Unofficial translation

Federal Tribunal
Federal Tribunal

{T 0/2}
5P.353/2004 /frs

Decision of 21 February 2005
2nd Civil Chamber

Members of the Court
Judge Nordmann, Presiding judge
Judges Meyer and Marazzi. Clerk: Mr. Abrecht

Parties in the proceedings
X. _____,
appellant, represented by Mr Nicolas Genoud, attorney at law versus

Y. _____,
appellee, represented by Mr Laurent Panchaud, 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. (objection to seizure),

public law appeal against a decision of the First Section of the Court of Justice of the Canton of Geneva of 23 September 2004.

Facts:
A.
X._____ and Y._____ are oil trading companies operating especially in the Baltic countries and Belarus.

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 tonnes 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 (Art. 3.2) The remaining balance of US$ 4,537.50 was to be paid after the goods were loaded on 15 July 2003 (Art. 4.2) X. _____ failed to pay the balance.
B.
The contract dated 28 May 2003 provided for any dispute to be resolved by the Commercial Arbitral Tribunal of Riga if the parties failed to reach an agreement by discussion (Art. 8.2); the tribunal's decision would be final and binding on the 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 honoured, the claimant could petition the District Court of Zimeliai of the City of Riga with a request for an enforceable payment order for the enforcement of said decision.

On 7 January 2004, the District Court of Zimeliai of the City of Riga held the aforementioned arbitral decision dated 2 December 2004, to be enforceable; no appeal could be brought against this decision. The corresponding document was given to Y. _____ on 9 January 2004.
B.b X. _____ also petitioned the Riga Commercial Arbitral 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 grounds that Y._____ did not deliver the agreed quantity of fuel oil.

In a hearing where Y. _____ was not present, the 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 had been issued by the District Court of Zimeliai of the City of Riga.

In a decision dated 12 January 2004, this court refused to grant the requested enforcement order as Y. _____ had not been subpoenaed to attend the aforementioned arbitral proceedings. This decision was upheld in two identical decisions rendered by the Riga Departmental Court on 4 March 2004.
C.
On 24 March 2004 Y. _____ seized the First Instance Tribunal of the Canton of Geneva with a request against X. _____ seeking the seizure of X. _____'s assets held by two banks in Geneva, on the basis of the decisions mentioned in paragraph B. above.

In an order dated 25 March 2004, the First Instance Tribunal granted this request on the grounds of Art. 271 para. 1 ch. 4 LP. It thus ordered the seizure of X._____ 's assets held by the two banks in question, to a total value of 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, in exchange for the prior deposit of a surety of CHF 5,000.
D.
Informed of the seizure, X. _____ objected to it and requested that the order for seizure be annulled, and in the alternative, that Y. _____ be obliged to provide a surety of CHF 100,000.

