Unofficial translation

HEARING OF FRIDAY 17 SEPTEMBER 1976

1st Chamber

Between

L_____ Ltd,
London, appellant of a decision rendered by the 10th Chamber of the First Instance Tribunal of that canton on 25 March 1976, represented by Mr Woodtli, attorney, at whose office it elects domicile,

On the one hand,

And
C_____ SA, having its registered office c/o Mr B _____ attorney, appellee, represented by Mr B. _____, attorney, at whose office elects domicile,

On the other hand,

Case no. 549.

Following the order rendered by the President of the First Section of this Court on 14 April 1976, the clerk, in registered letters of 5 April 1976, summoned the parties to the hearing of Friday 30 April 1976.

At this hearing of Friday 30 April 1976, the case was postponed to Friday 14 May 1976 for the pleadings.

At the hearing of Friday 14 May 1976:

Mr Woodtli, counsel, on behalf of the appellant requested, as per the appeal, with costs:

(Appended exhibit, from: Whereas…)

Mr B, counsel, representing the appellee argued that the appeal was inadmissible, requested costs and filed its case documents.

Following deliberations by the Advisory Chamber, the Court, in a public hearing of Friday 27 September 1976, pronounced the following ruling through the intermediary of the President of the Court:

Facts:

a) L _____ Ltd in London requested definitive dismissal of an objection against an order to pay, order no. _____, amounts of CHF 222,141 and CHF 48,510 – payment order notified on 20 August 1975 to C _____ SA Geneva.

The aforementioned amounts were the equivalent of amounts in US dollars awarded to L_____ Ltd by the arbitral award handed down on 1 October 1973 by the International Chamber of Commerce in Paris.

The sales contract of 30 December 1970 binding the parties stipulated in Art. II that any dispute regarding the contract would be submitted to arbitration by the International Chamber of Commerce.

The award dated 1 October 1973 rendered in The Hague by three arbitrators was approved by the Court of Arbitration of the International Chamber of Commerce pursuant to Art. 26 of the Rules for Conciliation and Arbitration in force since 1 June 1955; it thus was final and, consequently, enforceable pursuant to Art. 29 of the aforementioned Rules.

In support of its request for dismissal of the objection to pay, L_____ Ltd complied with the requirements of Art. 4 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards signed in New York on 10 June 1958 (RO 1965 p. 799), ratified by Switzerland on 1 June 1965 which entered into force in this country on 30 August 1965 (RO 1968 p. 1063).

L_____ Ltd produced the duly certified original arbitral award dated 1 October 1873, a translation of it by a certified translator of the canton of Geneva and the original sales contract of 30 December 1970.

In reading the award, it is revealed that the dispute which arose among the parties concerned the fact that the ore delivered by C _____ SA on L_____ Ltd's request contained less than 46% of Cr203 which obliged the arbitrators to interpret Art. 4 of the contract to resolve the price of ore with regard to its CR203 content compared to 46%.

b) C _____ SA argued that its objection relied on an infringement of party rights, in the sense that the Arbitral Tribunal consulted an expert in the chrome trade, Mr E _____ without the presence of the parties and did not subsequently give the parties any latitude to discuss said expert's conclusions.

The appellee thus holds that, as the award was to be enforced in Geneva, Swiss public policy would thus be breached such that recognition and enforcement of the award would be refused in accordance with Art. 5 para. 2 let. B of the New York Convention.

For its part L _____ Ltd maintained:

- that the arbitrators had great freedom of decisions, in accordance with Art. 20 of the Rules,
- that the expert was not called on to decide a factual point in dispute but rather to provide practical information regarding the industry,
- that even if the procedure adopted in this case by the arbitrators was not the same as that applied by Geneva courts, that would not necessarily result in a breach of public policy.

c) In a decision dated 25 March 1976, the Tribunal dismissed L _____ Ltd's claims.

The first court first noted that the request for definitive dismissal of the objection to pay was admissible given that The Netherlands, where the matter was heard and the award decided and rendered, like Switzerland, had ratified the New York Convention (Art. 81 para. 3 LP).

Moreover, the court held that the conditions set at Art. IV for the recognition and enforcement of an award were met in the case at hand.

Even considering that Art. 81 para. 3 LP grants broader powers to the Tribunal than those granted in Art. 81 para. 1, the first court held, however, that it was useless to order the requested measures of proof which C _____ SA requested, in the alternative, as L _____ Ltd did not challenge Mr E _____'s consultation and the conditions in which it occurred.

Lastly, observing that the arbitrators consulted a third-party on a factual point which they were not able to clear up using the exhibits produced, the debates or their own knowledge of business, the tribunal held that the arbitration proceedings did not comply with the agreement between the parties. It also considered that the award was flawed, as Mr E ____'s deposition was taken without the presence of the parties who could thus not verify what he said as the award did not mention the declarations of the witness in question, while all the other depositions were committed to the minutes and considered to be part of the award.

