Unofficial translation

HEARING OF THURSDAY 14 APRIL 1983

1st Chamber

Between

C_____ SA, c/o
Mr B_____, Nyon (VD), appellant of a decision rendered by the 6th Chamber of the First Instance Tribunal of that canton on 20 July 1982, represented by Mr B. Reymann, attorney, at whose office it has elected domicile,

On the one hand,

And
E_____ CORPORATION, a Liberian company, p.a. London EC 3, appellee represented by Mr J. Witter, attorney, at whose office it elected domicile,

On the other hand,

Case no. 736/82.

Following the order rendered by the President of the First Section of this Court on 4 August 1983, the clerk, in registered letters of that same day, summoned the parties to the hearing of Tuesday August 1983, and informed them that the suspension of the appealed judgment was ordered pending the Court's decision.

On Thursday 14 October 1982 the case was remanded.

At this hearing of Thursday 14 October 1982:

Mr Wittmer, counsel, on behalf of the appellee argued that the appeal was inadmissible and requested that the decision be upheld, with costs and expenses. He pleaded his case and filed his notes and the case file.

After the deliberations of the Chamber of the Council, the Court, in a public hearing of Thursday 14 April 1983, pronounced the following ruling through the intermediary of the President of the Court:

Facts:

The following facts are evident in the exhibits submitted to the Tribunal, then to the Court:

A. E_____ Corporation presented itself as a Liberian company, owner of the cargo "K_____", represented in London by its agent G_____ and Co. During an exchange of telexes on 30 April and 1 May 1981, between this agent and the agent L. _____ Ltd, it argued that it had developed, subject to details which needed to be finalised in a charter-party, the

essential elements of a contract of affreightment for the ship above to transport a load of 15,000 metric tonnes of soy flour from Rio Grande (Brazil) to Iskenderun (Turkey).

The charterer should have been C_____ SA, with its registered office in Nyon.

The terms of the contract stipulated, according to the first telexes, an "ordinary clause for arbitration in London" and a more detailed telex from "L_____" providing, in essence, that if one of the parties did not appoint its arbitrator within 7 days after the other party had notified it of its choice, the arbitrator thus appointed would be a sole arbitrator, as if he or she had been appointed by mutual consent.

C_____ SA made a payment of CHF 99,995.50 for demurrage and informed, via a French broker, according to a telex sent by L_____ on 10 June 1981, that the signed copy of the charter-party would be sent as soon as possible, which does not appear to have been done.

Then, as C_____ did not provide the bank guarantee agreed in the telex of 1 May, E_____ Corporation held that it had a right to abandon the contract and claim damages.

Thus, it mandated attorney's R_____ and Co. in London to appoint as arbitrator A_____. On 17 August 1981, these attorneys sent C_____ SA a registered letter, the content of which was not produced in the debate, which was refused with the words "does not concern". This letter was followed by a registered letter of 28 August 1981 containing "the claim of E_____ Corporation entitled Points of Claim" sent to the Nyon office of C_____ SA, as well as another letter, to the same address, for the company's lawyer, Mr B_____.

The latter replied on 3 September 1981 "for good procedure", that C_____ SA considered "this document to be null and void as it was imprecise and notably did not mention the court chosen, and in what capacity it would be." The Points of Claim were once again served by bailiff to "C_____ SA, 10, _____ in Geneva". A copy of this document was produced in the original English in the debate; the names of attorney's R_____ and Co. were on it, but not that of arbitrator A_____.

B. E_____ Corporation subsequently obtained in Geneva two orders for seizure of 2 September and 11 September 1981, mentioning a debt of CHF 2,062,469 – equal to US$ 967,841 – with interest of 20% from 8 July 1981 onward, against C_____ SA for "non-performance of the charter-party of 1 May 1981". The first seizure was confirmed by payment order no. _____ notified on 21 October 1981, which C_____ challenged.

