Unofficial translation

Federal Tribunal

{T 0/2}
5P.292/2005 /frs

Decision of 3 January 2006
2nd Civil Law Chamber

Members of the Court:
Judges Nordmann, President,
Hohl and Marazzi
Clerk: Mr Abrecht

Parties
Y._____,
Appellant, represented by Mr Laurent Panchaud, attorney-at-law

versus

X._____, respondent, represented by Mr Nicolas Genoud, attorney-at-law,
1st section of the Canton Geneva Court of Justice, post box 3108, 1211 Geneva 3.

Object
Art. 9 Cst and others (definitive dismissal of the objection to pay a debt; recognition of a foreign arbitral award)

public law appeal against a decision of the 1st Section of the Court of Justice of the Canton of Geneva of 16 June 2005.

Facts:
A.
Companies X._____ and Y._____ are both active in oil trade, especially in the Baltic countries and Belarus. On 2 May 2003, they entered into agreement no. 01-W/T-28-05-2003, according to which Y._____ committed to delivering to the border between Belarus and Latvia 10,000 metric tonnes of M-100 fuel oil at US$ 110/metric tonne. X._____ paid 90% of the price agreed within the allotted time, but did not pay the balance of US$ 49,537.50.
B.
The agreement of 28 May 2003 provided that all disputes be submitted to the Riga Commercial Arbitration Tribunal (Art. 8.2) and that this tribunal's decision would be final and binding upon the parties (Art. 8.3).
B.a Y._____ thus seized the Riga Commercial Arbitration Tribunal and on 2 December 2003 and obtained a decision ordering X._____ to pay it the amount of LVL 28,434.53 (Latvian Lats)—equal to US$ 49,537.50—as well as the costs of proceedings and legal assistance, *i.e.* LVL 2,169.21. This decision, which may not be appealed, was declared immediately enforceable and stated that if it was not voluntarily performed, the claimant had the right to petition the Zimeliai district court of the city of Riga for an enforceable payment request for enforcement of said decision. On 7 January 2004, the said district court declared enforceable the aforementioned arbitral award of 2 December 2004; such decision may not be appealed.
B.b For its part, X._____ also petitioned the Riga Commercial Arbitration Tribunal, requesting that the contract of 28 May 2003 be annulled and that Y._____ be ordered to pay damages for non-performance of the contract as well as the arbitration costs, on the ground that Y._____ did not deliver the agreed quantity of fuel oil.
Ruling by default on 13 October 2003, this court annulled the aforementioned contract and ordered Y._____ to pay X the total amount of LVL 93,690.64 with interest at 6%. This decision, which cannot be appealed, could only be enforced once an enforcement order had been granted by the Zimeliai district court of the city of Riga. However, on 12 January 2004, this court refused to grant such order on the ground that Y._____ had not been properly summoned to the abovementioned arbitration.
B.c On 15 October 2004, X._____ petitioned the Riga Commercial Arbitration Tribunal again claiming damages for non-performance of contract no. 01-W/T-28-05-2003, against Y._____. Even though it had been properly summoned to participate, the latter did not appear before the tribunal. In a decision of 16 November 2004, it was ordered to pay US$ 41,455 (or LVL 22,510.20) with interest at 6 %; in the operative part of the decision, it was stated that it could be neither challenged nor appealed.
C.

At the same time, on 24 March 2004, Y._____ requested and obtained from the Geneva Canton First Instance Tribunal the freezing of X._____'s assets in two banks in Geneva, amounting to 68,166.31 Swiss francs (CHF), with annual interest of 5% as of 16 July 2003 and CHF 1,439.49 with interest at 5% per annum as of 7 January 2004.
Notified of the freezing order, X._____ objected to the measure. The Tribunal of First Instance dismissed the objection to the freezing order in a decision of 7 May 2004, which X._____ unsuccessfully challenged before the Court of Justice of the Canton of Geneva, and then before the Federal Tribunal (Art. 5P.353/2004 of 21 February 2005).
D.
In parallel and validating the aforementioned freezing order, Y._____ notified payment order no. xxx, which was challenged, to X._____. On 9 July 2005, Y._____, relying on the decisions rendered in Riga on 2 December 2003 and 7 January 2004 (see, letter B above) of which it had previously requested enforcement, requested the definitive dismissal of the objection of the payment of the debt. X._____ objected to this request and notably requested compensation of US$ 41,455, based on the decision rendered on 16 November 2004 by the Riga Commercial Arbitration Tribunal (see letter B.c above).

