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Heading

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19. Excerpt from a decision of the 1st Chamber of Civil Law in the case of Compagnie X SA versus State Y. (appeal on a civil matter)
4A_403/2008 of 9 December 2008

Summary

Recognition in Switzerland of an arbitral award rendered in France (Art. V para. 1 letter (e) of the New York Convention of 10 June 1958). The mere fact that an action to set aside the award can be or has been filed in the country where it was rendered against an award for which recognition is sought in a third-State does not, in principle, affect its compulsory character ("binding") (recital 2). Suspension of the award in the State of origin is a ground for challenging the award, within the meaning of Art. V para.1 letter e of the New York Convention, only if it was ordered in a judgment (recital 3).

Facts from page 137

A.

A.a On 27 February 2003, at the request of Compagnie X SA (hereafter: Compagnie X) in Geneva, the Geneva Bureau of Cases of Geneva notified State Y of an order to pay CHF 1,185,600,000 (case no. ...), the equivalent of USD 800,000,000 that State Y had committed to paying Compagnie X, pursuant to a Memorandum of Understanding entered into on 31 July 2002 by the parties. In a decision of 7 July 2003, the Tribunal of First Instance of Geneva temporarily lifted the objection to the appeal lodged by State Y. Compagnie X and State Y, had included in the Memorandum of Understanding an arbitration clause, whereby all disputes arising from the memorandum would be arbitrated by one or three arbitrators in accordance with the Arbitration Rules of the International Chamber of Commerce (ICC). The seat of the arbitration would be Paris and French the language of the arbitration procedure. The parties decided that the above-mentioned Memorandum of Understanding would be governed by Luxemburgish law. In a request for arbitration filed on 30 July 2003, State Y presented the dispute arising from the Memorandum of Understanding to the International Court of Arbitration of the ICC in Paris, pursuant to the arbitration clause contained in said agreement. On 19 October 2004, Compagnie X and State Y signed the Terms of Reference which set the rules that the arbitral tribunal, made up of 3 arbitrators, would have to apply to the proceedings. On 5 June 2007, the arbitral tribunal rendered a majority award, in which it notably held that the debt under Case no. ... filed in Switzerland was inexistent, as the condition on which the effectiveness of the 31 July 2002 Memorandum of Understanding was contingent was not met on the day that the award was rendered. On 5 July 2007, Compagnie X filed a request for correction and interpretation of the arbitral award rendered on 5 June 2007.

A.b Upon State Y's request, an enforcement order was granted for the aforementioned arbitral award in France on 25 June 2007 and served to Compagnie X on 13 July 2007 in Geneva through the Office of the General Prosecutor of Geneva. This service mentioned the time frame during which it an appeal may be brought before the Paris Court of Appeal against an enforcement order, *i.e.* 3 months from 13 July 2007. In an Addendum of 17 October 2007, the arbitral tribunal partially accepted the request for correction of material errors and dismissed the request for interpretation filed by Compagnie X. The parties were not served an enforcement order for this addendum, which they received at an undetermined date.

A. c On 8 January 2008, State Y requested the recognition in Switzerland of the arbitral award dated 5 June 2007. Compagnie X objected to this request. Relying on a legal opinion issued by a professor of French law, it argued that the award of 5 June 2007 was not binding.

A. d In a decision of 13 March 2008, the First Instance Tribunal of Geneva granted recognition to the "judgment" rendered on 5 June 2008, by the ICC International Court of Arbitration in Paris in the dispute between State Y and Compagnie X.

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B. Compagnie X appealed the judgment of 13 March 2008, before the 1st Section of the Court of Justice of the Canton of Geneva, which, in a decision of 7 August 2008, upheld this decision.

C. Compagnie X brought a civil appeal before the Federal Tribunal against the aforementioned decision. It requested that the decision be set aside and that State Y's claims be dismissed.
The respondent argued for the dismissal of the appeal and confirmation of the decision of 7 August 2008.
The Federal Tribunal dismissed the appeal.

Recitals

Excerpt from recitals:

2. With its first ground of complaint, the appellant contends that an action to set aside an arbitral award rendered in France in an international arbitration may only be brought on the grounds set forth in Art. 1504 para. 1 of the New Code Of Civil Procedure

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(hereafter: NCCP). The addendum of 17 October 2007 is an integral part of the award of 5 June 2007, and the action to set aside must target both the award and the addendum. Compagnie X infers then, that the time frame in which to bring an action to set aside the award of 5 June 2007 only runs as from the service of a new enforcement order for both the award and the addendum. As the Cantonal Court did not understand that situation, it breached Art. V para. 1 letter (e) of the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Award (RS 0.277.12; hereafter: the New York Convention).

2.1 It would seem that the challenged awards of which recognition is sought in France were rendered by an arbitral tribunal with a seat in France. Thus, the PILS (RS 291) is not applicable to the dispute over enforcement (see Art. 176 para. 1 PILS), but rather the New York Convention, as stated in Art. 194 of the PILS. Art. V para. 1 of the treaty sets forth grounds on which enforcement may be challenged. These can only examined if raised and proven by the party objecting to recognition of the arbitral award in the State where enforcement is sought (**ATF 110 Ib 191** recital 2c p. 195; 108 Ib recital 3 p. 88; decision 4P.173/2003 of 8 December 2003 recital 3.1). The grounds for objection, listed at letters a through e are exhaustive (JAN PAULSSON, The New York Convention in International Practice - Problems of Assimilation, Bulletin Association suisse de l'arbitrage [Bulletin ASA], 1996, Special Series n° 9 p. 107-108; ALBERT JAN VAN DEN BERG, The New York Arbitration Convention of 1958, The Hague 1981, p. 264-265; POUDRET/BESSON, Droit comparé de l'arbitrage international, 2002, ch. 902 p. 880). The appellant does not avail itself of any ground provided for in Art. V para. 1 letter (e) of the New York Convention. The Article 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:
e. 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."

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2.2 Thus it must be ascertained whether or not the award of 5 June 2007 and the addendum of 17 October 2007 are binding within the meaning of the New York Convention, as the appellant claims. According to the Federal Tribunal's case law, foreign arbitral awards are binding on parties when they can no longer be appealed by ordinary means (decision 5P.292/2005 of 3 January 2006 recital 3.2, partially reproduced in RSDIE 2007 p. 80). This conception was approved by modern legal scholarship (POUDRET/BESSON, *op. cit.*, ch. 918 p. 895; PATOCCHI/JERMINI, Commentaire bâlois, LDIP, 2nd Edition 2007, n° 116 ad art. 194 LDIP; the same, International Arbitration in Switzerland, The Hague 2000, ch. 116 ad art. 194 LDIP, p. 666/667). For it to be binding, a foreign award does not necessarily have to be enforceable in the country of origin, as the New York Convention sought to prevent "double enforcement" (**ATF 108 Ib 85** recital 4e; decision 5P.292/2005 3 January 2006 cited above, recital 3.2; PATOCCHI/JERMINI, *op. cit.*, n° 114 ad art. 194 LDIP; KURT SIEHR, Commentaire zurichois, LDIP, 2nd Edition. 2004, n° 26 ad art. 194 LDIP).
The mere fact that an action for setting aside an award is admissible or has been filed in the State of origin against the award of which enforcement is sought in a third state does not make the award any less binding (POUDRET/BESSON, *op. cit.*, ch. 920 p. 897; PHILIPPE FOUCHARD ET AL., Traité de l'arbitrage commercial international, Paris 1996, ch. 1684 p. 992). In this case, the appellant argues that an arbitral award rendered in France in an international arbitration may only be set aside on the grounds set forth in Art. 1504 para. 1 of the NCCP. However, according to the doctrine cited above, the fact that such action is possible does not make the

award any less binding within the meaning of the New York Convention. Added to that is the fact that the appellant did not demonstrate that the action to set aside the award was an ordinary appeal under French law. Thus the appellant failed to establish that the award of 5 June 2007 and the addendum did not become binding, pursuant to Art. V para. 1 letter (e) of the New York Convention.
The claim must thus be dismissed.

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3. In support of its second ground, the appellant argues that the Court of Justice breached Art. V para. 1 letter (e) of the New York Convention, admitting that the suspensive effect of recourse against an arbitral award is not a ground on which to set it aside, pursuant to the aforementioned treaty, unless the suspension was ordered by a judicial authority. According to the appellant, the suspensive effect arising from Art. 1506 NCCP, on the contrary, is sufficient to preclude an enforcement order for the arbitral award. The Cantonal authority's position, based on the doctrine, seems not to comply with the case law of the Swiss courts. In this regard, Compagnie X refers to **ATF 110 Ib 191** recital 2c p. 195 and a decision rendered in 1987 by the Geneva Court of Justice following this precedent.