In a decision dated 7 May 2004, the First Instance Tribunal dismissed the objection to seizure with costs.
E.
In an award rendered on 23 September 2004 on X. _____'s appeal, the First Section of the Court of Justice of the Canton of Geneva upheld the First Instance Tribunal's decision and ordered X. _____ to bear the fees and costs of these proceedings. The essence of the reasoning for this decision, to the extent that it is useful for the examination of the public law appeal, is the following:
E.a Whoever's rights are infringed by a seizure may object to such before the court ordering seizure within 10 days; a decision on that objection may be referred to a higher court (Art. 278 para. 1 and 3 LP). The creditor requesting seizure must show the probability of the debt, the reason for seizure and that the debtor does hold assets (Art. 272 para. 1 LP). Simple probability is sufficient and the administration of evidence is restricted to grounds which are immediately available. In the proceedings for the objection to seizure, both the first court and the higher cantonal court rule only on the probability of the conditions of the seizure; however, it is not arbitrary to use a strict assessment of probability, given the harsh effects of the seizure.
E.b Pursuant to Art. 271 para. 1 ch. 4 LP, when the debtor does not live in Switzerland and when there is no other seizure, the creditor can only obtain seizure if there are sufficient ties between the debt and Switzerland or if it is based on an enforceable debt or on recognition of the debt under Art. 82 para. 1 LP. In order to ascertain whether a foreign judgment is enforceable under Art. 271 para. 1 ch. 4 LP, it is necessary to assess whether it can be recognised in Switzerland. The recognition and enforcement of foreign arbitral awards are governed by the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (Art. 194 LP). With regard to Art. V ch. 1 let e of this convention (RS 0.277.12), a foreign arbitral award does not have to be enforceable in its country of origin; 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. Recognition and enforcement of the 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.
E.c In this case X. _____ did not mention any of these grounds with regard to the decision rendered on 2 December 2003 by the Commercial Arbitral Tribunal of Riga ordering it to pay Y. _____ the amounts of LVL 28,434.53 (equal to US$ 49,537.50) and LVL 2,169.21 This decision was final and binding pursuant to Art. 8.3 of the contract entered into on 28 May 2003. The enforceable nature of this decision can thus be admitted at this stage, irrespective of the enforcement order issued on 7 January 2004 by the District Court of Zimeliai of the City of Riga, only challenged by X. _____.
E.d X. indeed alleged that the enforcement order was void on the grounds, on the one hand, that the judge in question was corrupt and, on the other hand, that there was a manifest error in the assessment of the facts, as the District Court of Zimeliai of the City of Riga had considered that the contract of 28 May 2003 existed, even though it had been annulled by the Riga Commercial Arbitral Tribunal's decision dated 13 October 2003.
E.e While it does seem that a criminal investigation is pending involving an executive of Y. _____, it is, however, pending in Belarus and not in Latvia. Moreover, there is no evidence linking these proceedings to any alleged corruption on the part of the executive involved with regard to the Riga judicial authorities.
E.f As for the contract dated 28 May 2003, it was indeed annulled by the operative part of the arbitral award rendered on 13 October 2003 by the Riga Commercial Arbitral Tribunal. Yet it does appear, from the judgment rendered on 4 March 2004 by the Riga Departmental Tribunal, that the related enforcement order could not be issued, as Y. _____ was not subpoenaed to attend said arbitral proceedings (cf. letter B.b *supra*). Thus the arbitral decision dated 13 October 2003 does not meet the requirements of Art. V ch. 1 let. b of the aforementioned New York Convention and it thus cannot be an enforceable decision under Art. 271 para. 1 ch. 4 LP. Thus the two decisions are not incompatible, such that the probability of the debt alleged by Y. _____ must be admitted.
E.g X. _____claims that the amount of the surety to be provided by Y. _____ as a guarantee for a potential debt for damages for unjustified seizure should amount to CHF 71,660. The creditor is responsible for the damage that an unjustified seizure may cause to both the debtor and to third-parties (Art. 273 para. 1, 1st sentence, LP), especially in the event of a dubious debt or seizure. The court may order the creditor to provide a surety (Art. 273 para. 1, 2nd sentence LP); it freely assesses the circumstances determining the amount of said surety, the only restriction being not to make arbitrary decisions

In this case, given the dispute, there is no need to consider the requested seizure to be dubious. Moreover, X. _____ merely provided figures related to the cost of any bank loan it could need to take out in order to make up for the freezing of its assets in Geneva. However, it does not provide any evidence of the reality of the facts and conditions upon which it relies, with the exception of interest rates. Nor does it allege that it is at risk of insolvability in the event of an action seeking damages for unjustified seizure, due to Y. _____'s precarious financial situation. Given these circumstances, there is no reason to accept its request for an increase in surety.
F.-
In its public law appeal before the Federal Tribunal, X. _____ 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 Y._____ and the cantonal court's conclusions, dismissed in an order dated 16 November 2004. No submissions on the merits were ordered.

