Unofficial translation

Federal Tribunal

{T 0/2}
4A_233/2010

Decision of 28 July 2010
1ST Civil Law Chamber

Members of the Court:
Ms Klett, President, Kolly and Kiss
Clerk: Mr Carruzo

Parties:
X _____SA, represented by Mr. Daniel Richard
Appellant,

v.

Y. _____, represented by Mr. Urs Saal
Respondent,

Facts:

A.
A.a In a contract of 22 November 2002 amended on 5 February 2003, X._____ SA (hereafter: X._____) a company under Swiss law entrusted Y._____ (hereafter: Y._____), a company under American law with maintaining and servicing three aircrafts against a fee. The general conditions applicable to the contract included an arbitration clause.

A dispute arose in the performance of the contract and Y._____ initiated arbitral proceedings, which provided for the appointment of three neutral arbitrators. However, X._____ accepted to submit the dispute to a sole arbitrator.
In an award of 13 February 2008, arbitrator A._____ ordered X._____ to pay to Y._____ an amount of US$ 1,102,486.97 plus US$ 785,088.36 as interest on that amount as of 14 February 2008, as well as additional interest of 0.049315% by day from that date until payment.
A.b. On 1 April 2008, the United States District Court for the Central District of Illinois recognized the award and ordered X._____ to pay to Y._____ the aforesaid amounts and the additional interest.

B.
B.a. The Debtor did not pay and on 8 December 8, 2008 Y._____ had an order to pay notified to X._____ which objected to it.

On October 16, 2009, Y._____ sued X._____ in the Tribunal of First Instance of Geneva with a view to having the opposition definitively set aside. Preliminary, it sought the recognition and the enforcement of the arbitral award and of the judgment of the American District Court. X._____ submitted that the request should be rejected because the award should have been issued by three arbitrators according to the arbitration clause and not by a sole arbitrator.
On 30 November 2009 the Tribunal of First Instance of Geneva recognized and enforced the 13 February 2008 award and the 16 April 2008 judgment in Switzerland. Consequently, it definitively set aside the debtor's opposition to the order of pay. In its decision, the court held in substance that X._____ could not rely on the alleged irregular composition of the arbitral tribunal as it had participated in the proceedings without reservations and even filed a counter-claim. The court also found that the debtor could not submit argument relating to the merits of the dispute.

B.b On 14 December 2009, X._____ appealed the judgment of the lower Court. It filed an e-mail sent on 2 December 2009 by B. _____ from which it appears that the arbitrator and C._____, Y._____'s counsel, had practiced in front of the US Court of Appeals for the tenth Circuit (Exhibit 6). In a letter of 27 January 2010 the appellant also submitted an affidavit established the previous day by its counsel D._____ according to whom C._____ has stated in a phone conference held between the arbitrator and counsel for the parties on 19 October 2006 that he had accompanied the arbitrator's daughter to a social event once and that on that occasion he had briefly met that person's father at her domicile. Lawyer D._____ added that he saw no reference to that meeting in the arbitrator's letter of 24 October 2006 (Exhibit 8).
For its part, Y._____ filed the minutes of a preliminary meeting held on 24 October 2006. It appears from that that C._____ had stated that he met the arbitrator only once at a time when he and the aforesaid arbitrator's daughter, a trainee at the time, were working in the same law firm. Counsel for X._____ had answered that he had no objection to continuing the arbitral proceedings (Exhibit 10).

On 25 March 2010 the Court of Justice of the Canton of Geneva rejected the appeal with costs.

As to the e-mail filed by the appellant, the cantonal judges held that the new evidence was a "a priori" inadmissible under the law of civil procedure of Geneva and that in any event it would not cast doubt on the arbitrator's impartiality as it merely recorded that the latter and counsel for the respondent had practiced in front of the same American Court of Appeals. As to the affidavit of 26 January 2010 the cantonal court held that it was inadmissible due to late filing. Yet it considered that this was of no consequence to the extent that respondent's Exhibit 10, which was to be admitted because it answered an unexpected argument by the appellant, established that the meeting between the respondent's counsel and the arbitrator had been brought to the appellant's attention with no objection from the latter in this respect.

After rejecting the grievance based on the arbitrator's alleged bias, the cantonal judges also rejected the arguments based on the arbitrator's lack of jurisdiction *ratione loci* as well as that relating to the merits, as to which the Appellant argued that the rules on a debtor's default had been violated.