On 18 February 1982, C_____ SA filed an action in challenge of the seizure before the Geneva First Instance Tribunal (currently registered under docket no. 1682 A 51).
According to information from the clerk of that Tribunal, the proceedings were suspended, with the agreement of the parties according to Article 307 LPC, on 5 August 1982.

C. The arbitrator A_____ rendered an award with reasons dated 19 January 1982 in which it set at US$ 667,263.65 the amount owed by C_____ SA to E _____ Corporation. This award contains a detailed chronological account of the arbitration proceedings. On 13 July 1981, E_____ Corporation had already notified C_____ SA in writing of its choice of arbitrator and had given it a deadline of 7 days in which to appoint an arbitrator of its own. On 10 September by registered letter the arbitrator invited C_____ to present its grounds for defence by 1 October; this letter was addressed to the registered office of the company, for the

attention of Mr B_____, chairman of the board of directors. On 8 October, the respondent was again invited, in the same manner, to present its statement of defence by 23 October and informed that the hearing would take place on 2 November, at 2pm at M. _____ Exchange, with the exact address. On 2 November, C_____ SA, who did not appear, was informed that the hearing was postponed until 6 November at 2pm, and on 19 November as the company still did not attend, the parties obtained in writing a deadline of 1 December to request a new hearing which was set for 8 December 1981, according to a telex addressed to each party on 3 December. As for the previous hearings, E_____ Corporation was represented by a lawyer, whereas C_____ SA again did not attend.

This was the point when the arbitrator rendered his final decision.

D. a) Relying on the arbitral award, of which it produced an original as well as a translation in French, E_____ Corporation filed on 18 February 1982 an initial request seeking definitive dismissal of the objection to payment order no. _____ 8, in the amount of CHF 1,421,938.85 – equal to US$ 667,263.65, at an exchange rate of 2.131 – plus interest of 18% per annum from 19 August 1981 until 19 January 1982 with interest of 15% per annum from 20 January 1982. The appellant claimed to justify such interest rates by producing the Weekly Market Report of 28 January 1982, published by Credit Suisse for its clients' "exclusively personal use"; in this regard it invoked the discount rate as in Article 104, para. 3 CO.

Moreover, the appellant argued that the arbitral award had become enforceable on 10 February 1982; in other words after the 21 day time limit set by English law (Arbitration Act, 1939) had expired.

b) The appellee submitted three grounds, two of which were primary claims:

1. It invoked the absence of a valid arbitration clause, within the meaning of Article 11 para. 2 and IV, para. 1 letter b of the New York Convention of 10 June 1958 for the Recognition and Enforcement of Foreign Arbitral Awards.
2. It maintained that it should have been summoned by diplomatic channels before the Arbitral Tribunal, an argument which it claimed was compliant with Swiss public policy.
3. In the alternative, it requested a suspension of the dismissal proceedings pending the outcome of the action challenging the seizure, relying on Article 278 LP.

c) In a decision dated 20 July 1982, communicated to the parties by letter dated 22 July 1982, the First Instance Tribunal ordered a definitive dismissal of the order to pay, in accordance with the appellant's conclusions.

The first court, in essence, based its decision on the New York Convention. Citing a decision of the Court of Appeal of Naples, it interpreted Article II para. 2 of this Convention, to the extent that an "agreement in writing" as imposed on the arbitration agreement, merely required an exchange of letters or telegrams, as this private international law provision states, but also an exchange of telexes. It thus dismissed the first of the appellee's objections and considered that the contract of affreightment and thus the arbitration agreement, both entered into by telexes of 30 April and 1 May 1981, were not void.

As for the ground regarding Swiss public policy, the Tribunal recalled that there must be an intolerable breach of fundamental principles of law; in this case C_____ SA duly informed of the appointment of the arbitrator, who, by its fault, had become sole arbitrator

and that it had been granted the power to present its case, such that public policy had not been breached.

E. Alleging that E_____ Corporation ~~it~~ had received this decision of 23 July 1982, C_____ SA filed an appeal on 2 August 1982.