The Federal Tribunal held, in law:

1.
1.1 A decision on an objection to seizure handed down by a final instance cantonal court (Art. 278 para. 3 LP; Art. 22 para. 4 of the law for the implementation of LP in the Canton of Geneva, RSG E 3 60) can be subject to a public law appeal before the Federal Tribunal (Decision dated 2 October 1997,

recital 2 unpublished in **ATF 123 III 494** but appearing in SJ 120/1998 p. 145; decision 5P.117/2001 of 21 August 2001, recital 1a, appearing in IWIR 2002 p. 72; Bertrand Reeb, Les mesures provisoires dans la procédure de poursuite, in RDS 116/1997 II p. 421 et seq., 483 and cited references). If an appeal against such a decision is filed in time, the appeal is admissible under Art.86 para. 1, 87 and 89 para. 1 OJ; as well as under Art. 88 OJ, the appellant was personally affected by the challenged award. 1.2 According to Art. 90 para. 1 let. b OJ, the application for public law appeal must - on pain of inadmissibility (**ATF 123 II 552** recital 4d and cited decisions) - contain a brief description of the constitutional rights or legal principles breached, stating what constitutes this breach. When examining a public law appeal, the Federal Tribunal only assesses the claims raised in a clear and detailed manner; the *iura novit curia* principle is not applicable (**ATF 125 I 71** recital 1c p. 76). Thus a defendant raising a challenge on the grounds of arbitrary treatment (Art. 9 Cst.) may only criticise the challenged decision in the manner it 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 that of the cantonal court but, using precise argumentation, must demonstrate 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).**

2.
The appellant maintains that the cantonal court arbitrarily applied Art. 272 LP in maintaining the probability of the debt invoked by the appellee despite evidence which should have made it doubt its probability.

2.1 In this regard, the appellant first argues that the cantonal judges founded their decision on two decisions: the arbitral award dated 2 December 2003 and a Court decision dated 7 January 2004 ordering enforcement of the former. However, they arbitrarily ignored the fact that the order dated 7 January 2004 contained a manifest error: to the appellant's objection that the contract dated 28 May 2003 had been annulled by the arbitral award dated 13 October 2003, the Latvian court replied considering - wrongfully, as a careful reading of said award shows - that the contract annulled was not the disputed contract of 28 May 2003, but a different contract numbered 01-W/T-08-07-2003. This error in the decision dated 7 January 2004 was crucial, as it was clear from that decision that the Latvian court would have refused to enforce the award had it recognised that the contract of 28 May 2003 had indeed been annulled. As it ignored this fact at the time it assessed the probability of the debt at stake, the cantonal court acted arbitrarily.

This argument is incorrect. It disregards the fact that the cantonal court considered that the decision rendered on 2 December 2003 by the Riga Commercial Arbitral Tribunal, at the time of seizure, was an enforceable decision, within the meaning of Art. 271 para. 1 ch. 4 LP irrespective of the enforcement ordered issued on 7 January 2004 (see letter E.c *supra*). The cantonal court thus sought to ascertain whether the arbitral decision dated 2 December 2003 was contrary to that rendered on 13 October 2003 by the Riga Commercial Arbitral Tribunal, annulling the contract of 28 May 2003. According to that court the answer was negative. From the decision dated 4 March 2004 it appeared that the Departmental Tribunal of Riga refused to issue an enforcement order, that the appellee had not been subpoenaed to appear at the arbitration proceedings; under those circumstances, the arbitral decision dated 13 October 2003 did not meet the requirements of Art. V ch. 1 let. b of the New York Convention and thus could not be an enforceable decision under Art. 271 para. 1 ch. 4 LP. (see letter E.f *supra*). The cantonal court's reasoning, which is independent of the enforcement order dated 7 January 2004, is not challenged in a manner compliant with the requirements of Art. 90 para. 1 let. b OJ. Thus, the argument relating to flaws in the decision dated 7 January 2004 is ill-founded to the extent that it is admissible.