C.
On 27 April 2010, X._____ filed a Civil law appeal and an ancillary constitutional appeal. It submits that the Federal Tribunal should annul the decision under appeal and reject all submissions by Y._____. Alternatively, the appellant submits that the matter should be sent back to the cantonal court.

The respondent submits that the appeal should be rejected and doubts that the matter is capable of appeal. The cantonal court refers to the reasons in its judgment.

By order of 31 May 2010 the president of the first civil law chamber, seized of a request for a stay, found that the appeal related to a constituent judgment in a civil matter, so that it was stayed *ex lege* pursuant to Art. 103 (2) (a) LTF within the limits of the submissions made.

In law:

1.
1.1 The civil law appeal in front of the Federal Tribunal was made by a party which took part in the proceedings in front of the lower court and whose submissions were rejected (Art. 76 (19) LTF). It is aimed at a final decision (Art. 90 LTF) the object of which was the recognition and the enforcement of a foreign arbitral award and a foreign judgment (Art. 72 2) (b) (1) LTF), as well as the definitive setting aside of the opposition to an order of payment (**ATF 134 III 115** at 1.1). The decision was made by a cantonal authority of last instance (Art. 75 (1) LTF) in a monetary matter in which the amount in dispute is above the CH 30,000.00 threshold set at Art. 74 (1) (b) LTF for a matter to be capable of a civil law appeal. The appeal, which was filed timely (Art. 100 (1) LTF) and in the

legally prescribed format (Art. 42 LTF) is accordingly admissible as a matter of principle. Hence the ancillary constitutional appeal made by the appellant simultaneously is inadmissible due to its subsidiary nature (Art. 113 LTF).

1.2 To argue that the matter is not capable of a civil law appeal the respondent claims that the appellant should have appealed the judgment issued by the Tribunal of First Instance because the judgment of the Court of Justice in the framework of an extraordinary appeal merely rejected that appeal against the first judgment. The respondent is wrong. Indeed, as the cantonal Court itself states in the opinion at paragraph 2 of the reasons, its judicial review was not more restricted than that of the Federal Tribunal in a civil law appeal. Thus, the appellant could merely appeal the decision second. Also, by submitting that the respondent's submissions should be entirely rejected it implicitly submitted that the requests for enforcement and setting aside of the opposition made by that party should be rejected, so that the matter is also capable of appeal in the light of Art. 107 (2) LTF.

Still as to whether the matter is capable of appeal or not, the respondent wrongly argues that the appellant should have appealed the cantonal judgment, which based the decision of definitely setting aside the opposition on the American judgment of 16 April 2008 and not merely on the arbitral award of 13 February 2008. In fact, it is not at all established that the American court, which, incidentally, issued its decision very shortly after the aforesaid award was issued and in a decision apparently without reasons, would have had the power to modify the arbitral award, so that its judgment would have substituted the latter, thus being capable of recognition and enforcement only under the conditions of Art. 25 *et seq.* PILS (see decision 4A_137/2007 of July 20, 2007 at 5 and the authors quoted). To the contrary, it appears from the judgment under appeal that at the cantonal level the dispute involved only the enforcement of the arbitral award, to the exclusion of that of the American judgment.

1.3
1.3.1 A civil law appeal may be made for violation of the law as defined by Art. 95 and 96 LTF. Seized of an appeal for the violation of an international treaty (see Art. 95 (b) LTF), the Federal Tribunal freely reviews the merits of the arguments based on a violation of the treaty. Due to the exception embodied at Art. 106 (2) LTF the Federal Tribunal reviews the alleged violation of a constitutional right or of an issue of cantonal or inter-cantonal law only if the grievance is raised and reasoned in details by the appellant. Otherwise, it applies the law *ex officio* (Art. 106 (1) LTF) without being bound by the arguments raised in the appeal or by the reasons in the decision under appeal. It may accordingly accept an appeal for reasons other than those raised or conversely reject an appeal based on reasons other than those of the lower court (**ATF 134 III 102** at 1.1 and case cited). However, in view of the requirement for reasons contained at Art. 42 (1) and (2) LTF, which is a condition to the appeal being admissible (Art. 108 (1) (b) LTF), the Federal Tribunal reviews in principle only the grievances raised; unlike a court of first instance it does not have to review all the legal issues arising when they are no longer in front of this Court (**ATF 134 III 102** at 1.1).