The appellant argues that the first court wrongly acknowledged that it had personally participated in the exchange of telexes of 1 May, whereas, according to that very arbitral award, it was a juridical person or individual named "L_____"; in any event, a telex cannot be equated to an exchange of telegrams.

The arbitrator thus did not have jurisdiction.

Secondly, the Arbitral Tribunal breached Article V of the New York Convention and Article 81, para. 2 LP, as well as Swiss public policy in holding that a "foreign private individual" could directly and validly take action against a Swiss company without the intermediary of the Swiss authorities: "A summons by simple letter, which C_____ SA never received, can under no circumstances be deemed a proper summons."

Lastly, the appellant pursued its request for suspension, on which the first court omitted to rule.

Recital in Law:

1. The appeal was filed within the ten day limit provided for in Article 392 para. 1 LPC. However, it is not admissible unless the decision, handed down by the highest court, pursuant to Article 23, para. 3 letter b LALP, upholds a breach of the law to which the wrongful assessment of a point of fact is equated (Art. 339, para. 1 letter c LPC). This procedural rule implies an obligation upon the party filing the appeal to detail in its request, or see it be deemed inadmissible, which legal provisions it considers to have been breached and what such breaches consisted of (SJ 1976 p. 41/44; 1973 p. 43).

This Court must recall that an extraordinary appeal for breach of the law is an action of which the characteristics are those of a civil action to quash a decision (*cassation*) as only the legal grounds argued before the first court, or those which that court addressed by virtue of its powers to assess matters freely, may be discussed before this Court. This is even more true of the factual grounds, subject to exceptional cases accepted by case law, for which conditions are not met here (SJ 1981 p. 88/89; 1979 p. 371; 1945 p. 31 note Ed. Barde; Guldener, Schw. Zivilprozessrecht 3rd ed. § 59 p. 520, note 12, 523 *et seq.* and note 46; Kummer, Grundiss des Zivilprozessrechts, 3rd ed. P 2020 para. 2 and note).

2. The first ground to be assessed by this Court, as it is a procedural ground, is the request for suspension already filed at the hearing on dismissal of the objection to pay. The appellant claims that such a request is based on the right to legal action and bankruptcy, due to the challenge of the seizure that it brought and which is pending before the First Instance Tribunal. It is certain that the first court broke the law in omitting to rule on the request, but it remains to be determined whether such a request should have been granted. As the appeal filed by C _____ quashes the challenged decisions, the Court may nonetheless rule on the matter itself without remanding it to the Arbitral Tribunal (see aforementioned case law and doctrine).

Contrary to what is stated in the request for appeal, the suspensive effect of a challenge to seizure is not governed by Article 278, 2nd para. LP, but by Article 279 para. 2, 2nd sentence, *in fine*; this provision simply states that the time limits mentioned in Article 278 para. A to 4 do not run during the course of the proceedings in the challenge to seizure. This serves to allow the "creditor to decide whether to await the outcome of the proceedings to annul the seizure before going ahead with it or to disregard the proceedings and continue with the seizure" (on annulment of an order for seizure: ATF 80 III 33 = JT 1955 II 24 citing "unanimous doctrine"). This Court, referring to this Federal Tribunal case law, held, in a manner which has remained unchanged, that proceedings for the recognition of a debt validly initiated either before or after the time limit set by Article 278 must follow its ordinary course (SJ 1956 p. 385/389).

As for actual proceedings, the Federal Tribunal in the aforementioned decision held that it could continue until such time as the assets had been seized and that, if necessary, the creditor would be liable for compensation, notably through the provision of the surety provided in order to obtain the seizure (Art. 273).

As the dismissal formed part of these proceedings, the first court thus had no reason to stay the proceedings.