2.2 The appellant also argues that it had not been aware of the arbitral decision dated 2 December 2003, nor was it informed of the existence of the proceedings initiated before the Arbitral Tribunal which ruled in the absence of a party - a fact the cantonal court arbitrarily ignored. The cantonal authority "merely considered arguments based on the possibly enforceable nature of the arbitral

decision dated 2 December 2003 according to the criteria set by the New York Convention on the Recognition and Enforcement of foreign arbitral awards, without examining in detail the manifest flaws of the decisions in question and considering them, from the outset, to be irrelevant".

However, the appellant does not contest that the question of whether the debt arose from an enforceable decision within the meaning of Art. 271 para. 1 ch. 4 LP must be resolved, as it is a foreign arbitral award, with regard to the aforementioned New York Convention (see letter E.b *supra*). Yet it does not demonstrate how the cantonal courts acted arbitrarily in holding that it did not provide evidence of any ground, according to Art. V ch. 1 of the aforementioned New York Convention, on which to refuse recognition and enforcement of the decision rendered on 2 December 2003 by the Commercial Arbitral Tribunal of Riga. (see letter E.c *supra*). With that said, the claim can only be disregarded to the extent not already inadmissible due to a lack of sufficient reasons (see recital 1.2 *supra*).

2.3 Again regarding the probability of the debt invoked by the appellee, the appellant lastly challenges the cantonal court for not having accepted its allegations that the decision dated 7 January 2004 had been obtained through corruption of a judge.

This criticism is false because, as we have seen (see recital 2.1 *supra*), the cantonal court's reasoning is independent of the enforcement order rendered on 7 January 2004, such that the arguments regarding flaws in that decision seem, from the outset, irrelevant. Moreover, the appellant merely opposes its theory to that of the cantonal court in a manner devoid of substance and thus inadmissible, without demonstrating how the substantiated reasoning having led the cantonal judges to hold that the allegations of corruption against the courts of Riga were not made probable (see letter E.e *supra*) would be untenable.

3.
3.1 The appellant criticises the cantonal court for having applied Art. 277 LP in an arbitrary manner for not having ordered an increase in surety sufficient to cover damages for unjustified seizure (see letter E.c *supra*). According to the appellant, the cantonal court's reasoning was arbitrary for two reasons: on the one hand it holds that X. _____ did not demonstrate sufficient evidence to calculate the price of the unavailability of the seized assets and on the other hand because it applied, in an unacceptable manner, principles arising from Federal case law for the calculation of surety. The appellant thus argues that it was not able to abstractly demonstrate the damage it would suffer, to the extent that this would depend on the interest rate applicable to each of the transactions occurring while the funds would be blocked and it would have to take out loans to cover said transactions. This interest rate would be at least 4,5% per annum and 5,5% over ten years. And to this sum the costs of the objection to the seizure order and participation in the proceedings to uphold the seizure would have be added. Thus, the appellant would incur considerable and irreparable damage due to the failure to increase the surety. While the proceedings for definitive dismissal to pay are pending and should, in all probability, lead to the release of the seized funds within a relatively short period of time, the appellant would not, given the appellee's financial situation and the absence of an actual seat, have any chance of recovering compensation for the damage caused by the unjustified seizure.

3.2 According to Art. 273 para. 1 LP, the creditor is liable for the damage that an unjustified seizure can cause to a debtor or third-parties; the court may order it to provide surety, the conditions and content of which are governed by Federal law (**ATF 112 III 112** recital 2a). The court freely assesses whether it is necessary to order surety or increase it - the only restriction being not to make arbitrary decisions (SJ 1987 p. 586, recital 4 unpublished in **ATF 113 III 94**; **ATF 112 III 112** recital 2c; Gilliéron, Commentaire de la loi fédérale sur la poursuite pour dettes et la faillite, 2003, n. 27 ad art. 273 LP; Stoffel, Kommentar zum Bundesgesetz über Schuldbetreibung und Konkurs, 1998, n. 20 ad art. 273 LP). The court deciding on seizure will oblige the creditor to provide a surety when the debt or the ground for seizure are dubious (**ATF 128 I 295** recital 7a p. 312; in other words, when it cannot exclude that the facts upheld while assessing probability are not otherwise or when an in-depth assessment leads to a different legal solution than that indicated by the summary assessment

(Gilliéron, op. cit., n. 27 and 37 ad art. 273 LP). Thus there should be no reason to order surety when the creditor can show that the debt arises from an enforceable decision (Stoffel, op. cit., n. 21 ad art. 273 LP).