In a decision of 23 March 2005, the Tribunal of First Instance granted recognition and enforcement in Switzerland to the arbitral award rendered on 2 December 2003 by the Riga Commercial Arbitration Tribunal and consequently rendered a final decision dismissing X._____'s objection to payment order no. xxx, for amounts of CHF 68,166.31 with interest at 5% per year as of 16 July 2003 and CHF 1,439.49 with annual interest as of 7 January 2004, subject to a deduction of US$ 41,455 with interest at 6% per annum as of 1 November 2004.
E.
In a decision rendered on 16 June 2005, on Y._____'s appeal, the First Section of the Court of Justice of the Canton of Geneva upheld the decision of the Tribunal of First Instance of 23 March 2005. The reasons for this award and which are relevant to the public law appeal assessment are, in essence, the following:
E.a It is not contested that arbitral award of 2 December 2003, produced by Y._____, serves as a final dismissal for the amount of debts claimed as the Tribunal of First Instance had previously granted enforcement. The only disputed point is whether the arbitral award of 16 November 2004, produced by X._____, meets the requirements of Art. 81 LP and can thus be relied upon by X._____ to claim that amount in compensation. With regards to the request for definitive dismissal of the objection to the payment of the debt, the debtor has means to liberate himself found in the compensation and the court must examine such request as long as the debt in question is enforceable and has been confirmed by a decision pursuant to Art. 81 LP or by the other party's unconditional recognition (**ATF 115 III 97** recital 4 p. 100).
E.b Arbitral awards are equated to court decisions. The recognition and enforcement of foreign arbitral awards are governed, pursuant to Art. 194 PILS, by the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (RS 0.277.12). Recognition and enforcement of such an award can only be refused if the party against which enforcement is sought provides proof of one of the grounds for refusal listed at Art. V ch. 1, letters (a) to (e), of this Convention, in particular, if it proves that it was not properly informed of the appointment of an arbitrator or of the arbitration, or if it was not able to argue its case for other reasons (let. b), or that the award had not yet become binding on the parties, or had been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made (let. e).
E.c In this case, we can only note that Y._____ failed to prove any grounds. It is not contested that notification by post of documents regarding arbitration complies with Latvian legislation, applicable to the matter. In its decision of 16 November 2004, the Riga Commercial Arbitration Tribunal found that the request for arbitration filed by X._____ on 26 October 2003 was sent to Y._____ and its duly mandated representative, according to postal stubs no. 5967 and 5968; it then sent the aforementioned its request, with the list of arbitrators, which were object of its decision of 26 October 2004 (receipts no. 72 and 74), as well as the order of 11 November 2004 setting the date and place of the hearing, and noting that the two addresses mentioned in said award were identical to those on the documents produced by Y._____ in the dispute.
X._____ did not provide any proof that the final award of 16 November 2004 had been sent to Y._____. Y._____'s Latvian council, Mr Igors Dreija, does not however, in his statement of 15 April 2004 produced by Y._____ as exhibit no. 27, claim that the decision was not received, but only that he was no longer formally mandated by Y._____ since 8 March 2004 and only again represented his client from 24 December 2004. However, a letter signed by the aforementioned counsel produced by Y._____ as exhibit 28, shows that it had, in December 2004, challenged the issuance of the enforcement order for the award. Y._____ thus knew of the awards rendered in its absence before 7 March 2005, contrary to its claims.
E.d Moreover, a foreign arbitral award does not need to be enforceable in the country of origin according to Art. V ch. 1 let. (e) of the New York Convention; it is sufficient for it to be "binding" on the parties and its binding nature must be recognized as soon as the award becomes res judicata and can no longer be challenged by ordinary means of recourse. That condition is met in this case. In the aforementioned letter—exhibit 28, Y._____'s Latvian counsel confirms that the challenged award had become *res judicata* on the day it was made and that it

cannot be challenged. This information is also to be found on the bottom of said award. In addition, the parties themselves expressly agreed, in a contract of 28 May 2003, that all disputes would be arbitrated by the Riga Commercial Arbitration Tribunal and that this tribunal's decision would be final and binding upon the two parties (see, letter B above).
E.e Thus the arbitral award rendered on 16 November 2004 by the Riga Commercial Arbitration Tribunal is valid pursuant to Art. 80 and 81 LP and justifies the use of compensation claimed by X._____ for an amount of US$ 41,455 (*i.e.* CHF 48,917 at an exchange rate of 1.18 US$/CHF which was not contested) with interest at 6% per annum. Thus the first instance decision must be upheld.
F.
Having filed a public law appeal before the Federal Tribunal, Y._____ requests that the decision be overturned and that it be awarded the costs. Moreover, it requested that the proceedings suspend enforcement, which the presiding judge of this court, having heard X._____ and the cantonal authority, granted in an order of 7 September 2005. No exchange of submissions on the merits was ordered.

