

Unofficial translation

Federal Tribunal

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

Decision of 3 January 2006
2nd Civil Chamber

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

Parties in the proceedings
Y._____,
respondent, represented by Mr Laurent Panchaud, attorney at law,

versus

X._____,
appellant, represented by Mr Nicolas Genoud, attorney at law

First Section of the Court of Justice of the Canton of Geneva, post box 3108, 1211 Geneva 3.

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

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

Facts:

A.

X. and Y. are oil trading companies operating in the Baltic countries and Belarus in part. On 28 May 2003, they entered into contract no. 01-W/T-28-05-2003, stating that Y._____ would deliver to the border between Belarus and Latvia 10,000 metric tons of M-100 grade fuel oil at a price of US\$ 110 per metric tonne. X._____ paid 90% of the agreed price within the agreed time, but did not pay the outstanding balance, *i.e.* US\$ 49,537.50

B.

The contract dated 28 May 2003 provided for any dispute to be resolved by the Commercial Arbitral Tribunal of Riga (Art. 8.2) and that the tribunal's decision would be final and binding on both parties (Art. 8.3).

B.a Y. _____ thus seized the Riga Commercial Arbitral Tribunal and, on 2 December 2003, obtained an award ordering X. _____ to pay it an amount of LVL 28,434.53 (Latvian lats) - equal to US\$ 49,537.50 - as well as the costs and fees of the proceedings and legal counsel, equal to LVL 2,169.21 This decision, which could not be appealed, was declared immediately enforceable and stated that, should it not be voluntarily followed, the claimant could petition the

District Court of Zimeliai of the City of Riga with a request of enforceable payment for the enforcement of said decision. On 7 January 2004, said District Court held to be enforceable the aforementioned arbitral decision of 2 December 2003, this decision could not be appealed.

B.b X. _____ also petitioned the Riga Commercial Arbitral Tribunal, requesting that the contract dated 28 May 2003 be annulled and that Y. _____ be ordered to pay damages for non-performance of the contract and the arbitration fees, on the grounds that Y. _____ did not deliver the agreed upon quantity of fuel oil.

In a hearing where Y. _____ was not present, this tribunal annulled the aforementioned contract and ordered it to pay X. _____ a total amount of LVL 93,690.64, with interest at 6%. This decision, which could not be appealed, could only be enforced after an enforcement order issued by the District Court of Zimeliai of the City of Riga. In a decision of 12 January 2004, this court refused to grant the requested enforcement order on the grounds that Y. _____ had not been correctly summoned to the aforementioned arbitral proceedings.

B.c On 15 October 2004, X. _____ once again filed a request for damages against Y. _____ on the grounds of non-performance of contract no. 01-W/T-28-05 before the Commercial Arbitral Tribunal of Riga. While it was correctly summoned to attend, Y. _____ did not do so. In a decision of 16 November 2004, it was ordered to pay US\$ 41,455 (*i.e.* LVL 22,510.20) with interest of 6%; according to the operative part of that decision it could not be challenged or appealed.

C.

At the same time, *i.e.* on 24 March 2004, Y. _____ sought and obtained from the First Instance Tribunal of the Canton of Geneva the seizure of the assets that X. _____ had deposited in two banks in Geneva, amounting to CHF 68,166.31 with interest at 5% per annum from 16 July 2003 and CHF 1,439.49 with interest at 5%/annum from 7 January 2004 onward, in exchange for the prior deposit of surety of CHF 5,000.

Informed of the seizure, X. _____ objected to it. The First Instance Tribunal dismissed the objection to the seizure in a decision dated 7 May 2004, which X. _____ unsuccessfully challenged before the Court of Justice of the Canton of Geneva and then before the Federal Tribunal (decision 5P.353/2004 of 21 February 2005).

D.

In parallel and in support of the aforementioned seizure, Y. _____ notified X of payment order no. xxx, against which an objection had been brought. On 9 July 2005, based on the decisions rendered in Riga on 2 December 2003 and 7 January 2004 (see letter B.a *supra*) for which it first requested enforcement, Y. _____ requested definitive dismissal of the amount of US\$ 41,455 objected to the order to pay. X. _____, objected to the request for dismissal, and notably sought after compensation, on the basis of the decision rendered on 16 November 2004 by the Commercial Arbitral Tribunal of Riga (see letter E.c *supra*).