The surety provided for in Art 273 para. 1 LP is intended to guarantee claims for damages from a debtor whose assets are seized, which arises from the unavailability of the debtor's assets (**ATF 113 III 94** recital 9, 10a and 11 a). The amount of surety thus depends on the damage that the debtor could suffer in the event of an unjustified seizure (**ATF 113 III 94** recital 12) **93 I 278** recital 5b and cited decisions; Gilliéron, op. cit., n. 36 ad art. 273 LP; Stoffel, op. cit., n. 22 ad art. 273 LP). Among the relevant elements for the assessment of the potential damage are the predictable length of the seizure validation hearings and the interest on loans that the debtor may have to take out to make up for the temporary loss of his assets (**ATF 113 III 94** recital 11a and 11b). According to case law, an amount equal to two years interest is often justified (Stoffel, op. cit., n. 22 ad art. 273 LP and the cited reference). The damage against which the surety serves to guarantee also includes costs incurred for the proceedings to uphold the seizure and the objection to the order for seizure (**ATF 113 III 94** recital 9b and 9c and cited references; Gilliéron, op. cit., n. 36 ad art. 273 LP; Stoffel, op. cit., n. 22 ad art. 273 LP and cited references).

3.3 In this case, the cantonal court held that, given the outcome of the dispute, there was no reason to consider the requested seizure to be dubious (see letter E.g *supra*). This opinion is at best untenable as the cantonal judges held, without any arbitrary ruling, that the seizure requested on the basis of the arbitral decision dated 2 December 2003 was based on an enforceable decision within the meaning of Art. 271 para. 1 ch. 4 LP - which in principle excludes the possibility of this seizure being unjustified (see recital 3.2 *supra*) - and that the appellant had not made probable the existence of grounds on which to refuse to grant recognition and enforcement of this arbitral decision in Switzerland (see recital 2 *supra*). Under these conditions, the decision not to increase the amount of requested surety - the only matter put to the cantonal court, as the appellee did not object to the provision of a surety of CHF 5,000 (see ATF 126 III 485 recital 2a/aa) - cannot be considered to be arbitrary, irrespective of the surety requested at the time of the seizure.

Moreover, as regards the amount of surety, it must be noted that it is not clear how the appellant can demand a surety equal to interest over ten years while it itself stated that the dismissal proceedings would result in the seized funds being freed "in a relatively short period of time". Either the definitive dismissal of the objection to pay would void the seizure (see Art. 280 ch. 3 LP), in which case interest on the loans taken out by the appellant in order to make up for the loss of its assets should not exceed the amount of the surety provided at the time of the seizure, or it will hold that the seizure was founded and will allow the appellee to request that the action be continued (Art. 272 para. 1 LP).

4.
It appears from the above that the appeal, ill-founded to the extent it is admissible, should be dismissed to that same extent. The unsuccessful appellant shall bear the costs of these legal proceedings (Art. 272 para. 1 LP).

Moreover, it shall bear the appellee's expenses, regarding only the costs that it was obliged to incur with regard to the proceedings before the Federal Tribunal (Art. 159 para. 1 and 2 OJ), in other words for the ruling on the request for suspension.

For these reasons, the Federal Tribunal declares:

1.
The appeal is dismissed to the extent that it is admissible.

2.
The appellant shall bear the following costs:
2.1 judicial costs of CHF 5,000;
2.2 compensation of CHF 1,000 to be paid to the appellee for the costs of these proceedings.

3.
A copy of the present decision is communicated to the representatives of the parties and to the First Section of the Court of Justice of the Canton of Geneva.

Lausanne, 21 February 2005
On behalf of the 2nd Civil Chamber of the
Swiss Federal Tribunal