3.1 E _____ Corporation based its request for definitive dismissal of the objection to pay on Article 81, para. 3 LP, which relies on the application of the international convention of 10 June 1958 known as the New York Convention. This text entered into force in Switzerland on 30 August 1965 (RSLF O. 277.12) with the reservation – offered to contracting states by Article 1 para. 3 – that it would apply in Switzerland to awards rendered in other contracting States; yet Great Britain acceded to said convention effective on 23 December 1975, with no particular declaration or reservation. As arbitrator A _____'s award was rendered in London, the convention is applicable in that regard; the fact that one of the parties' registered office was situated in a State that had not ratified the international convention is irrelevant.

3.2 According to the First Instance Tribunal's decision, C _____ SA relied on the "absence of a valid arbitration agreement" and indicated that Articles 2 and 4 of the New York Convention had thus been breached (decision page 3, *in fine*). The request for appeal repeats this argument, holding that the first court broke the law when it dismissed that request; and adds that "due to the absence of an arbitration clause, the London arbitrator did not have jurisdiction". This is not a new ground raised for the first time during the appeal, as the arbitrator's jurisdiction obviously depends on the validity of the submission agreement or arbitration clause (ATF 96 I 334, citing Guldener = JT 1972 I 27; ATF 85 I 150s = JT 1959 I 556; ATF 96 I 338, recital 2; Batifol, Droit international privé, Volume I 431 No. 721).

Article II, paragraph 1 of the New York Convention provides that each of the Contracting States recognises the "agreement in writing" whereby parties commit to submitting to arbitration their arbitrable dispute, and states at paragraph 2:

"2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."

Moreover Article IV, para. 1 letter b obliges the party seeking recognition and enforcement to provide the "original agreement referred to in Article II or a duly certified copy thereof."

These provisions provide the basis for dismissing the appellee's argument that the assessment of the formal validity of the submission agreement or the arbitration clause would fall, in the spirit of the New York convention, under the exclusive remit of the arbitrators themselves (Kompetenz-Kompetenz: see Habscheid, Droit judiciaire suisse, 2nd ed. p. 566 and Schnitzer FJS 946 a, p. 4) and thus escaped the jurisdiction of the domestic courts of the country where recognition or enforcement were sought. As the existence of an "agreement in writing" is a condition for the application of this international convention, the Swiss court examining the request for dismissal of an objection to pay must provide a preliminary ruling on the validity of the agreements upon which the arbitrators came into play and the award was rendered. The Federal Council's message, which the appellant cited, does not state the contrary when it says that the States, and consequently their national courts, must only recognise international arbitration agreements which can "thus give rise to an arbitral award referred to in the convention" and adds that Article I, para. 1 indicates "the form that the arbitration agreement referred to in the convention must take" (FF 1964 II p. 630).

This message, as regards Article V, however, states that while the formal conditions set forth in Article IV are acknowledged (FF 1964 II p. 634):

…"The New York Convention shifts the burden of proof, placing it on the respondent. That party, according to Article V, shall, where necessary, prove that the request for recognition or enforcement of the award is not founded, unless the competent authorities refuse to grant such *sua sponte* (Art. V para. 2).

In the same way, one can refer to doctrine (Klein, La Convention New-York RSJ 196 1 p. 234, ch. 9).

In short, when a court notes that the arbitration agreement produced in accordance with Article IV, para. 1 let. b is not compliant, it may not even assess the arbitral award in the production of which is required by letter a) of the same provision. It will have to acknowledge that the New York Convention is not applicable and that, in the absence of any other international convention, it cannot definitively dismiss the objection to pay, pursuant to Article 81, para. 3 LP on the basis of the award before it; the problem of enforcing this award can only resolved in accordance with cantonal procedural law (SJ 1976 p. 577/581) *i.e.*, where applicable, through an enforcement order. If, however, this court declares the submission agreement or arbitration clause to be valid under Article II, it will have to examine the grounds for setting aside raised by the party objecting to enforcement and will thus have to assess 1° the legality of the arbitration agreement and the civil capacity of the contracting parties (Art. V let. a), 2° errors in the arbitral procedure (let. B and d) and 3° those affecting the award itself (let. C and e).

