Unofficial translation

Heading

118 II 353

69. Decision of the 1st Civil Chamber of 23 June 1992 in Fincantieri-Cantieri Navali Italiani S.p.A and Oto Melara S.p.A versus M and Arbitral Tribunal (public law appeal)

Summary

International arbitration; arbitrability (**Art. 177 para. 1 PILS**).
Definition of arbitrability (recital 3a); Federal Tribunal's powers of examination (recital 2); notion of “dispute of a financial nature” (recital 3b).
Arbitrability and public policy (recital 3c). Arbitrability and enforcement abroad of awards rendered in Switzerland (recital 3d).

Facts from page 354

A.- Fincantieri-Cantieri Navali Italiani S.p.A and Oto Melara S.p.A are nationalised companies under Italian law specialised in arms manufacturing. From 1979 to 1980, they mandated M to act as agent in the sale of ships and other military equipment to the Republic of Iraq. Until 1987, the contracts entered into with this State, as well as the agents contract, were performed suitably. After that, difficulties arose as the competent Iraqi authorities suspended payment.

B.- On 4 December 1989, M filed a request for arbitration with the Arbitration Court of the International Chamber of Commerce against the two above-mentioned companies seeking to obtain payment of the provisions to which it claimed to be entitled. Based on resolutions adopted by the UN Security Council in 1990 and 1991 which notably prohibited any commercial relationship with the Republic of Iraq - resolutions which were integrated into domestic law by various States, including Italy and Switzerland - the respondents objected to the arbitral tribunal's jurisdiction on the grounds that the dispute was inarbitrable.

In an incidental award dated 25 November 1991, the Arbitral Tribunal, seated in Geneva, upheld its jurisdiction over the dispute.

C.- The respondents filed a public law appeal, under **Art. 191 para. 1 PILS** and 85 let. c OJ, in which they raised the ground provided in **Art. 190 para. 2 let. b PILS** and requested that the incidental award be set aside.

The appellee sought the dismissal of the action. As for the arbitral tribunal, it declined to rule over the appellants' arguments.

In an order dated 13 May 1992, the Chairman of the 1st Civil Chamber dismissed the request, which had a suspensive effect, introduced by the appellants.

The Federal Tribunal dismissed the action.

Recital in law:

1. As the parties were not domiciled in Switzerland at the time that the arbitration agreement was entered into and as the Arbitral Tribunal was seated in Geneva, the provisions of chapter 12 of the Federal Private International Law Statute are applicable here as there is no exclusion clause (**Art. 176 para. 1 and 2 PILS**.)

2. The challenged decision is a partial award, or more specifically and to use the Federal Tribunal's terminology (**ATF 116 II 82** recital) 2b), an incidental award (Zwischenentscheid), in other words an award which rules on a preliminary procedural matter, in this case, the arbitrators' jurisdiction. In principle, as mentioned in the cited decision, a public law appeal under **Art. 85 let. c OJ** is not admissible against a *lato sensu* partial award (**ATF 116 II 85** recital 3b). The incidental award, whereby the Arbitral Tribunal ruled on its jurisdiction (cf. **Art. 186 para. 3 PILS**, which talks of an "incidental decision"), is an exception to the rule. It can - and shall - be challenged directly before the Arbitral Tribunal **Art. 190 para. 3 PILS**, who freely examines whether the Arbitral Tribunal rightly upheld or declined its jurisdiction (**ATF 117 II 97** recital 5a).

