Unofficial translation

Federal Tribunal

{T 0/2}
5A_441/2011

Decision dated 16 December 2011
2nd Civil Law Chamber

Members of the Court:
Judge Hohl, President
Judges Escher and Herrmann.
Clerk: Ms Achtari.

Parties in the proceedings
A. _____ SA,
represented by Mr Guy Bernard Dutoit, Attorney-at-law,
appellant,

versus

B. _____ S.p.A,
represented by Mr Mathis Kern, Attorney-at-law,
respondent.

Object
Definitive dismissal of objection to pay a debt, enforcement

appeal against decision of the Civil Chamber of the
Court of Justice of the Canton of Geneva of 26 May 2011.

Facts:

A.
A.a In a sales contract dated 23 October 2003 (and the amendment dated 28 October 2003), 3 and 12 November
2003, A. _____ SA, headquartered in Geneva, sold “durra feterita” (white sorghum) to
C. _____ S.p.A, headquartered in X (Italy).
A.b As the seller did not perform the contracts, C. _____ S.p.A seized the GAFTA (Grain and Feed Trade Association) arbitral tribunal. In an award dated 26 May 2005,, which was confirmed by the GAFTA appeals committee on 30 December 2005, A.SA was ordered to pay C. _____ S.p.A US$ 5,093,750, plus 4% composite interest as well as £ 8,212.97 for fees and costs. In an order dated 27 April 2006, the London High Court (UK) refused to grant A. SA authorisation to file an appeal against the award.
A.c On 25 February 2008, C. _____ S.p.A and A. _____ SA entered into a settlement agreement in which they first agreed not to appeal the award in return for payment by the second of an amount of US$ 3,000,000 in eight instalments. In the event of non-payment, C. _____ S.p.A could terminate the agreement in exchange for a final payment period of 7
working days. If payment did not occur within that period, the agreement would be null and void, save with regard to payments already made.
A.d On 5 March 2008, C. _____ S.p.A transferred its debt towards A. _____SA to its holding B. _____ S.p.A. In a letter dated 8 May 2009, B. _____ S.p.A notified C. _____ S.p.A that A. _____ SA had not honoured its debt. In a letter dated 11 May 2009, the attorneys of companies

C. _____ S.p.A and B. _____ S.p.A terminated the settlement agreement dated 22 May 2009 and invited A. SA to pay the amount due up until 22 May 2009. On 3 November 2010, B. S.p.A. sued A. _____ SA for 7,615,747 francs with interest at 5% from 1 June 2009 onwards. The latter objected to the payment.
B.
B.a On the request of B. _____ S.p.A, sent on 30 December 2011 and received on 3 January 2011, the Geneva First Instance Tribunal, in a decision dated 24 February 2011, declared enforceable in Switzerland the appeals award dated 30 December 2005 rendered by the GAFTA appeals committee and declared the definitive dismissal of A. _____ SA's objection to the payment order.
B.b A. _____ SA appealed this decision before the Geneva Canton Court of Justice, requesting that it be overturned. This appeal was dismissed in an award dated 26 May 2011.
C.
In a statement of 28 June 2011, A. _____ SA filed a civil appeal against this decision. It requested that the federal Tribunal "overturn the decision rendered by the Court of Justice (...)". It argued a violation of Art. 20 CO and V ch 1 let b of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention, RS 0.277.12).
No observations were required. Nonetheless, B. _____ S.p.A, on its own initiative, determined the outcome of the action in a document dated 7 September 2011. It primarily requested that the action be held inadmissible, and in the alternative, that a deadline be set either for the relevant authority to appoint a legal representative for A. _____ SA, or for A. _____ SA's legal representative to ratify the latter's procedural documents, failing which the action would be held inadmissible. In letters dated 6 and 10 October 2011, A.SA produced exhibits to prove that it had a legal representative.

In law:

1.
1.1 The action was brought in time (Art. 100 para. 1 LTF); against the final decision (art. 90 para. 1 LTF), and sought the enforcement of a foreign arbitral award (art. 72 para. 2 let. b ch. 1 LTF) as well as the definitive dismissal of an objection to a payment order (Art. 72 para. 2 let. a LTF; ATF 134 III 115 recital 1.1) rendered by a last instance cantonal court having ruled on an appeal (Art. 75 LTF); the amount at stake was 30,000 francs (Art. 74 para. 2 let. b LTF; ATF 133 III 399 recital 1.3).

