,966 and US$ 910,000 frozen with D.________ SA.
A.d The criminal proceedings initiated by UBAF were dismissed (decision of Versailles Court of Appeal on 24 January 2007, upheld on 23 January 2008 by the French *Cour de cassation*).
A.e On 6 November 2009, C.________/B.________ requested an enforcement order for the arbitral award of 29 May 2007, as well as the final dismissal of the objection to the aforementioned payment order. A judgment of the Tribunal of First Instance on 9 February 2010, confirmed by the Court of Justice of the Canton of Geneva on 6 May 2010, dismissed its claims regarding the final dismissal. The latter Court penalised it for not producing the original arbitration agreement or a certified copy thereof, as well as other documents to support its version of events.

B.
On 13 July 2010, C.________/B.________ filed a new request for seizure and produced certified copies of the original documents in support of its request. By an order of 14 July 2010, the Tribunal of First Instance ordered that an amount of CHF 2,000,000 be seized with 5% interest as of 13 July 2010. A.________'s objection to that order was dismissed in a decision of the same court on 10 November 2010. A new payment order, no. xxxx, for an amount of CHF 2,000,000 plus interest and the cost of the seizure proceedings (CHF 1,952) was notified to A.________ on 11 August 2010. A.________ objected to it. Upon C.________/B.________'s request, the Tribunal of First Instance, by decision of 8 December 2010, recognized and held enforceable in Switzerland the arbitral award rendered by the Syrian Council of State on 29 May 2007 and finally dismissed the objection to payment order no. xxxx. A.________'s appeal of this decision was dismissed by a decision of the Court of Justice on 20 May 2011, communicated to the parties on 24 May and the grounds of which will be set forth hereafter, to the extent that that is useful.

C.
On 24 June 2011, A.________ filed a civil appeal with the Federal Tribunal, to which it attached a request to suspend enforcement and a request for judicial assistance, seeking annulment of the Cantonal court's decision and dismissal of C.________/B.________'s claims; in the alternative, that the matter be remanded to the previous court for a new decision in line with the recitals. The appellant claimed that the facts had not been accurately established, pursuant to Art. 97 para. 1 LTF, breach of Art. 3 and 7 LPC [rect: aLPC/GE), Art. II to V of the New York Convention of 10 June 1954 [rect: 1958] on the Recognition and Enforcement of Foreign Arbitral Awards (RS 0.277.12; hereafter: New York Convention), 25, 27 and 29 PILS, as well as non-compliance with the principle of equal treatment (Art. 4 [rect: 8 para. 1] Cst.).

By order dated 5 July 2011, the present court dismissed the request for judicial assistance as such assistance may only be granted to juridical persons in truly exceptional circumstances, which was not the case here. The advance payment of costs which had been required of the appellant was paid on time.
By order of 21 July 2011, the Chairman of the Court granted suspension but dismissed, as the appellant's insolvency was not duly established (Art. 62 para. 2 LTF), the respondent's request for security for costs.

No filing of response was requested.

In law:

1.
1.1 The appeal was brought against the final decision (Art. 90 LTF), made by the highest cantonal court (Art. 75 para. 1 LTF), which renders enforceable a foreign judgment in a civil matter (Art. 72 para. 2 letter b ch. 1 LTF), as well as final dismissal of the objection to a payment order (**ATF 134 III 115** recital 1.1). The amount at stake clearly exceeds CHF 30,000 (Art. 51 para. 1 let. a and 74 para. 1 let. b LTF). The appeal was brought by a party having unsuccessfully participated in the previous proceedings (Art. 76 para. 1 LTF). In principle an appeal is admissible when filed in a timely manner (Art. 100 para. 1 LTF) and in compliance with formal requirements (Art. 42 para. 1 to 3 LTF).

1.2 An appeal in civil matters may be filed on the grounds that the law has been breached, such as defined by Art. 95 and 96 LTF. The Federal Tribunal does not assess matters regarding breach of constitutional law or issues pertaining to cantonal or intercantonal law if those claim were not raised and reasoned in detailed fashion by the appellant (Art. 106 para. 2 LTF). For the rest, it applies the law by default (Art. 106 para. 1 LTF), and is not limited by the arguments raised during the appeal, nor by the reasoning contained in the deferred judgment; it may thus accept an appeal for motives other than those set out, or even dismiss an appeal for reasons different to those of the previous court (**ATF 135 III 397** recital 1.4; 134 III 102 recital 1.1). However, given the requirement of reasons contained in Art. 42 para. 1 and 2 LTF, which when not met render it inadmissible (Art. 108 para. 1 let. b LTF), the Federal Tribunal, in principle, only examines claims raised; unlike a first instance authority, it is not obliged to examine all the legal issues which arise, when these are not raised before it (**ATF 135 III 397** recital 1.4; **134 III 102** recital 1.1).

Moreover, the Federal Tribunal conducts its legal reasoning on the basis of facts established by the previous court (Art. 105 al. 1 LTF). It can only depart from it if the previous court's findings were clearly inaccurate - a notion which corresponds to arbitrariness within the meaning of Art. 9 Cst (**ATF 135 III 127** recital. 1.5, 397 recital. 1.5; **135 II 145** recital. 8.1)—or did not comply with the law, pursuant to Article 95 LTF (Art. 105 para. 2 LTF) and if the rectification of the error may impact the outcome of the case (Art. 97 para. 1 LTF). An appellant intending to depart from the previous court's factual findings must explain in detail why the conditions for an objection set out in Art. 105 para. 2 LTF are met, given that assessment of proof is only arbitrary if the court clearly misunderstood the meaning and scope of an element of proof; if, without any valid reason, it omitted to consider an important ground which could modify the challenged decision or if, on the basis of proof, it came to untenable conclusions (**ATF 137 I 58** recital 4.1.2; **136 III 552** recital 4.2; **134 V 53** recital 4.3; **129 I 8** recital 2.1). For the rest, the Federal Tribunal does not assess appeals claims regarding circumstances or assessment of proof (**ATF 136 II 101** recital 3 and cited decisions). No new facts or proof may be submitted, unless it is a result of the previous court's decision (Art. 99 para. 1 LTF).

2.

A decision granting or refusing dismissal, whether final (Art. 81 LP) or provisional (Art. 82 LP), is purely an enforcement decision and its only purpose is to state whether payment may be pursued or if the debtor is remanded to act through ordinary channels. A court examining a dismissal request only assesses the probative force of the document of title produced by the creditor, its formal nature—and not the validity of the debt—and renders it enforceable if the debtor does not object or does not make immediate objections likely (**ATF 132 III 140** recital 4.1.1). As it is only an incident of the payment proceedings—which differ from ordinary proceedings in that the court only rules on the basis of evidence produced, and, for temporary dismissal, according to the criterion of probability—the dismissal decision is only *res judicata* with regard to pending proceedings and the evidence produced, and is not even *res judicata* when creditors have initiated new payment proceedings (decisions 5A_905/2010 of 10 August 2011 recital 2.2 and 4A_119/2009 of 9 June 2009 recital 2.1, published in SJ 2010 I 58; **ATF 100 III 48** recital 3 and cited references).

3.

The appellant argues that the challenged decision enshrines an incomplete, inaccurate and arbitrary assessment of the facts of the case, in particular with regard to contractual relations, performance of contractual obligations, French criminal proceedings, Syrian and Slovak arbitration.

3.1 Regarding contractual relations, the appellant challenges the cantonal court's findings as to the identity of the other party (appeal, p. 8 *et seq.* ch. 1 to 16; p. 32, ch. 1a) and the contract (appeal, p. 8 *et seq.* ch. 17 to 30).

3.1.1 During the cantonal proceedings, the appellant questioned the respondent's capacity to appear in court, as well as whether it was the same company as the beneficiary mentioned in the arbitral award, *i.e.* "Etablissement Public du Commerce Extérieur", and had mentioned confusion between the companies "C.________" and "B.________". The respondent, relying on exhibit no. 57 which it had produced with its request, an excerpt from B.________'s website stating that "B.________" had been created by decree no. 120 of 22 March 2003 and had absorbed various external trade bodies, including C.________, as B.________ fell under the Ministry of Economy and Trade and was considered a trader in its commercial relations.