3. a) A dispute must be arbitrable for an arbitration agreement to be valid, and, consequently for the arbitrators to have jurisdiction (**ATF 117 II 98** recital 5b; A. BUCHER, Le nouvel arbitrage international en Suisse, p. 37, n. 86; LALIVE/POUDRET/REYMOND, Le droit de l'arbitrage interne et international en Suisse, p. 381, n. 4; LALIVE, Arbitrage international, FJS No 946, p. 7/8). This term designates disputes which can be resolved by arbitration (material arbitrability as opposed to *ratione personae* arbitrability, in other words, parties' capacity to enter into arbitration agreements). In order to solve the arbitrability problem, the Swiss legislator deliberately opted not to adopt the solution based on a conflicts of law rule (anchoring it to applicable law, to the law of the parties' seat or *lex fori*), and instituted a material law of private international law, based on the object of the dispute, providing the possibility of arbitration for "any dispute of a financial nature" (**Art. 177 para. 1 PILS**); Message of 10 November 1982 concerning the federal statute on private international law, FF 1983 I 445 et seq.; LALIVE/POUDRET/REYMOND, *op. cit.*, p. 304/305, n. 1 ad **Art. 177 PILS**; LALIVE, *op. cit.*, p. 8; BUCHER, *op. cit.*, p. 38, n. 90; WALTER/BOSCH/BRÖNNIMANN, Internationale Schiedsgerichtsbarkeit in der Schweiz, p. 54). They thus wished to exclude any difficulties relating to the conflicts of law approach (BUCHER, *op. cit.*, p. 38, n. 89 et 90), in particular the need to determine applicable law when assessing the arbitrability of a dispute (LALIVE, *Ibid.*). The solution, which does not attribute sole jurisdiction to domestic courts, contrary to treaty law for example, (cf. Art 5 CIA), incidentally reflects the Federal legislators' intention

to make international arbitration widely accessible (LALIVE/POUDRET/REYMOND, *op. cit.*, p. 305/306, n. 2; SCHLOSSER, Das Recht der internationalen privaten Schiedsgerichtsbarkeit, 2nd ed., p. 211/212, n. 291).

b) The claimants - rightly - do not challenge the financial nature, within the meaning of **Art. 177 para. 1 PILS**, of the dispute, which concerns the respondent's advance payment. All claims having financial value - asset or liability - for the party fall under this provision, *i.e.* any rights which, for at least one of the parties, can be assessed in monetary terms (BUCHER, *op. cit.*, p. 38, n. 90; LALIVE/POUDRET/REYMOND, *op. cit.*, p. 306, n. 2 ad **Art. 177 PILS**; LALIVE, *Ibid.*; WALTER/BOSCH/BRÖNNIMANN, *op. cit.*, p. 58/59).

For the rest, **Art. 177 para. 1 PILS** does subject arbitrability to the availability of a disputed right, that it is wrong to equate the "financial nature", within the meaning of this provision, to freedom to avail oneself of Art. 5 CIA, as WENGER does (in Bulletin ASA 1992/1, p. 20; see POUDRET's pertinent critique in the same, p. 29/30). These are two separate criteria. The legislator deliberately disregarded the second, which presupposes the conflicts of law approach as, in international matters. The assessment of the availability of legal rights subject to arbitration requires the assessment of the material law governing them.

(WALTER/BOSCH/BRÖNNIMANN, *op. cit.*, p. 57).

Thus, given, **Art. 177 para. 1 PILS**, it must be accepted that the consideration of the dispute is arbitrable under Swiss law.

c) As supported by the contrary conclusion, the appellants maintain that the trade embargo decreed by the international community against the Republic of Iraq excludes the very possibility of raising claims resulting from contracts with that State and, consequently, prohibits raising such a claim before

an arbitral tribunal. The present dispute is thus not arbitrable, according to the appellants, at the risk of breaching public policy, which excludes the arbitrators' jurisdiction irrespective of **Art. 177 para. 1 PILS**.