In a civil law appeal the Federal Tribunal conducts its legal reasoning on the basis of the facts established by the lower court (Art. 105 (1) LTF). It may depart from them only if the factual findings of the lower court were made in a manifestly inaccurate manner—a concept corresponding to that of arbitrariness within the meaning of Art. 9 Cst (**ATF 134 V 53** at 4.3—or in violation of the law within the meaning of Art. 95 LTF (Art. 105 (2) LTF) and provided that correcting the irregularity could have an impact on the outcome of the case (Art. 97 (1) LTF). It behooves the appellant to raise a specific grievance in this respect and to submit a clear and circumstantial demonstration (Art. 106 (2) LTF; **AFT 133 II 249** at 1.4.2 p. 254).

No new fact or new evidence may be introduced unless it arises as a consequence of the decision of the lower court (Art. 99 (1) LTF).
1.3.2 As a preliminary, the appellant sets forth a certain number of facts, claiming in particular that it would never have received respondent's Exhibit 10. Believing that it could disregard the rule that the Federal Tribunal decides on the basis of the facts established by the lower court, it invokes in its

respect a passage of the decision published at **ATF 101 Ia 521** where it is written that if the enforcement of the foreign award relies on an international treaty, the Federal Tribunal freely reviews the facts and the parties may even submit new facts (at 1.b). However, the appellant disregards that the Federal Tribunal, modifying its case law in this respect, subsequently limited its review to arbitrariness in the finding of facts for the appeals against a judicial decision (**ATF 129 I 110** at 1.3) and also extended the prohibition to claim new facts to the appeals based on the violation of a treaty (**ATF 128 I 354** at 6c). Therefore, it is not possible to take into consideration the new facts alleged by the appellant or the criticism of an appellate nature which it raises against the factual findings of the cantonal decision (see appeal p. 4 at 6 and 8 at 10).

The appellant's arguments as to the "right to produce evidence" with regard to the 26 January 2010 affidavit (see appeal p. 10 *et seq.*) are not admissible either. In a jumble they contain some grievances drawn from an alleged violation of private federal law, such as Art. 8 CC and of various provisions of the law of civil procedure of Geneva, all of which are again presented as though the appellant were in front of a Court of Appeal.

2.
Under the heading "Constitutional grievances", the appellant then argues that the cantonal court violated Art. 9 and 29 (2) Cst (appeal p. 12-14).

To substantiate its argument as to arbitrariness, the appellant again resorts to explanations of an appellate nature based in part on new allegations, allegedly with a view to clearing the misunderstanding as to the appointment of a sole arbitrator instead of three, which may have led the cantonal court to imagine that the appellant was in bad faith and in order to explain the circumstances in which B._____ sent the e-mail of 2 December 2009 (Exhibit 6). Such explanations are not at all appropriate to substantiate the argument and they are inadmissible in large part.

As to the violation of its right to be heard, the appellant deduces it from the fact that the cantonal court refused to accept the affidavit of 26 January 2010. The grievance is unfounded: such refusal relied on a specific provision of the law of civil procedure of Geneva—Art. 306A (1) LPC/GE—the alleged arbitrariness of which the appellant did not establish; also, the cantonal judges held without incurring any grievance based on Art. 9 Cst that even if it had been accepted the affidavit would not have had the meaning given by the Appellant due to the contents of respondent's Exhibit 10.

3.
3.1 As to the violation of Federal law, the appellant argues that the Court of Justice violated "Art. 194, 190 (2) (b) 6 para. 1 ECHR, 25 and 27 PILS and V(1) New-York Convention of June 10, 1958" (sic, appeal p. 15-20).

The decision under appeal is not the foreign arbitral award, the enforcement of which was ordered. Consequently, the appellant relied in vain on Art. 190 (2) (b) PILS relating to civil law appeals against the decisions of arbitral tribunals within the meaning of Art. 77 (1) LTF. The reference to that provision is even less pertinent because it does not relate to the grievances in connection with the composition of the arbitral tribunal which fall under Art. 190(2) (a) PILS but to those relating to the jurisdiction of the arbitral tribunal.