3.1 Compagnie X, does not argue, and rightly so, that the awards for which enforcement is sought in Switzerland were set aside by a French court. In any event, it never claimed that it had filed actions against said awards in France. It merely states that the awards were suspended in the State of the seat (*i.e.* in France) due to the suspensive effect of Art. 1506 NCCP, which provides that the time frame in which an action to set aside an award, pursuant to Art. 1504 para. 1 NCCP, suspends enforcement of an arbitral award; and that an action brought during that time also has a suspensive effect.

3.2 In **ATF 110 Ib 191** recital 2c, cited by the appellant, the Federal Tribunal held, without referring to the doctrine, that the *ex lege* suspensive effect of an appeal in cassation under French law, is a ground on which to set aside the award, pursuant to Art. V para. 1 letter (e) of the New York Convention. In decision 5P.371/1999 of 21 March 2000 recital 2b, published in Bulletin ASA 20/2002 p. 266 *et seq.*, specifically p. 268, the federal court held that the ground based on the aforementioned provision on which to refuse enforcement of an English arbitral award was not applicable in this case, as the judges of the London Court of Appeal did not formally suspend the award. The federal judges supported their change of opinion, referring to ALBERT JAN VAN DEN BERG, The New York Convention: Summary of Court Decisions, Bulletin ASA, Special Series n° 9 p. 90 and PAULSSON, *op. cit.*, p. 112, who both referred to a decision of the

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Swedish Supreme Court dated 13 August 1979 on the enforcement in Sweden of an arbitral award rendered in France and for which an action to set aside could have been brought in France (*Götaverken Arendal AB v General National Maritime Transport Company*, in Revue de l'arbitrage, Paris 1980, p. 555 *et seq.*).
On 8 December 2003, the Federal Tribunal rendered decision 4P.173/2003, of which recital 3.1 *in medio* states that enforcement of a foreign arbitral award must be refused "when suspensive effect has been granted to an action to set aside an award by the relevant authority." This sentence was followed by a reference to PATOCCHI/JERMINI, in Commentaire bâlois, LDIP, 1st ed. 1996, no 117 ad art. 194 LDIP. In decision 5P.292/2005 of 3 January 2006, mentioned in aforementioned recital 2.2, the Federal Tribunal implicitly upheld the two aforementioned decisions published in the Recueil officiel, in writing that the requirement of the ground to object to enforcement in Art. V para. 1 letter (e) of the New York Convention was met if the effects of the award "for the duration of a pending action to set aside the award...were suspended by the relevant authority." This decision refers, in addition to the aforementioned PATOCCHI/JERMINI opinion, to those of SIEHR, *op. cit.*, n° 26 ad art. 194 LDIP, and BUCHER/BONOMI, Droit international privé, 2nd edition 2004, n. 1330. The new opinion of the Federal Tribunal, according to which the suspension of the award in the State of origin only constitutes a ground for challenge, as intended by Art. V para. 1 letter (e) of the New York Convention, if it were granted by a judicial decision, but not when it simply arises from an action brought against the award, was welcomed by legal doctrine (KAUFMANN-KOHLER/RIGOZZI, Arbitrage international, 2006, ch. 895 p. 359; GIRSBERGER/VOSER, International Arbitration in Switzerland, 2008, ch. 1196 p. 359).

3.3 The case law initiated by decision 5P.371/1999 of 21 March 2000 must be upheld. First of all, it is in line with the very text of the New York Convention, which, in light of the ground for refusal in question, mentions an award "suspended by a competent authority of the country in which, or under the law of which, that award was made." An *ex lege* suspension is evidently not covered by this provision. Lastly, the grounds for refusal of Art. V of the New York Convention must be interpreted narrowly to favour enforcement of arbitral awards

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((POUDRET/BESSON, *op. cit.*, ch. 902, p. 881; VAN DEN BERG, The New York Arbitration Convention of 1958, p. 267/268).
Lastly, it seems difficult, from a point of view of legal theory, to oppose an international convention which seeks to facilitate recognition of foreign arbitral awards, based on a mere procedural rule of the state of the seat, which stays the enforcement of an award in that State as long as an extraordinary challenge may be brought against it.

3.4 In light of the above, it is necessary to accept that the suspensive nature of an action to set aside an award set forth in Art. 1506 NCCP does not constitute a ground upon which the appellant could rely to prevent enforcement in Switzerland of the award of 5 June 2007 and the addendum of 17 October 2007.
The ground is without merit.