As the legislators made arbitrability conditional on the nature of the consideration and not of the law governing it, there is in principle no need to take the restrictions and prohibition of the foreign law regarding arbitrability into consideration (LALIVE/POUDRET/REYMOND, *op. cit.*, p. 308, n. 5; LALIVE, *Ibid.*). However, in

doctrine there also exists the opinion that an arbitral tribunal seated in Switzerland, in an international arbitration, does not have jurisdiction over a financial dispute if holding that dispute arbitrable is incompatible with public policy (BUCHER, *op. cit.*, p. 41, n. 98 and 100; LALIVE/POUDRET/REYMOND, *Ibid.*; POUDRET, *op. cit.*, p. 30, ch. 3; for a more reserved view:

WALTER/BOSCH/BRÔNNIMANN, *op. cit.*, p. 60, ch. 1, et LALIVE, *Ibid.*). Incidentally, this last notion is not understood in the same way by all authors (International or Swiss public policy for BUCHER, Ibid; Swiss international public policy for POUDRET, *Ibid.*, and

LALIVE/POUDRET/REYMOND, *Ibid.*). However, there is no need to pursue the analysis of these questions any further as any breach of public policy whatsoever can be excluded in this case for the following reasons:

In this case, public policy would only be of importance if it was mandatory for the disputed claim to be heard by a domestic court. However, the fact that said claim concerns public policy is, in itself, insufficient to render the dispute inarbitrable. In such a case the arbitral tribunal would have to take that fact into consideration and, if necessary, refuse to grant any legal protection to the challenged claim - the award could then only be challenged on the ground put forth in **Art. 190 para. 2 let**. e PILS (BUCHER, *op. cit.*, p. 41, n. 99). The arbitrability of the dispute thus does not depend on the material existence of the disputed claim. Consequently, the dispute cannot be denied for the sole reason that the mandatory provisions or some material public policy render said claim void or make its performance impossible. It can only be void in the case of claims which may only be heard by domestic courts pursuant to provisions which must be taken into consideration under public policy. This is by no means the case in the matter at hand. While the trade measures taken against the Republic of Iraq raise the questions on the validity of the contracts entered into before the measures were adopted, as well as the subsequent impossibility to perform such contracts, it does not appear - and the appellants do not demonstrate either - that this state of affairs should lead to holding all inarbitrable claims stemming from these contracts, especially those arising from related contracts such as the agents contract on which the respondent's claims are based; In particular, it is not clear which fundamental legal principles

(**ATF 116 II 636**) give exclusive jurisdiction to domestic courts over disputes regarding civil claims affected by public international law. In such a situation, the material existence of the disputed claim, and not its arbitrability, would be called into question by such legal rules. It is thus not necessary to ascertain whether the embargo applies retroactively to the contracts at hand and, given their universal nature, whether they fall under any international or other public policy. Lastly, given **Art. 177 para. 2 PILS**, that appellants which are nationalised companies, cannot rely on restrictive provisions in Italian law on the matter to challenge the arbitrability of the dispute.

d) Relying on Art. V para. 2 of the 1 let b of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention, RS 0.277.12), the appellants also base their objection to jurisdiction on the fact that any award against them resulting from the arbitration could not be enforced. According to this provision, the recognition of an award may be refused in a contracting State if, according to the law of that State, the cause of the dispute may not be arbitrated (let. a) or if recognition of the award would be contrary to public policy in that State (let. b).

In choosing the material regulation of arbitrability, the federal legislator chose a solution which does not exclude awards rendered in Switzerland from not being enforced in other countries. However,

that was done deliberately, leaving it up to the parties to evaluate the risks involved in the event that the award is not recognised (FF 1983 I 447 top of page), so that a narrow approach to arbitrability based on the existence of such a risk cannot be justified (BUCHER, *op. cit.*, p. 38, n. 90; LALIVE/POUDRET/REYMOND, *op. cit.*, p. 306, n. 2 ad art. 177 PILS; LALIVE, *Ibid.*; WALTER/BOSCH/BRÖNNIMANN, *op. cit.*, p. 58/59). In any event, **Art. 177 para. 2 PILS** also restricts the appellants' ability to rely on related provisions in Italian law.

4. Thus, based on this free assessment of the disputed matter, it must be held that the arbitral tribunal rightly upheld its jurisdiction over the dispute between the parties. Thus, all of the appellants' claims must be dismissed.