Similarly, for the reasons indicated above (see at 1.2, second paragraph), Art. 25 *et seq.* PILS are not to be applied in this case.

As to Art. 6 (1) ECHR, it is not directly applicable as such to set the conditions of the recognition and the enforcement of foreign arbitral awards.
Pursuant to Art. 194 PILS it is actually in the light of the pertinent provisions of the Convention of the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958 (RS 0.277.12; hereafter the New York Convention) that on the basis of the arguments submitted by the appellant, it must be examined whether the cantonal court violated Federal law or not by enforcing the award in dispute as

well as the judgment confirming it and by setting aside definitively on that basis the debtor's opposition to the order of payment.
3.2
3.2.1 Art. V of the New York Convention exhaustively sets forth the grounds on which recognition and enforcement of a foreign arbitral award can be refused (**ATF 135 III 136** at 2.1 p. 139). Such grounds must be interpreted restrictively in order to facilitate the enforcement of the arbitral award (**ATF 135 III 136** at 3.3). It behooves the party opposing enforcement to establish that one of the grounds for refusal of Art. V (1) of the New York Convention is met (**ATF 135 III 136** at 2.1 p. 139) whilst the Court may retain *ex officio* the two grounds for refusing enforcement at Art; V (2) of the foresaid Convention (Kaufmann-Kohler/Rigozzi, Arbitrage International, Droit et pratique à la lumière de la LDIP, 2nd ed. 2010, n° 897).

Pursuant to Art. V (1) (d) of the New York Convention, invoked by the appellant, the enforcement of the award may be opposed by establishing in particular that the composition of the arbitral tribunal was not in accordance with the agreement of the parties. Yet the irregularity in the composition of the arbitral tribunal must also be connected to the outcome of the dispute (Kaufmann-Kohler/Rigozzi, op. cit., n° 893 *in fine*).

Pursuant to Art. V (2) (b) of the New York Convention, on which the appellant also relies, the recognition and the enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement are sought finds that the recognition or the enforcement of the award would be contrary to the public policy of that country. As a clause establishing an exception, the public policy reservation is to be interpreted restrictively, especially as to the recognition and enforcement of foreign judgments, as to which its scope is narrower than as to the direct application of foreign law (attenuated effect of public policy). There is a violation of public policy when the recognition or the enforcement of a foreign award offends the Swiss concepts of justice in an intolerable manner. A foreign award may be incompatible with the Swiss legal order not only due to its substantive contents but also in relation to the procedure under which it was issued. In this respect, Swiss public policy demands that the fundamental procedural rules deducted from the Constitution be complied with, such as the right to a fair trial and the right to be heard Judgment 4P.173/2003 of December 8, 2003 at: 4.1 and cases quoted). The arbitrator's independence and impartiality are certainly among such rules (**ATF 93 I 265** at 4a; Kaufmann- Kohler/Rigozzi, op.cit., 11°360 in fine).
3.2.2 Being akin to a judge, an arbitrator must present sufficient guarantees of independence and impartiality (**ATF 125 I 389** at 4a; **119 II 271** at 3b and cases quoted). To decide whether or not he presents such guarantees the constitutional principles developed as to State courts must be referred to (**ATF 125 I 389** at 4a; 118 II 359 at 3c p. 361). However the specificities of arbitration and specifically those of international arbitration must be taken into account when reviewing the circumstances of the case (**ATF 129 III 445** at 3.3.3 p. 454).

According to Art. 30 (1) Cst anyone whose case must be decided in judicial proceedings has a right to his case being brought in front of a court established by law, having jurisdiction, independent and impartial. That guarantee makes it possible to challenge a judge whose situation or behaviour is such as to cast doubt on his impartiality (**ATF 126 I 68** at 3a p. 73); it seeks in particular to avoid that some circumstances external to the case may influence the judgment in favour of or against a party. It does not impose removal only when a bias of the judge is established because an internal disposition on his part may hardly be proved; it is sufficient for the circumstances to create the appearance of bias and to cast doubt that the magistrate's activity may be biased. Only circumstances objectively established must be taken into consideration; mere individual impressions of a party to the trial are not decisive (**ATF 128 V 82** at 2a p. 84 and the cases cited).