3.3 The agreement on which the London arbitrator based its jurisdiction to render an award is an arbitration clause inserted in a contract of affreightment entered into through an exchange of telexes.

The severability of arbitration clauses as to their validity is a generally accepted principle in international arbitration. Such clauses may be validly entered into even though the contract in which it is contained was not, or vice versa (ATF 41 II 534; regarding extension of the forum: ATF 93 l 323; Ivan Cohen RSJ 75(1979) p. 259; M. Schwartz RSJ 64 (1968) p. 49; Ph. Fouchard L'arbitrage commercial p. 148 *et seq.*; Clunet 1974 p. 913 and 915; 197 p. 936).

In this court's opinion, C _____'s objection that the arbitration clause was invalid due to an alleged formal error is actually a non-issue. It is evident that, in deeming an arbitration clause inserted in an exchange of telegrams, to be an "agreement in writing", Article II of the New York Convention, refers to the general electronic transfer of messages in a lasting form. In this regard, a telex is more apt than an ordinary telegraph to produce messages of which it is possible to identify the senders and recipients. The same opinion was also expressed by the message of the Federal Council stating:

"…in order to take into consideration the practices in international commerce, the convention also accepts a less stringent written form: it is sufficient for the arbitration agreement to be made up of letters or telegrams exchanged by the parties (FF 1964 II 630),"

Adding that the use of telex is so widespread nowadays that it has practically eliminated the classic telegrams of the past. Other courts have agreed with this opinion (Naples Court of Appeal 17. 3. 79, Yearbook Commercial Arbitration 1982/297, cited by the first court; OG Austrian Yearbook 1976 183 cited by Y. Cohen, *op. cit.*; see also F.E. Klein, la Convention de New-York RSJ 196 1 p. 229 *et seq.*, nota 235). If another method is to be applied to the interpretation of Article II, the same result would be obtained. According to the "development" or "updating" method applied by the Federal Tribunal in public law matters, a *contra legem* application is possible when a strict application of the law is unreasonable and contrary to the spirit of the rule it creates (ATF 103 Ia 117; 98 I a 1894). Yet the rule created by the New York Convention consists, even though the text is not entirely clear, in recognising, alongside signed documents in writing, those which are drawn up in a less stringent form accepted in business practice (Message, *loc. cit.*).

3.4 The Federal Tribunal observed, as regards to the court assessments of the arbitrators' jurisdiction – which implies an examination of the validity of the arbitration agreement – that it should concern the form of the agreement between the parties but also its material validity (ATF 102 la 574/578; 10 1 II 170, recital 2 = JT 1975 I 62), as the New York Convention also provides (Art. II ch. 3).

In this case, C____ SA objected from the outset, in the first instance proceedings, to its capacity as a party to the arbitration agreement contained in the exchange of telexes and also maintained that this exchange did not amount to an agreement within the meaning of Article II of the New York Convention as it did not constitute the expression of compatible declarations.

Yet, the Court must note that the first court did not rule on the material validity of the arbitral agreement which it rightly held valid as to formal requirements; the court thus broke the law in such a manner that the Court of Appeals may not rule.

4. The ground that Swiss public policy had been breached may be preserved as is. As the decision was overturned and the case referred back to the first court, that court shall retain the ability to order the production of evidence on that matter, if it believes that to still be necessary.

5. As the Court found in favour of C_____ SA, the costs of the appeals proceedings shall be borne by the appellee.

For these reasons, the Court:

Admits the appeal filed by C_____ SA against decision no. 6246 rendered on 20 July 1982 in case no. 682 S 726.

Overturns this decision and refers the matter back to the First Instance Tribunal, in the sense of the recitals.

Orders E _____ Corporation to pay compensation, taxed CHF 1,600 – for damages

Judges:

Messrs. Starobinski, President; Pagan, Peter, judges; Ms Verdel, clerk.