The First Instance Court held that exhibit no. 57 was inadmissible as it had not been produced in a timely manner, i.e. at the same time as the request for dismissal (judgement of 8 December 2010, p. 5/6). The Cantonal court, after recalling that the previous law of cantonal procedure, applicable pursuant to Art. 405 para. 1 CPC,

exceptionally accepted production of “[new] exhibits regarding public policy, a field in which assessment is automatic, the conditions in which an extraordinary appeal is admissible, breach of procedural rules or those of judicial organization, the findings of which cannot result from the docket, nor from the challenged decision” (challenged decision, recital 2 p. 7/8), considered the disputed exhibit and held that C.________, an external trade body, had been absorbed into B.________, pursuant to a decree of 23 March 2003 (challenged decision, recital 4.1.2 p. 9). The appellant challenges the cantonal court for having wrongfully based its decision on the exhibit in question not because it was inadmissible, but because a quote from a website is not an official document and thus has no probative force. This statement is not sufficient to demonstrate the arbitrary nature of the disputed findings and, moreover, seems incorrect in light of case law which accepts that a well-known fact need not be proven by documents if it can be verified, in particular, on the internet (see, decision 5A_559/2008 of 21 November 2008 recital 4.1 and cited references; see also, decision 9C_298/2010 of 28 February 2011 recital 11.2 in fine). The issue may, however, remain unresolved as the cantonal court moreover noted that the appellant had rightly notified the absorption of external trade body C.________ into B.________ by way of judgments of the Versailles Court of Appeal and the French *Cour de cassation* of 24 January 2007/ 23 January 2008, which it had itself produced (exhibits 16 and 17), holding that “company C.________ no longer legally exist[ed], as confirmed by its attorney's statement and by the certificate delivered on 24 February 2004 by the General Company of Exterior Trade (...)”. In addition, the cantonal court held that the arbitral award stated that Etablissement du Commerce Extérieur was the former Etablissement des Métaux et des Matériaux de Construction and its content was an exact match to the dispute between the parties, i.e. delivery of 7,350 tonnes of cold-rolled laminated bands from Kazakhstan amounting to US$ 2,285,850. However, the appellant does not even question these arguments and merely opposes its point of view to that of the cantonal court in stating that it never accepted the existence of the respondent, nor did it know that it was created as a result of the merger of various companies.
3.1.2 As it previously challenged the Tribunal of First Instance, the appellant claims that the Cantonal court ignored the contract negotiation phases, especially the modification of 26 May 2001 when a new pro forma invoice was drawn up and communicated—it was still dated 22 February 2001 and was the only invoice to be signed by the parties—which stipulated that Slovak law would be applicable and that the Slovak Chamber of Commerce and Industry would have jurisdiction.

The cantonal court found that the appellant merely substituted its version of events to that of the court and that the first court did not address the supposed modification of the arbitration clause after 2 May 2001, as the appellant did not produce any original documents in that respect, that the respondent alleged that the copy submitted in the proceedings was false and that, in any event, the appellant itself had appointed the Syrian Council of State as arbitration authority for disputes subsequent to 26 May 2001. The appellant remained silent on this point and merely stated (appeal, p. 13 para. 29) that “as we shall see at a later stage”, without stating when that would be, “the Court’s opinion is both shocking and arbitrary”.

The claim that the facts regarding contractual relations were inaccurately established must be dismissed, to the extent that it is admissible. For the remainder, it is inadmissible to the extent that it regards facts which are irrelevant as they relate to the merits of the dispute, which cannot be examined when ruling on enforcement or dismissal (see, recital 2 above).
3.1.3 The same applies to the claim regarding the performance of contractual obligations (appeal, p. 14et seq. para. 31 to 42).

3.2 Regarding the French criminal proceedings, the appellant challenges the cantonal court for not having taken into account the findings of the French criminal authorities, *i.e.*, that there had allegedly been no fraud.

It would seem from the case documents that if such a finding was reached it was by the Public Prosecutor of the Nanterre First Instance Tribunal, the only authority which the appellant quotes, in its examination of 12 July 2006. Neither the Versailles Court of Appeal, in its decision of 24 January 2007, nor the French *Cour de cassation*, in its decision of 23 January 2008, held that no fraud had been established. They merely considered that there was insufficient evidence that someone had committed the alleged fraud, as the information was insufficient to ascertain who had drawn up the documents allegedly falsified by the civil parties. These findings are insufficient to reach the conclusion that there was no fraud.

The claim is thus unfounded.

3.3 As the appellant did not challenge the authenticity of the documents containing the arbitration clause in favour of the Council of State, as it did not produce any original copy regarding the alleged modification of the arbitral clause of 26 May 2001, the respondent alleged that the copy submitted to the court was false and that the appellant itself had appointed the Syrian Council of State as arbitration authority for proceedings initiated after 26 May 2001 (see, recital 3.1.2 above), the cantonal court did not act arbitrarily in referring to said arbitration clause and denying that the Slovak Chamber of Commerce and Industry's decision upholding its own jurisdiction had an impact on the dispute. Moreover, on this point, the appellant merely opposed its own point of view to that of the cantonal court and does not demonstrate in what way the decision is untenable.

3.4 Having argued at the cantonal level that the respondent had not suffered any loss following the alleged non-performance or ill-performance of the contract, the appellant challenges the cantonal court for having ignored that reality, even though it had been noted by the French criminal court, and granted enforcement to an arbitral award enshrining gross unjust enrichment, which was greatly incompatible with Swiss public policy as well as the principles of justice and fairness. In addition, as we have mentioned, to the fact that the French courts did not find that there had been no fraud, the subsequent fact and argument that the client derived are substantive in nature. Thus the challenged decision, rightfully and in accordance with the arguments in recital 2 above, holds that the court examining the request for enforcement was not to review the award either with respect to damages or the criminal proceedings conducted by French authorities.

3.5 The appellant argues that, contrary to what the cantonal court could arbitrarily find, there is not enough probability that it had been properly summoned before the arbitral tribunal, nor that it had been informed of the progress of the proceedings; moreover, it did not refuse to participate in the arbitration at any time.

According to the findings of the first instance tribunal, which the cantonal court did not question, the exhibits produced by the respondent showed that the appellant had indeed been informed of the arbitration as of 2 June 2003, when it received the request to initiate proceedings, a seizure order and summons to appear in a Syrian court which was to authorise arbitration by the competent body; moreover, from the same exhibits it was demonstrated that the appellant had refused to appoint an arbitrator and to participate in arbitration in Syria, relying on the modification of the arbitration clause in favour of the Slovak Chamber of Commerce and Industry.

The cantonal court held that the fact that the appellant had been duly informed of the arbitration resulted from the contents of the arbitral award of 29 May 2007, which referred to a receipt received by the Syrian Council of State (respondent's exhibit no. 40), and that the fact that it had refused to participate in the arbitration had been established by the respondent's exhibit no. 32.

On this point the appellant merely denies the allegations and makes general statements without explicitly demonstrating (see, recital 1.2 above) how the cantonal court arbitrarily assessed the exhibits.

3.6 Thus it seems that, to the extent that it is admissible, the claim that the facts were inaccurately established must be dismissed.

4. In support of its claim that pursuant Art. 3 and 7 LPC [rect: aLPC/GE), the appellant fails to mention the content of these provisions. The Federal Tribunal only assess grounds based on the breach of provisions of cantonal law if they were raised and reasoned in a specific manner (Art. 106 para. 2 LTF); the appellant's claim is automatically inadmissible as it does not meet this requirement (cf. ATF 136 I 65 recital 1.3.1 and cited decisions).

Therefore, to the extent that the appellant is relying here on the fact that the respondent's capacity to act in court and the claim that it is the same as the beneficiary mentioned in the award were not established, it can simply be referred to recital 3.1.1 above.

5. 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.

According to case law, it is best to avoid any excessive formalism when applying this provision. Thus the claim that the arbitration clause had not been authenticated must be dismissed as the party relying on the claim does not contest its authenticity (decisions 4P.173/2003 of 8 December 2003 recital. 2 and 5P.201/1994 of 9 January 1995 recital 3 and references).

The cantonal court held that, although the respondent's exhibits regarding the call for tender of 2 January 2001 and fax of 28 February 1996, including the contents of the arbitration clause in favour of the Syrian Council of State were not certified copies of the original documents but faxes sent on 8 June 2010, the authenticity of the documents had nonetheless not been challenged by the appellant during the first instance proceedings. It had merely stated that these were only copies of faxes which the respondent could not have certified and that, as it could not recall the contents of said faxes, it had challenged the contents using the wording, "as required". The cantonal court held that this wording was insufficient and, moreover, that in alleging the modification of the clause, the appellant implied that the arbitration clause in favour of the Syrian Council of State had been agreed previously. The appellant did not demonstrate how the arguments were irrelevant or unfounded; it merely opposes its own version whereby the arbitration clause had been modified on 26 May 2001 in favour of the Slovak arbitral tribunal. In addition, according to the findings of the challenged decision, which it does not contest, it appointed the Syrian Council of State itself as arbitration authority for proceedings following 26 May 2001. The cantonal court thus rightfully accepted that the requirements of Art. IV para. 1 letter b of the New York Convention had been respected as far as the documents regarding the Syrian arbitration clause were concerned, of which the authenticity was not challenged. That said, it matters little that, as the appellant contends, only the Slovak arbitral clause had been signed by both parties, as the copy submitted had, contrary to the Syrian arbitration clause, been challenged as being false.

6. Art. V ch. 1 letter b of the New York Convention which the appellant claims to have been breached states the following:
"Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case."

Art. 27 para. 2 let. a and b PILS, which the appellant alleges to have been breached, states that: "Recognition of a decision must also be refused if a party shows that:
a. it had not been properly summoned in accordance with the law of its domicile nor that of its place of usual residence, unless it had proceeded on the merits without reservation;
b. the decision was rendered in breach of fundamental principles resulting from the Swiss understanding of procedural law, in particular, that said party was not able to present its case."

Art. 29 para. 1 let. c PILS, which the appellant also maintains was breached, states:
"A request for recognition or enforcement shall be filed with the relevant court in the canton where recognition of the foreign decision is sought. [...] if the decision was rendered in the absence of one of the parties, it must be accompanied by an official document proving that the absent party was properly summoned and was given an opportunity to defend its case."
The only argument that the appellant raised in this context was that it had not been duly informed of the Syrian arbitration, and that it was thus unable to defend its case, which it had never waived. It challenges the factual findings which, as mentioned above (recital 3.5), were not established arbitrarily and which thus bind the Federal Tribunal (Art. 105 para. 1 LTF). As it has been established that the appellant had been informed of the arbitration in question as of 2 June 2003, when it received the request to initiate proceedings, the seizure order and summons to appear before the Syrian court before which the request was filed with a view to obtaining authorisation for arbitration in Syria, the appellant unsuccessfully argues that the aforementioned provisions had been breached, as the cantonal court rightfully held.

7. 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. According to Art. 27 para. 1 PILS, "recognition of a foreign judgment shall be refused in Switzerland if it is manifestly incompatible with Swiss public policy."

As an exceptional clause, the public policy reservation can be interpreted in a restrictive manner, especially in terms of recognition and enforcement of foreign decisions, 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 conception 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; decision 4P.173/2003 already cited, recital 4.1).

7.2 According to the appellant, the arbitral award breached Swiss public policy as it amounts to non-compliance with *res judicata*, as well as unjust enrichment, and, in addition, as it was rendered by an authority which was not totally impartial and independent.
7.2.1 Regarding *res judicata*, the appellant challenges the cantonal court for not having properly assessed the findings of the French criminal courts, which found that there was no proof of fraud and avails itself of the principle whereby criminal findings bind the civil court.