The party intending to challenge an arbitrator must raise the ground for challenge as soon as it becomes aware of it. That rule, established by case law, addresses the grounds for challenge that the interested party was effectively aware of as well as those which it may have become aware of by using the required attention and, as the case may be, choosing to remain in ignorance may be regarded

as an improper manoeuvre similar to the postponement of the announcement of a challenge. The rule in question applies the principle of good faith to the arbitral proceedings. Pursuant: to that principle the right to invoke the irregular composition of the arbitral tribunal is forfeited unless the party raises it immediately because it cannot keep it in store only to raise it if the outcome of the arbitral proceedings is unfavourable (decision 4A_234/2008 of August 14, 2008 at 2.2 and the cases cited).

3.3 The appellant argues against enforcement by reference to both Art. V(1)(d) and Art. V(2)(b) of the New York Convention. Yet both arguments are based on the same circumstances. Consequently the arguments will be examined together in the light of these two provisions. It will be necessary to determine whether, as the appellant claims, the award the enforcement of which was granted to the respondent was issued by an arbitrator who did not present sufficient guarantees of impartiality and independence in conformity with the requirements of the aforesaid case. Should this be the case, it would lead to the conclusion that both aforesaid provisions were violated (irregular constitution of the arbitral tribunal and incompatibility of the award with the public policy of the country in which enforcement is sought).

As the Respondent rightly points out, it is striking to notice that the appellant developed some perceptibly different arguments in the three courts which were called upon in this case. That was doubtlessly its right. Yet such changes in the arguments in support of the validity of its own thesis are an important sign of the fragility of the position adopted by the party submitting the argument.

Be this as it may, the argument merely relies on allegations departing from the factual findings to which the Federal Tribunal is bound, namely those made by the lower court. From such findings it appears only that C._____ , counsel the respondent and the arbitrator practiced in front of the same American Court of Appeals without any further precisions as to when they did so or as to the nature of the work each of performed in that jurisdiction and on the other hand that the two met in one occasion when and C. _____, and the arbitrator's daughter, then a trainee, were practicing in the same law firm, a circumstance brought to the attention of the appellant's counsel during the preliminary arbitration hearing of 24 October 2006 when the latter stated that he had no objection to continuing the arbitral proceedings. Accordingly neither the appellant's allegations that respondent's counsel and the arbitrator's daughter worked "for years" in the same law firm neither the claim that the appellant's counsel D. _____ would never have taken cognizance of the minutes of the October 2006 hearing shall be taken into account.

Thus the Appellant is trying to paralyze the enforcement of a foreign arbitral award and of the judgment confirming that award by resorting to an argument—the meeting between the arbitrator and respondent's counsel at a time when the latter was working in the same law firm as the former's daughter—that its own lawyer did not consider at the time as likely to cast doubt on the sole arbitrator's impartiality and by putting forward another argument—the fact that the arbitrator and respondent's counsel practiced in front of the same American Court—which, objectively, was obviously not such as to disqualify the arbitrator. There is nothing there which would justify the refusal to enforce the award and the judgment at issue.

Moreover the appellant argues in vain that C._____ would himself have violated the rules relating to the arbitral proceedings. One does not see in this respect why Art. 8 of the Code of Conduct for Arbitral Proceedings conducted in Switzerland, which is invoked, would be applicable in this case, as the arbitral proceedings were conducted in the USA. One sees even less how the appellant could argue a provision contained in the Code of Professional Conduct applicable to counsel appearing in front of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Yugoslavia.

This being so, the civil law appeal may only be rejected to the limited extent that the matter is capable of appeal at all.

4.

The Appellant shall pay the costs of the federal proceedings (Art. 66 (1) LTF) and compensate the Respondent for the costs (Art. 68 (1) and (2) LTF).

Therefore the Federal Tribunal pronounces:

1.
The matter is not capable of a constitutional appeal.

2.
The civil law appeal is rejected to the extent that the matter is capable of appeal.
3.
The judicial costs, set at CHF 17,000 shall be borne by the appellant.

4.
The appellant shall pay to the respondent an amount of CHF 19,000 for the federal judicial proceedings.

5.
This judgment shall be notified to the representatives of the Parties and to the first Section of the Court of Justice of Geneva.

Lausanne, July 28, 2010

In the name of the First Civil Law Chamber
of the Swiss Federal Tribunal
The President: The Clerk:

Klett Carruzzo