Thus, the Tribunal considers that the three arbitrators had "added a fourth arbitrator to their deliberations."

Considering, in addition, that the arbitrators had breached the rules of procedure of The Netherlands, where the award was rendered, the Tribunal dismissed L _____ Ltd's request for definitive dismissal of the objection to pay.

d) L _____ Ltd appealed this decision on 14 April 1976.

The appellant argues that the first court wrongfully considered, and without any proof of such, that the Arbitral Tribunal had consulted a third-party on a factual matter and that it was unable to clear up that point without the help of the evidence produced and that the information provided enabled it to set an amount that it believed the appellee owed the appellant.

Art. 20 of the rules, at any rate, provide the arbitrators with some latitude in the establishment of the procedures for hearing witnesses and experts, and they only need to refer to Dutch procedural rules when the provisions of the Rules are insufficient to resolve a matter.

In any event, the Arbitral Tribunal did not breach Swiss public policy as the conditions defining such breach are not met in this case.

The appellant also notes that the appellee became aware of the alleged informality for which it challenges the arbitrators on 27 November 1972 at the latest, in others words, one year prior to the rendering of the arbitral award, and that it did not use the legal means at its disposal to ensure that its rights were preserved or reserved. Thus, the appellant notes a manifest misuse of a right on the part of the appellee who raises and relies on such an argument when enforcement of the arbitral award is sought.

C _____ SA requested that the appellant's appeal be dismissed, and pursued the allegations already presented to the first court.

Law:

1. The appeal was filed within the ten day limit and in compliance with the formal conditions provided for (Articles 417-423 LPC).

As the decision was rendered by the highest court, an appeal can only be admissible under Art. 339 let. C LPC, in other words, if said decision enshrines a breach of the law - a wrongful legal assessment of a factual point being equated to such breach.

2. a) The sales contract entered into by, C ____ SA the seller, Geneva and L _____ Ltd the buyer, in London, contains an arbitration agreement at Article 11, whereby the parties agree to arbitration by the International Chamber of Commerce in Paris in the event of a dispute.

As a dispute arose among the parties, the appointed arbitrators chose The Hague to be the seat of arbitration. This choice was approved without reservation by the parties.

As the dispute regarded the performance of the sales contract, the arbitrators applied Swiss law to the merits of the dispute – to which the parties did not object, thus showing their agreement on the matter.

c) As for the applicable procedural rules, Art. 16 of the Rules for Conciliation and Arbitration in force from 1 June 1955, state that the rules are those provided by said rules and that, only in the event that such rules do not address a matter, may the rules of the procedural law chosen by the parties apply or, where they have not chosen such, the rules of procedure of the country where the arbitration proceedings take place.

It appears that the parties made an express decision regarding the procedure to be followed. However, if one refers to the letter of Mr S_____, chairman of the Arbitral Tribunal, sent on 15 February 1972 to the parties' attorneys and one of the recitals of the interim decision dated 3 November 1972 (top of p. 2), it appears that all the parties considered that Dutch law was applicable in a secondary manner in procedural matters.

c) The objection regarding public policy raised by C_____ SA must be assessed in light of the New York Convention of 10 June 1958.

Thus the appellee bases its objection on Art. 5 let. B and d. of said Convention on the grounds that it was not informed of the arbitral proceedings and thus could not present its arguments (let. B), which amounts to saying that the arbitration was not carried out in compliance with Dutch law (let. D).

While a public policy reservation may be raised against both the content of an arbitral award for which enforcement is sought in Switzerland, and against the proceedings from which it arose (RO 85 1 47 recital 4 a; RO 97 1151; RO 98 1 a 533 recital 3) the Federal Tribunal did, however, note (ATF 12.12.1975 Provenda S.A. cl Alimenta S.A., recital 4, ATF 101 la 521) that the reservation of Swiss public policy has a narrower scope in terms of recognition and enforcement of foreign arbitral awards than in the application of foreign law by Swiss courts. Thus, as far as procedure is concerned, this restriction means that a procedural flaw does not necessarily lead to a refusal to enforce the foreign arbitral award, even when such a flaw would cause an award rendered in Switzerland to be set aside; it would have to concern a breach of a fundamental

principle of Swiss public policy constituting an intolerable affront to the law (RO 96 1 391; 87 1 193). The Federal Tribunal also observes on this topic (ATF 12.12.1975 already cited) that the more detailed the formal conditions for the enforcement of arbitral awards in conventions, the narrower the scope of the – express or tacit – public policy reservation. This reservation should not allow, in a round-about manner, the exclusion of international conventions ratified by Switzerland and which are part of Swiss law, thus excluding the application of Swiss law; it must not amount at the final assessment to a breach of treaty, of which the purpose is to recognise the existence of different legal systems and to coordinate them.