In a decision of 23 March 2005, the First Instance Tribunal recognised and declared enforceable in Switzerland the arbitral award rendered on 2 December 2003 by the Riga Commercial Arbitral Tribunal, and consequently definitively dismissed X. _____ 's objection to payment order no. xxx, for amounts of CHF 68,166.31 with 5% interest per annum from 16 July 2003 and CHF 1,439.49 with interest at 5%/annum from 7 January 2004, minus the amount of US\$ 41,455

with annual interest of 6% from 16 November 2004.

E.

By 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 First Instance Tribunal of 23 March 2005. The essence of the reasoning for this decision, to the extent that it is useful for the assessment of the public law appeal, is the following:

E.a It is not contested that the arbitral award dated 2 December 2003, produced by Y._____, amounts to a definitive dismissal of the objection to pay as regards the debts claimed, as the First Instance Tribunal had already issued an enforcement order. The only disputed point is whether the arbitral award dated 16 November 2004 produced by X._____ meets the requirements of Art. 81 LP and can thus be the basis of the compensation requested by X._____ for the corresponding amount. For definitive dismissals of objections to pay, debtors can free themselves of debt by raising a request for compensation which the court must accept as long as the debt for which compensation is requested is valid and its existence can be proven by a court decision pursuant to Art. 81 LP or by the opposite party’s unconditional recognition (ATF 115 III 97 recital 4 p. 100).

E.b Arbitral awards are assimilated 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 (New York Convention, RS 0.277.12). Recognition and enforcement of an award can also be refused if the party against which enforcement is sought proves the existence of one of the grounds for refusal listed at Art. V ch. 1, letters a to e, of the aforementioned New York Convention; and notably if it proves that it was not duly informed of the appointment of the arbitrator or the arbitration proceedings, or if it was impossible for whatever reason to raise on its arguments (let b), or that the award had not yet become binding on the parties or was set aside or suspended by the relevant authorities in the country where or under the laws of which the award was rendered (let .e).

E.c In this case, it must be held that Y._____ failed to demonstrate such. It is not contested that notification by post of documents relating to arbitral proceedings complies with Latvian law, applicable in the matter. In its decision of 16 November 2004, the Riga Commercial Arbitral Tribunal observed that the request for arbitration filed by X._____ on 26 October 2003 was addressed to Y._____ and its duly mandated representative, as evidenced by postal receipts no. 5967 and 5968. The Tribunal then went on to send said request to Y._____, along with the list of arbitrators, which was the subject matter of its decision of 26 October 2004 (receipts no. 72 and 74), as well as its order of 11 November 2004 setting the date and place of the hearing - it was noted that the two addresses mentioned in said award were identical to those on documents produced by Y._____ in the present case.

X._____ did not, however, provide any proof that the final award dated 16 November 2004 had been sent to Y._____. Yet the latter’s Latvian counsel, Mr Igors Dreija, in his declaration of 15 April 2004, produced by Y._____ as exhibit no. 27, does not claim that he did not receive this decision, only that he had not been formally mandated by Y._____ since 8 March 2004 and had only been mandated once again from 24 December 2004. However, it appears from a letter signed by the abovementioned counsel, produced by Y._____ under exhibit 28, that he had been requested by the party to object to the enforcement order for the award in December 2004. Y._____ was thus aware of this award rendered in its absence before 7 March 2005, contrary to its statements.

E.d Moreover, a foreign arbitral award does not need to be enforceable in its country of origin,

under Art. V ch. 1 let. e of the New York, it merely has to be binding on the parties, and its binding nature must have been recognised as soon as the award becomes *res judicata* and can no longer be appealed. This condition is met in the case at hand. In the abovementioned letter known as exhibit 28, Y. _____'s Latvian counsel confirmed that the challenged award entered into force on the day it was rendered and that it could not be appealed. These statements also appear at the bottom of the page of said award. In addition the parties themselves expressly agreed, by contract dated 28 May 2003, that any dispute would be decided by the Commercial Arbitral Tribunal of Riga and that that tribunal's decision would be final and binding on the parties (see letter B *supra*).