1.2 The respondent argued that A. _____ SA had no body able to represent it. In support of its appeal, it produced a certified copy of an excerpt from the Geneva Companies' Register dated 6 September 2011, from which it appears that the powers of person having held the position of director had been withdrawn on 14 March 2011.
The petitioner confirmed that a new director had been appointed. To demonstrate this statement, it produced a copy of the minutes of the extraordinary general meeting of shareholders from which it appears that, on 30 September 2011, a new administrator had been appointed. It also produced a proxy dated 10 October 2011, signed by this director, empowering the attorney having filed the civil appeal before the federal tribunal to represent A. _____ SA in the present case 5A_441/2011.
1.2.1 Both parties raised new facts and submitted new evidence. In principle, such new elements may not be submitted (art. 99 al. 1 LTF). Exceptionally speaking, they may be relied on in order to allow the federal tribunal to determine which are the parties in the proceedings before it (BERNARD CORBOZ in Commentaire de la LTF, 2009, n°21 ad art. 99 LTF). In this case, the question raised regarded a party's power to bring an action (cf. infra consid. 1.2.2). It thus constituted an exception.
1.2.2 Although it is inseparable from the exercise of civil rights, governed by substantive law, the appellant must have the ability to act in court for its action to be admissible. That includes the ability to partake in proceedings, both by being party itself or appointing a qualified representative in its place. Full powers to act in justice are granted to juridical persons (Art. 54 CC) acting through their organisation (Art. 55 para. 1 CC; FABIENNE HOHL, Procédure civile, Tome I, 2001, n°404 et seq.).
Under joint stock company law, General Assemblies have a non transferrable right to appoint board members (Art. 698 para. 2 ch. 2 CO). Each of these has, in principle, the power to represent the company with regard to third-parties (Art. 718 para. 1 2nd ph. CO). The board may, however, delegate the power of representation to one or more members (delegates) or to third-parties (directors,

Art. 718 para. 2 CO). It must communicate to the officer of the Companies Register, with a view to the registration, the names of all persons empowered to represent the company and produce a certified copy of the document empowering them (Art. 720 1st ph. CO). Registration on the Companies Register is not, however, a condition for the existence of that power of representation, neither internally or externally (ATF 96 II 439 recital 2; 76 I 338 recital 5; decision 4C.136/2004 dated 13 July 2004 recital 2.2.2.2.2, unpublished in ATF 130 III 633).
1.2.3 In this case, the minutes produced show that the appellant's General Assembly appointed a new director on 30 September 2011. However, it is not proven that the director was registered on the Companies Register. Nonetheless the aforementioned exhibit is sufficient, under the aforementioned case law, to show that the director had the power to represent the appellant. Moreover, in signing the attorney's proxy, it ratified the appeal brought in the name of and on behalf of the appellant on 28 June 2011 (Art. 38 CO). In addition, as the appellant was unsuccessful before the previous authority, it had the capacity to act in court (Art. 76 para. 1 LTF).

1.3 The appellant did not submit any claims in the appeal for reform. It merely requests as follows: "On a preliminary basis: 1. to state and hold that the present appeal is admissible as to its form. Principally: 1. to overturn the decision of the Court of Justice of the Canton of Geneva in its ruling dated Thursday 26 May 2011 ACJC/667/2011 in the matter C/30235/2010 between B. _____ S.p.A and A. _____ SA. 2. To order B. _____ S.p.A to bear all costs and expenses".
1.3.1 According to Art 42 para. 1 LTF, statements submitted in actions must contain requests. The appellant must therefore state which points of the decision it challenges and which changes are requested. As the federal tribunal itself can rule on the merits (Art. 107 and 117 LTF), the claims cannot, in principle, exclusively seek to see the decision quashed (ATF 134 III 379 recital 1.3). If requests are lacking or are insufficient on the whole, the appeal is inadmissible. However, the prohibition on excessive formalism dictates that we not be too strict in the formulation of requests, if, in reading the statement, it is clear what the appellant seeks. (Decision 4A_321/2009 dated 15 January 2010 recital 2; 1C_100/2008 dated 18 June 2008 recital 1).
1.3.2 In this case, it appears from the grounds for the appeal that the petitioner challenges the enforceable nature of the arbitral award. Thus, one understands that it seeks a reform of the challenged decision to the extent that enforcement of the appeals award dated 30 December 2005 was dismissed, and thus, the request for the definitive dismissal of the objection to pay was refused. It is therefore necessary to examine the substance of the action.

2.
2.1 The Federal Tribunal necessarily applies the law (Art. 106 para. 1 LTF) and is not bound by either the grounds raised by the parties, nor the legal arguments of the cantonal authorities (ATF 130 III 297 recital 3.1). However, in light of the appellant's obligation to provide grounds under Art. 42 para. 2 LTF (ATF 133 IV 286 recital 1.4), it does not assess all possible legal issues but only those raised before it (ATF 133 III 545 recital 2.2). The decision ordering enforcement and definitive dismissal of the objection to the payment order is not equated to a provisional measure. All grounds of Art. 95 and 96 LTF are thus admissible against it (ATF 133 III 399 consid. 1.5.).

2.2 The Federal Tribunal rules on the basis of facts established by the previous court (Art. 105 para. 1 LTF); it can only disregard them if they were manifestly inaccurately or arbitrary pursuant to Art. 9 Cst (ATF 134 IV 36 recital. 1.4.1; 133 II 249 recital 1.2.2) -or in breach of the law under Art. 95 LTF (Art. 105 para. 2 LTF) and if correcting an error can influence the outcome of the case (Art. 97 para. 1 LTF). The appellant maintains that the facts were established in an arbitrary manner and must demonstrate, in detailed reasoning, what the breach entailed, in compliance with the allegation principle (Art. 106 para. 2 LTF). Challenges of an appellant nature are inadmissible (ATF 133 III 589 recital 2 and the aforementioned decisions).

3.
3.1 As far as we can tell, the appellant first appears to criticise the cantonal court for having breached Article 20 CO by not holding sales contracts to be void. As a ground for their nullity, it argues that it

"never formally entered into a contractual relationship with the respondent and that "no organisation or person empowered by the appellant had signed the contract".
3.2
3.2.1 According to Art. 80 para. 1 LP, a debtor in whose favour an enforceable decision is rendered may request that the court definitively dismiss the objection to payment. International arbitral awards, when provisionally enforceable, are equated to court decisions (cf. Art. 194 PILS, which refers to the New York Convention; ATF 130 III 125 recital 2). The court before which enforcement is sought merely assesses the authenticity of the decision in question, whether it is enforceable, as well as three identities (the claimant, respondent and claims); the merits of the dispute are no longer assessed (cf. in line with this WALTER A. STOFFEL/ISABELLE CHABLOZ, Voies d'exécution, 2nd ed., 2010, § 4 n°76).
3.2.2 In this case, while it claims that the contract was void pursuant to Art. 20 CO, it is clear that the petitioner actually argued that it was not a debtor to the contract, since the signatory was not empowered as a representative. That is a ground pertaining to the merits of the dispute and decided by the arbitral tribunal, which the court examining enforcement and the definitive dismissal of an objection to payment may not assess. The argument is thus inadmissible.

4.
In a second claim the appellant argued breach of Art. V of the New York Convention. It challenges the cantonal court for having refused to admit that it had never participated in the arbitration, nor mandated any representative to represent it. It claims that its subsequent directors did not know who had participated in the arbitration and that it had not been informed of it.

4.1 The cantonal court first observed that the respondent had met the formal conditions set forth in Art. IV of the New York Convention, allowing it to obtain recognition and enforcement of the arbitral award. Consequently it was up to the appellant, pursuant to Art. V ch. 1 let. b of this convention, to prove the ground for refusal of enforcement on which it relied. The court then explained that, under Art. 326 para. 1 CPC, any new documents produced by the appellant at the appeal stage, as well as any allegations related to them, would be inadmissible. Lastly, the Court held that the appellant never, during the first instance proceedings, questioned its participation in the arbitral proceedings before GAFTA. Moreover the appellant itself had produced the settlement agreement dated 25 February 2008 in an attempt only to challenge the enforceable nature of the appeals award - an argument which it then dropped during the appeal. It also appears from the arbitral award of 26 May 2005 that it had appointed an arbitrator and from the appeals award dated 30 December 2005 that it had itself
filed that appeal and had been represented during those proceedings. Lastly, A. _____ SA again tried to challenge the appeals award before the London High Court, which, in an order dated 27 April 2006 of which a certified copy was provided, refused to grant it such authorisation. For these reasons, the cantonal authority dismissed the action which it considered to be a delaying tactic.
4.2
4.2.1 A debtor wishing to have a foreign decision enforced in Switzerland requests that the court petitioned to definitively dismiss an objection to a payment order hand down a preliminary ruling on the recognition of the decision and then dismiss the debtor's objection (Art. 83 para. 3 LP). Thus, as the proceedings for the definitive dismissal of an objection to pay are extended to the incidental decision on recognition, admissible allegations and evidence encompass any element necessary to prove the existence of the material conditions for recognition. If a debtor relies on a foreign arbitral award, the conditions for recognition arise from the New York Convention (cf. p. ex. STOFFEL/CHABLOZ, op. cit., § 4 n°198 et seq.).
According to Article V ch. 1 let. b of the New York Convention, recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.
4.2.2 In this case, the appellant's only argument was to say, in its purely factual criticism, that it did not participate in the arbitration proceedings and on that topic vaguely refers to the Companies Register. Thus, it merely contradicts its own version of the facts in objection to that believed by the

cantonal authority, which held that the appellant did take part in all stages of the proceedings. As it is devoid of any substance, the claim is inadmissible (cf. supra recital 2.2).

In conclusion, the appeal is inadmissible for insufficient grounds. The legal costs, amounting to 15,000 francs are to be borne by the appellant (Art 66 para. LTF). There is no reason to award expenses to the respondent, who was not invited to reply.

For these reasons, the Federal Tribunal rules that:

1.
The action is inadmissible

2.
The legal costs, amounting to 15,000 francs are to be borne by the appellant.

3.
The present decision is communicated to the parties, as well as the Court of Justice of the Canton of Geneva.
Lausanne,
16 December 2011
In the name of the 2nd Civil Law Chamber
Swiss Federal Tribunal

President Hohl

Clerk: Achtari