According to the President of the Arbitral Tribunal, Mr S_____, the arbitrators asked Mr E ____ a question regarding the price scale for the different compositions of chrome ore. This question was not related to any point of debate between the parties but arose during the deliberations regarding the business practices in the matter. One of the arbitrators was very well versed in the matter and had shared his views in this regard with his colleagues. For greater certainty on the matter – which the parties had not raised – the arbitrators consulted Mr E _____ but not in his capacity as an expert, in the procedural sense of the word. Mr S____ held that there was no reason to keep the parties informed of the event, especially as Dutch law did not require it.

Again, according to Mr S____, the unquestioned doctrine in The Netherlands, accepts that knowledge gained through research in order to clarify an issue is added to the arbitrators own knowledge. If circumstances lead to such research, it is advantageous in that the research may supplement the evidence. Thus arbitrators can proceed to personal investigations of certain facts and circumstances and may collect information from competent sources. In The Netherlands, it is generally accepted practice for arbitrators to collect all sorts of information and conduct appropriate investigations in this regard, thus avoiding hearing many witnesses, as in the case at hand. (See Mr S _____'s letter dated 27 November 1972).

It thus follows that the arbitrators consulted Mr E_____, not in his capacity as expert witness in procedural terms, but only to obtain information from an authorised person on a matter arising merely from a discussion and not raised by either one of the parties.

This method does not cause any harm to either of the parties as neither of them attended the meeting; moreover, Mr E____ was heard by all three arbitrators together and they had the latitude to ask him any questions or counter-questions needed to further their understanding.

Thus, the arbitrators most likely did not ask Mr E____ questions which had a determining effect on the solution to the dispute before them; they merely tried to gain more certain knowledge of the business context underlying some of the issues of the dispute between the parties.

The appellee does not provide proof that any Dutch law or case law of the Dutch courts prohibits arbitrators from acting in the manner of Messrs. S____, H_____ and P_____.

Attorney W_____'s opinion, requested by the appellee, is too succinct to have a determining effect, especially as it is unknown how the facts were presented to him.

The procedure followed by the arbitrators and challenged by the appellee does not intolerably harm the sentiment of law as generally exists in Switzerland and does not breach fundamental rules of the Swiss legal order.

As the chairman of the Arbitral Tribunal said, the questions put to Mr E_____ were general questions which did not involve the points in dispute. In other words, Mr E_____'s answers clarified the arbitrators' questions as to the inherent practices in the chrome ore industry but did not resolve any of the points over which the parties were in dispute. If that had been the case, it could be held that there was a breach of law because the parties had not been given the opportunity to present their arguments on points relevant to the outcome of the dispute (RO 73 1 199 recital. 1; 78 IV 147; 94115).

In this case, the arbitrators acted as judges often do when ruling on fields with which they are unfamiliar – by obtaining information from competent persons around them or from specialist literature. These consultations only rarely appear in the recitals of decisions but do enable the drafters of those recitals to decide on the matter. Again, this concerns the matter of substantive knowledge, life experience which all judges have or, when they consider that they lack information on a particular topic, have a duty acquire in order to better understand the specificities of the parties' problem, and thus to solve it.

In this particular case, the independence of the judges was not questioned. Moreover, the principle of party equality was fully upheld.

The court therefore considered that the Arbitral Tribunal's hearing of Mr E____ without the presence of the parties, does not go against the inherent feeling of the law in an intolerable manner and thus cannot be considered contrary to Swiss public policy.

The New York Convention does not exclude an arbitral award from being set aside by the competent authority in the country in which, or in accordance with the laws of which, it was rendered (Art. V para. 1 let. E).

Yet, while the appellee learnt of the nature and scope of the informality alleged at present from Mr S_____'s letter dated 27 November 1972, it did not petition the competent Dutch authorities on the matter. At the very least, the appellee does not show that Dutch law did not award it the power to appeal in such circumstances.

The decision dated 25 March 1976 will be overturned for all the reasons put forth above; the unsuccessful appellee shall consequently bear the costs of both the first instance and these proceedings.

For these reasons, the Court:

Admits the appeal filed against the decision dated 25 March 1967.

Overturns this decision
And ruling again:
Declares definitive dismissal of the objection to pay raised by C_____SA, order no. ____.

Orders the appellee to pay CHF 500 for costs of the first instance and CHF 800 for the costs of the appeal.

Judges:

Messrs. Curtin, President; Schmidt, Kempf, judges; Monney, clerk.