The provision of Art. 53 para. 2 CO, whereby a decision in criminal proceedings does not bind the civil court as to the assessment of liability and the setting of damages, does not apply to establishing the facts (**ATF 107 II 151** recital 5b and c). Therefore, it does not prevent the civil court, even though not bound by the assessment of the criminal court, from echoing that court's factual findings (decisions 5C.35/2004 of 14 April 2004 recital 2.3 and 4C.74/2000 of 16 August 2001 recital 1, 3 and 4b).

As stated previously (recital 3.2), French criminal authorities did not state that there were no false documents, but simply held that there was insufficient evidence to find anyone guilty of the alleged fraud. Thus the claim raised before the cantonal authority on this point is ill-founded.
7.2.2 As for the unjust enrichment, which, according to the appellant resulted from the fact that the Syrian arbitrators ordered it to pay even though the respondent had not suffered any loss due to the performance of the contract binding the parties "as the banks bore the cost of the transaction"; this is a substantive argument which the court examining a request for enforcement or dismissal may not take into consideration, neither may it review or interpret the document submitted to it. (**ATF 124 III 501** recital 3a; decision 5P.371/1999 of 21 March recital 2c).

7.2.3 Lastly, regarding the alleged failure to guarantee impartiality and independence, the appellant raised new claims (the appellant is a "a wholly-owned Syrian State company belonging to the Syrian Arab Republic, just like CBS" [...] "The Syrian Arab Republic is accustomed to breaching fundamental procedural rights"), which are inadmissible grounds pursuant to Art. 99 para. 1 LTF.

8.
In support of its claims that the principle of equal treatment had been breached, as set forth in Art. 8 para. 1 Cst., the appellant argues that the facts were identical to those of the previous proceedings leading to a decision on 6 May 2010 and that, consequently, the cantonal authority could not depart from it without providing reasonable justification or serious grounds, and that the absence of the original arbitration agreement or certified copy of it would necessarily hinder the admissibility of the enforcement order.

Concerning the payment order regarding the proceedings in question, the Tribunal of First Instance notably reached the following findings: the respondent produced a series of exhibits, notably including a copy of a fax sent by the respondent on 28 February 1996 certified by a notary, which stated, in clause no. 5 that Syrian law would apply to any disputes; the appellant expressly accepted to submit to these conditions following two bids submitted to the respondent on 7 January 2001 and of which certified copies were produced; the respondent also relied on a copy of a fax of 18 February 2001, certified by notary, in which it accepted the two aforementioned offers and once again recalled that any dispute would be arbitrated before the Council of State in Damascus according to Syrian Law, due receipt of this fax by the appellant was proven in an exhibit; lastly, on 22 February 2001, the appellant drew up the final version of a pro forma invoice including a clause no. 7 which specifically provided that the Syrian Council of State would decide any dispute.

During appeal proceedings and on the basis of these facts, the cantonal court considered that although the exhibits in question were not certified copies of the original documents but faxes sent on 18 June 2010, the appellant, nonetheless, did not contest their authenticity.
A simple comparison of the two decisions of the cantonal court shows that the facts are not "completely identical" and, contrary to the appellant's arguments, new exhibits were produced, *i.e.* the faxes sent on 8 June 2010. Therefore, as the cantonal court so relevantly noted, the decision of 6 May 2010, dismissing the request for enforcement and request for dismissal of the objection in the previous proceedings, had not become *res judicata* (see, recital 2 above), enabling the respondent to reiterate its conclusions in the new case and the cantonal court to render a different decision.
The claim that the principle of equal treatment was breached is thus not founded.

9.
From the above it seems that the appeal must be dismissed, to the extent that it is admissible, at the expense of the appellant (Art. 66 para. 1 LTF)

There is no need to award costs.

For these reasons, the Federal Tribunal:

1.
Dismisses the appeal to the extent that it is admissible.

2.
Orders the appellant to bear the costs of the proceedings, set at CHF 12,000.

3.
The present decision is communicated to the parties to the proceedings, as well as the Civil Chamber of the Court of Justice of the Canton of Geneva.

Lausanne, 10 October 2011
On behalf of the 2nd Chamber of Civil Law
of the Swiss Federal Tribunal

Presiding Hohl

Clerk: Fellay