E.e Thus the arbitral award rendered on 16 November 2004 by the Riga Commercial Arbitral Tribunal is a decision as defined by Art. 80 and 81 LP and thus serves as a basis for the compensation requested by X. _____ in the amount of US\$ 41,455 (*i.e.* CHF 48,917 at an exchange rate of US\$/CHF 1.18, which was not contested) with annual interest of 6%. Therefore, the first instance decision must be upheld.

F.

Filing a public law appeal before the Federal Tribunal, Y. _____ requested that the decision be overturned and that costs be awarded. Moreover, it filed a request for suspension which the President of this court, after having heard X. _____ and the cantonal court's conclusions, dismissed it in an order of 7 September 2005. No submissions on the merits were ordered.

The Federal Tribunal held, in law:

1.

A decision at the highest cantonal level granting or refusing provisional or definitive dismissal of a payment order is a final decision (see Art. 87 OJ) against which a public law appeal may be brought (**ATF 120 Ia 256** recital 1a; **111 III 8** recital 1; **98 Ia 348** recital 1, 527 recital 1 and cited decisions; **94 I 365** recital 3). Such appeal is admissible under Art. 84 para. 1 let. a and c OJ as it invokes the prohibition on arbitrary decisions (Art 9 Cst), and an international treaty violation (see **ATF 126 III 438** recital 3, 534 recital 1). Lastly, the appellant was personally affected by the challenged decision and thus was able to appeal it (Art. 88 OJ), which it did in a timely manner (Art. 89 para.1 OJ).

2.

The Federal Tribunal, examining a public law appeal on the grounds of an arbitrary decision, does not take into consideration allegations, proof of facts not submitted to the cantonal authority; new elements 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 facts accepted by the cantonal authority, unless the appellant demonstrates that those are arbitrarily incorrect or incomplete (**ATF 118 Ia 20** recital 5a p. 26). Thus, any additions, changes or clarifications with regard to the factual statements of the challenged award that the appellant intends to submit under the heading of "Facts" in its memorial are inadmissible, unless arguments are brought on the grounds of breach of a citizen's constitutional rights and reasons for such are provided as per the requirements of Art. 90 para. 1 let. b OJ.

In this regard, it should be recalled that a party arguing that a decision was rendered arbitrarily (Art. 9 Cst.) may only criticise the challenged decision in the manner that would during appeal proceedings where the court of appeal has powers to assess the matter freely (**ATF 128 I 295** recital 7a p. 312; **ATF 117 Ia 10** recital 4b; **ATF 110 Ia 1** recital 2a; **107 Ia 186** and cited case law). It may not, in particular, oppose its theory to the cantonal court's but instead must

demonstrate, using precise argumentation, that the challenged decision relies on a manifestly untenable application of the law or assessment of evidence (**ATF 125 I 492** recital 1b; **120 Ia 369** recital 3a; **86 I 226**).

3.

3.1 In a first ground the appellant argues that in order to hold that it had failed to provide proof of the ground for refusal set forth in Art. V ch. 1 let. b of the New York Convention (see letter E.c *supra*) the cantonal judges failed to examine the arguments that it developed or the exhibits that it submitted in the proceedings ; yet these proved that it had received the Arbitral Tribunal's various notifications of the arbitrators' appointment, the deadline by which to reply and the date of the hearings.

This argument is unfounded. The cantonal court duly explained the arguments developed by the appellant in its decision (p. 4), referring to the exhibits produced, with regard to the ground for refusal provided in Art. V ch. 1 let. b of the New York Convention. It clearly explained why it held that Mr Igors Dreija's written declarations, on which the appellant based most of its arguments, did not enable the court to espouse the appellant's theory with regard to the elements of proof apparent in the said decision of the Riga Commercial Arbitral Tribunal of 16 November 2004, which referred to the postal receipts of the notification to the appellant and its counsel of documents relating to the arbitration (see letter E.c *supra*). Yet the appellant does not show how this assessment of the evidence was untenable, it merely reiterated its own theory in reference to the same exhibits.