The Federal Tribunal held, in law:
1.
The decision granting or refusing at the highest cantonal level (Art. 86 para. 1 OJ) of the temporary or final dismissal of the objection to a final decision (see, Art. 87 OJ) which can be appealed via the public law appeal proceedings (**ATF 120 Ia 256** recital 1a; **111 III 8** recital 1; **98 Ia 348** recital 1, 527 recital 1 and cited decisions; **94 III 365** recital 3). Moreover, the appeal is admissible with regard to Art. 84 para. 1 let. a and c OJ as it raises the prohibition of arbitrariness (Art. 9 Cst), and breach of international agreements respectively (see, **ATF 126 III 438** recital 3, 534 recital &). Lastly, the appellant is personally affected by the challenged award and thus has standing to appeal (Art. 88 OJ).
2.
When examining a public law appeal on the grounds of arbitrariness, the Federal Tribunal does not take into account allegations, evidence or facts which were not raised before the cantonal authority; any new pieces of evidence are inadmissible (**ATF 124 I 208** recital 4b; **119 II 6** recital 4a; **118 III 37** recital 2a and cited decisions). The Federal Tribunal thus only examines the facts seen by the cantonal authority, unless the appellant shows that the findings are arbitrarily false or incomplete (**ATF 118 Ia 20** recital 5a p. 26). Thus any additional information, modifications or clarifications that the appellant would like to make, under the "Facts" section of its current statement, to the factual findings of the challenged decisions are inadmissible, subject to the grounds which can constitute the basis for a complaint of violation of the constitutional rights of the citizens and which must be reasoned pursuant to the requirements of Art. 90 para. 1 let. b OJ.

In this respect, it is necessary to recall that a party claiming arbitrariness (Art. 9 Cst) may only criticize a challenged decision as it would in an appeal, where the appeal authority has power to freely assess the matter (**ATF 128 I 295** recital 7a p. 312; **117 Ia 10** recital 4b; **110 Ia 1** recital 2a; **107 Ia 186** and cited case law). In particular, it may not simply replace the cantonal authority's theory with its own, but must show, giving detailed reasons, that the challenged decision is based on the application of a law or on the assessment of manifestly untenable evidence (**ATF 125 I 492** recital 1b; **120 Ia 369** recital 3a; **86 I 226**).

3.
3.1 In the first ground, the appellant argues that the cantonal courts, when holding that it had failed to provide proof of the ground for refusal pursuant to Art. V para. 1 let. (b) of the New York Convention (see, letter E above), did not examine its arguments nor evidence produced; while these would prove that it had not received the various notifications of the arbitral tribunal regarding appointment of arbitrators, the deadline for filing the statement of defence and the date of the hearing.

This claim is without merit. The cantonal court did set out the appellant's arguments, referring to the exhibits produced, with regard to the ground for refusal at Art. V para. 1 let. (b) of the New York Convention in its decision (p. 4). It clearly explained why it held that the written submissions of Mr Igors Dreija, on which the appellant based most of its arguments, were not sufficient to find in its favour, given the elements of proof in the very decision of the Riga Commercial Arbitration Tribunal of 16 November 2004, which referred to the postal receipts of notification to the appellant and its counsel of documents regarding the arbitration procedure (see, letter E. c above). Yet the appellant does not demonstrate in what way this assessment of evidence is untenable, and only raises its theory again by referring to the same exhibits.
3.2 In its second ground of complaint, the appellant challenges the cantonal authority for holding that the ground for refusal of Art. V para. 1 let. (e) of the New York Convention was not applicable (see, letter E.d above). Referring to Mr Igors Dreija's written submissions, it argues, as it had already argued on appeal, that Latvian legislation enables the courts to refuse enforcement orders for arbitral awards when the party at fault proves that serious procedural breaches occurred during the arbitration. Yet, to this day, the respondent has not received this

order due to the actions brought against the appellant to prevent it from receiving it. Consequently, the award of 16 November 2004 would not be binding in Latvia and would not be enforceable in this country, as its enforcement would have been suspended.

This complaint is unfounded. As the cantonal court rightly stated (see, letter E.d above), a foreign arbitral award does not have to be enforceable in the country of origin, pursuant to Art. V para. 1 let. (e) of the New York Convention (**ATF 108 Ib 85** recital. 4e; Bucher/Bonomi, Droit international privé, 2nd ed. 2004, n. 1330; Patocchi/Jermini, Basler Kommentar, Internationales Privatrecht, 1996, n. 114 ad Art. 194 PILS; Siehr, Zürcher Kommentar zum IPRG, 2nd ed. 2004, n. 26 ad Art. 194 PILS), as the authors of the convention wanted to exclude the requirement of an enforcement order in the country of origin of the award, as well as any other procedure which confirms enforceability of the award in this country (Bucher, Le nouvel arbitrage international en Suisse, 1988, n. 451; Poudret/Besson, Droit comparé de l'arbitrage international, 2002, n. 918 and 920). The award simply needs to have become binding on the parties. That is the case when ordinary recourse is not or is no longer available against the award (Poudret/Besson, op. cit., n. 918; Patocchi/Jermini, op. cit., n. 116 ad Art. 1994 PILS). However, an award is not binding within the meaning of Art. V ch. 1 of the New York Convention if it was set aside in the country of origin or suspended by a competent authority pending the outcome of an action to set it aside (Bucher/Bonomi, *op. cit*., n. 1330; Patocchi/Jermini, *op. cit.*, n. 117 ad Art. 194 PILS; Siehr, *op. cit*., n. 26 ad Art. 194 PILS).

In this case, based on the factual findings in the challenged decision, the arbitral award of 16 November 2004 is binding on the parties, and there is no reason to refuse to enforce it on the basis of Art. V para. 1 let. (e) of the New York Convention.
3.3 In its third ground of complaint, the appellant alleges a breach of Art. V para. 2 let. (b) of the New York Convention, holding that recognition or enforcement of the arbitral award of 16 November 2004 would be contrary to Swiss public policy.

This claim was not raised before the last instance cantonal authority even though it could have been, and is therefore inadmissible in the public law appeal before the Federal Tribunal (**ATF 129 I 49** recital 3; **118 III 37** recital 2a; **118 Ia 20** recital 5a; **114 Ia 205** recital 1a; **108 II 69** recital 1). Moreover, it does not seem to contain sufficient reasons, pursuant to the requirements of Art. 90 para. 1 let. b OJ (see, recital 2 above).
3.4 Lastly, the appellant argues that the court proceeded to "a wrongful assessment of the facts leading to an incorrect assessment of the law" in two respects. First, the cantonal judges wrongfully held that the appellant claimed not to be aware of the arbitral award of 16 November 2004 until 7 March 2005. Second, that the award of 16 November 2004 plead in compensation would not be an equivalent value to the award of 2 December 2003, as, contrary to the latter (see, letter B above) it was not granted enforcement by the ordinary Latvian courts; it would therefore, not allow to accept the compensation.

It is difficult to see what the appellant hopes to achieve with the first of these complaints which concern a matter which has no impact on the outcome of the dispute. The second complaint is unfounded because, as we saw (see, recital 3.2 above) Art. V para. 1 let. (e) of the New York Convention does not require that a foreign arbitral award for which an enforcement order is sought be enforceable in the country of origin, nor that it be granted an enforcement order by a domestic authority of that country.
4.
It flows from the above that the public law appeal is ill-founded to the extent that it is admissible and must thus be dismissed. The unsuccessful appellant shall bear the costs of the proceedings (Art. 156 para. 1 OJ). However, there is no need to award costs, as the respondent was not asked to respond to the appeal and thus did not incur costs related to the proceedings before the Federal Tribunal (Art. 159 para. 1 and 2 OJ; Poudret/Sandoz-Monod, Commentaire de la loi fédérale d'organisation judiciaire, vol. V, 1992, n. 2 ad Art. 159 OJ).

For these reasons, the Federal Tribunal:
1.
Dismisses the action to the extent that it is admissible.
2.
The appellant is ordered to pay judicial fees of CHF 4,000.

Copies of the present decision are communicated to representatives of the parties and to the 1st Section of the Court of Justice of the Canton of Geneva.
Lausanne, 3 January 2006
On behalf of the 1st Civil Chamber
of the Swiss Federal Tribunal
The President: The Clerk: