Unofficial translation

[AZA 0]
5P.371/1999

2nd Civil Chamber
****

21 March 2000

Members of the Court: Mr. Reeb, president, Mr Bianchi and Ms Nordmann, judges. Clerk:
Mr Braconi

_____

Ruling on the pubic law appeal
brought by

S._____ Corporation, represented by Mr Bernard Vischer, Attorney-at-law, Geneva bar,

against the decision rendered on 2 September 1999 by the 1st Section of the Court of Justice of the Canton of Geneva in the case of the appellant against B._____ SA, represented by Mr Alain Lévy, Attorney-at-law, Geneva bar,

(definitive dismissal of the objection to pay a debt)

Given the exhibits, which reveal
the following facts:

A.- In a partial award of 15 August 1997, a London arbitral tribunal ordered B._____ SA to pay S._____ Corporation US$ 1,146,663.58, subject to interest and costs (set at £ 6,005). Relying on that award, S._____ Corporation requested that the London High Court of Justice wind up the debtor, which was granted on 2 February 1998. However, the London Court of Appeal set aside this decision on 31 July 1998.

B.- On 15 March 1999, S._____ Corporation notified B._____ SA that an order to pay amounts of CHF 1,685,486.60 and CHF 14,021.68, with interest of 7.5% per annum as of 16 August 1997, to which the latter objected. By a decision of 10 June 1999, the Tribunal of First Instance of Geneva granted *exequatur* to the arbitral award as well the definitive dismissal of the objection to the payment of the debt; the respondent seized the Geneva Canton Court of Justice on 2 September 1999, which set aside the decision and dismissed the request for the definitive dismissal of the objection to the debt's payment.

C. In its public law appeal before the Federal Tribunal, S._____ Corporation, concludes on the merits that the decision be set aside and that the objection to the payment of the debt be definitively dismissed. The respondent argues for the dismissal of the action and the confirmation of the challenged decision.

By order of 4 November 1999, the Chairman of the 2nd Civil Chamber invited the appellant to pay a deposit of CHF 15,000 as guarantee for the costs of the other party.

In law:

1.-a) Examining a public law appeal for breach of an international agreement (Art. 84, para. 1 let. c OJ), in this case the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (RS 0.277. 12) , applicable by virtue of the reference to Art. 194 PILS (see, *e.g.* unpublished decision of the 2nd Civil Chamber of 25 June 1991, in: SJ 1991 p. 611), the Federal Tribunal is free to review the application of the Treaty (**ATF 119 II 380** recital 3b p. 382/383 and decisions cited); however, it may only examine it in order to ascertain whether it was arbitrarily applied, pursuant to Art. 80/81 LP (**ATF 125 I. 386** recital 3a p. 388 and decisions cited).

b) In the course of an appeal on the grounds of Art. 84, para. 1 let. c OJ, the Federal Tribunal may be asked not only to set aside the challenged decision, but also to grant the definitive dismissal of the objection to the payment of the debt when the situation is clear-cut (**ATF 120 Ia 256** recital 1b p. 257; 116 II 625 recital 2 p. 627 and cited decisions; Gerber, La nature cassatoire du recours de droit public, thesis Geneva, Basel/Frankfurt 1997, p. 302 *et seq.*, with other references); the request to finally pronounce the annulment of the objection, is thus, in principle, admissible. However, if the court were to hold the action admissible on the basis of a breach of Art. 4 aCst, it could only set aside

the deferred decision and remand the case to a lower court in order to obtain a new decision (**ATF 98 Ia 527** recital 6 p. 537 and the abovementioned case law).

2. Relying on the decision of the London Court of Appeal, the Court of Justice held that the English judges, who did not question the formal and material validity of the partial award, did however refuse to grant it enforcement in England until such time as a decision was made on the respondent's counterclaim; it was thus left upon the (Swiss) judge to such a decision, unless that would to lead to the unacceptable situation in which enforcement is granted in Switzerland to an arbitral award governed by the common law, when even the English courts did not hold the award to be sufficient to wind up the party. In addition, the previous authority held that the arbitral award could be considered a decision subject to the suspensive condition that the respondent's counterclaims be dismissed; however, the respondent did not prove that that condition had been met.

a) The claimant may well wonder whether the cantonal court refused to enforce the English arbitral award for a reason related to Swiss public policy (Art. V para. 2 let. b of the New York Convention); the respondent argues that the lower court did not intend to base its decision on that ground. If, however, that had been the case, this opinion would indeed be wrong (see. decision of the Geneva Canton Court of Justice of 11 December 1997, in: Bull. ASA 1997 p. 672/673 and in: RSDIE 1998 p. 610 let. b; for compensation: **ATF 97 I 151** recital 5a p. 157 *et seq.*).

b) In reading the challenged decision it is difficult to accurately determine whether the main ground—drawn from the London Court of Appeal judgment—is based on treaty law or on domestic law, as no legislation is cited. The litigants assume that this ground is drawn from Art. V para. 1 let. (e) of the New York Convention, pursuant to which recognition and enforcement must be refused if the award has been suspended by the relevant authority of the country in which it was rendered or the country of the applicable law. Although it seems doubtful—especially as the cantonal court states that it used an argument which "escaped the parties and the Court examining the annulment of the objection"—the ground must be examined from that point of view (see **ATF 122 III 353** recital 3b/aa p. 354/355).

According to the doctrine, this rule covers a situation in which a court, "noticing that a fault is likely to impact the award, prevents its enforcement until such time as the issue is settled substantively by the Court examining the action to set aside the award" (see Fouchard/Gaillard/Goldman On International Commercial Arbitration, no. 1690 and the reference cited). But that is not the case here. The judges of the London Court of Appeal did not question the validity of the award as such, underscoring that it was rendered "in compliance with the well-established rule that freight must be paid for and no deduction of any kind be granted" (Judge Nourse). Neither did they formally suspend the award (see Van den Berg, The New York Convention: Summary of Court Decisions, in: ASA Special Series No. 9 p. 90 ["that the suspension of the award has been effectively ordered by a court in the country of origin"]; Paulsson, The New York Convention in International Practice, ibid., p. 112 ["a specific decision by a court in the country of origin to suspend the execution of the award of which enforcement is claimed"]); they only dismissed the request to wind up the debtor, a consequence which turned out to be excessively strict in light of the "sincere and serious" counterclaim in excess of the amount sought in the main claim; in other words, "the ability of the claimant and creditor to obtain enforcement against the company does not give it the right to wind up the debtor". In this respect, the cantonal authority seems to have misunderstood Judge Ward's opinion. He simply stated that, "in the case at hand, the request is dismissed because the claimant cannot properly claim to be a creditor"; the original text of the judgment shows that this assertion actually refers to a practice in the event of disputed debts "in the disputed debt case"), in which case ("in that case") the winding up of the debtor is rejected "because the claimant cannot properly claim to be a creditor". The London court definitively dismissed the request to "wind up", as a Swiss Court would have done were it petitioned with a request for bankruptcy (see Art. 172 ch. 3 LP, of which the interpretation is narrower: Giroud, in: Kommentar zum SchKG, vol. II, N 8 and 13 ad Art. 172).

c) The appellant also rightfully characterizes as arbitrary the subsidiary ground—based on domestic law—relied upon by the Court of Justice. As it has been often recalled in the case law, the judge examining the request of the definitive dismissal of the objection to the payment of the debt may not review or interpret the title produced before him (**ATF 124 III 501** recital 3a p. 503 and the above mentioned references). However, in this case, the Arbitral Tribunal clearly ordered the unconditional payment of the freight, pursuant to English law on the matter, and did not make it subject to the counterclaims being founded; it also did not suspend the award pending a decision regarding that claim. Regarding the allegations of the respondent in this appeal, its claim is not based on any enforceable judgment within the meaning of Art. 80 LP—as the London Court of Appeal did not rule on the merits—and was also not accepted without reservation by the appellant; therefore, an action for compensation may be brought (**ATF 115 III 97** recital 4 p. 100 and citations).

3.- Given the above, the action should be accepted and the challenged decision set aside; the unsuccessful respondent is to bear the costs of the proceedings (Art. 156 para. 1 and 159 para. 2 OJ).

Unofficial translation

However, the request for final annulment of the decision is not admissible. Because of the solution adopted, the Court of Justice did not rule on the respondent's other grounds, an assessment of which could nonetheless arrive at a confirmation of the decision refusing enforcement (**ATF 112 Ia 353** recital 3c/bb p. 355) the conclusion that the appellant was not to dispute the present proceedings. As the situation is not clear (see recital 1b, above), it is suitable to only set aside the judgment deferred to the Court.

For these reasons,

The Federal Tribunal:

1. Accepts the action and sets aside the challenged decision.

2. Orders the respondent in this appeal to pay:
a) legal fees of CHF 12,000,
b) compensation of CHF 15,000 to the appellant for its expenses.

3. Communicates copies of the present decision to the parties' representatives and to the 1st Section of the Geneva Canton Court of Justice.

_____

Lausanne, 21 March 2000
BRA/frs
On behalf of the 2nd Civil Chamber
of the SWISS FEDERAL TRIBUNAL:
The Presiding Judge, The Clerk