3.2 In a second claim, the appellant criticised the cantonal court for having held that the ground for refusal contained in Art. V ch. 1 let. e of the New York Convention was not met either (see letter E.d *supra*). In reference to Mr Igors Dreijars written submissions, it maintains - as it had already done at the appeal stage - that under Latvian law a court may refuse to grant enforcement of an arbitral award if the unsuccessful party proves that there were serious breaches of procedure during the arbitration proceedings. Yet, at this time, the appellee had not received an enforcement order due to the appeal filed by the appellant against enforcement. Therefore, the award dated 16 November 2004 was not mandatory in Latvia and could not be enforceable in that country as its enforcement had been suspended.

This accusation is false. As the cantonal court rightly stated (see letter E.d *supra*) a foreign arbitral award does not, under Art. V ch. 1 let. e of the New York Convention, need to be enforceable in the country of origin (**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 *exequatur* in the award's country of origin, as well as any other proceedings to confirm that the award is enforceable in that country (Bucher, *Le nouvel arbitrage international en Suisse*, 1988, n. 451; Poudret/Besson, *Droit comparé de l'arbitrage international*, 2002, n. 918 and 920). It is sufficient for the award to be "binding" on the parties. That it is the case when an ordinary appeal against the award is no longer possible (Poudret/Besson, *op. cit.*, n. 918; Patocchi/Jermini, *op. cit.*, n. 116 ad Art. 194 PILS). However, the award is not binding under Art. V ch. 1 let. e of the New York Convention if it has been set aside in its country of origin or if, for the duration of the proceedings, the effect of the award was suspended by the competent authority (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, given the factual statements of the challenged decision, the arbitral award dated 16

November 2004 was binding on the parties and there is no need to refuse to enforce it on the basis of V ch. 1 let. e of the New York Convention.

3.3 In a third claim, the appellant argued that Art. V ch. 2 let. b of the New York Convention had been breached as the recognition or enforcement of the arbitral award dated 16 November 2004 would be contrary to Swiss public policy.

This ground was not raised before the highest cantonal court whereas it could have been, such that it is inadmissible in the context of the public law appeal before the Arbitral Tribunal. (**ATF 129 I 49** recital 3; **118 III 37** recital 2a; 118 Ia 20 recital 5a; **108 II 69** recital 1a; 108 II 69 recital &). Moreover, it seems in any event to provide insufficient reasons with respect to the requirements of Art. 90 para. 1 lt. b OJ (see recital 2 *supra*).

3.4 Lastly, the appellant argues that an “incorrect assessment of the facts led to an incorrect legal assessment” on two points. Firstly, cantonal courts wrongfully held that the appellant had claimed to be unaware of the arbitral award dated 16 November 2005 until 7 March 2005. Secondly, the award dated 16 November 2004, for which compensation was requested, is not an equivalent decision to the award dated 2 December 2003, as, contrary to the latter (see letter B.a *supra*) it was not granted enforcement by Latvian courts; thus compensation cannot be accepted.

It is hard to understand what the appellant seeks to gain from the first of these claims which concerns an issue that has no bearing on the outcome of the dispute. As for the second claim, it is incorrect because, as we have seen (see recital 3.2 *supra*), Art. V ch. 1 let. e of the New York Convention does not require that the foreign arbitral award dated which enforcement is sought be enforceable in its country of origin, nor that it be accompanied by an enforcement order issued by a domestic court of that country.

4.

It appears from the above that the public law appeal, ill-founded to the extent that it is admissible, must be dismissed to that same extent. The unsuccessful appellant shall bear the legal costs (Art. 156 para. 1 OJ). There is, however, no need to award expenses, as the appellee was not invited to respond to the appeal and consequently did not incur expenses with regard 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 rules that:

1.

The appeal is dismissed to the extent that it is admissible.

2.

Judicial costs amounting to CHF 4,000 shall be borne by the appellant.

3.

Copies of the present decision are communicated to the parties’² representatives and to the Court of Justice of the Canton of Geneva.

Lausanne, 3 January 2006

On behalf of the 2nd Civil Chamber
of the Swiss Federal Tribunal
President: Clerk: