

Unofficial translation

Heading

93 | 49

6. Decision of 25 January 1967 in “Egetran SA” versus “Utexbel SA” and the Civil Court of Justice of the Canton of Geneva.

Summary

Enforcement of a foreign arbitral award in Switzerland;

1. The Federal Tribunal, when examining an appeal for breach of an international treaty, rules freely in fact and in law (recital 2).

2. Arbitration clause contained in an agreement between parties domiciled in different countries (recital 3a):

- in principle, the law applicable to such a clause is determined by the court examining a request for enforcement of the award;
- in Swiss case law, the law applicable to that clause is that of the country where the arbitrators were seated.

3. The Federal Tribunal itself generally applies the foreign law to which it submits the dispute. However, it refrains from doing so if the courts of the country where the award was rendered held the arbitration clause to be valid under the law of that country during proceedings in which both parties were able to make their case (recital 3a):

4. Public policy; Arbitral tribunal appointed by a foreign professional organisation. An arbitral award rendered in a dispute between a member of an organisation and a third-party is not necessarily contrary to Swiss public policy; the enforceability of the award depends on the degree of independence of the arbitrators (recital 4).

Facts from page 50

BGE 93 | 49 S. 50

Summary of the Facts:

A. - Starting on 3 July 1961 “Egetran SA” became the name of the former public company (“*société anonyme*”) “Transshipping” created on 22 April 1949 and which became known, in the meantime, as “Entreprise Générale Transshipping”

On 30 November 1950 “Utexbel SA” (“*Usines de textiles réunies de Belgique SA*”) bought Iranian cotton, through the intermediary of

BGE 93 | 49 S. 51

Maurice Hubain in Ghent, from one J.L. Florkin in Teheran; who was in contact with Abbas Nickbakht Djordjani, hired on 16 March 1950 by “Transshipping” as an associate in

its future organisation in Teheran. The contract dated 4 December 1950, signed by Florkin and two divisions of “Utexbel,” concerned 45 tonnes of Iranian cotton and contained a “Ghent Contract” clause, as “Utexbel” had requested in its letter of acceptance dated 30 November.

“Transshipping” took over the contract dated 4 December 1950. From various letters and telegrams between “Transshipping” and Hubain in January 1951, as well as a letter dated 6 January where “Transshipping” states that it had mandated Florkin to send “some 40 tonnes of “Utexbel” cotton bought on credit owed to our company”, as well as a letter dated 15 January in which “Transshipping” states, after having mentioned some disputes with Florkin: “We nonetheless have control over the transactions in which we are concerned, *i.e.* 45 tonnes of “Utexbel,” and we can assure you that these 45 tonnes, held by our intermediaries, and at our exclusive disposal, far beyond Mr Florkin’s reach, will shortly be loaded. We will then present the documents to the Bank of Reports and Deposits, which we have just notified, and the deal shall be concluded to our mutual satisfaction.”

On 7 February 1951, Hubain informed “Utexbel” that Florkin had sold one third of the 45 tonnes of cotton that it had bought.

B.- The “Ghent Contract” clause, included in the contract dated 4 December 1950, referred to rules adopted by the General Assembly of the Members of the Ghent Cotton Exchange, a professional union founded on 25 April 1947. The rules granted jurisdiction to the Arbitral Chamber to resolve “all disputes or disagreements”. In the event of Commercial Arbitration (concerning points of law, conditions of contracts, non-performance and similar cases), each party appoints its own arbitrator from a list drawn up by the Executive Committee of the Arbitral Chamber and approved by the Management Council of the Exchange. If a party fails to appoint an arbitrator, the Executive Committee will do so. Parties may appeal arbitral awards before a tribunal composed of three arbitrators, two of which shall be appointed by the

BGE 93 | 49 S. 52

Executive Committee and the third by the Management Council. The appeals award is final.

C.- Following the non-performance of the contract dated 4 December 1950, “Utexbel” filed arbitration proceedings as provided for in the rules to which the “Ghent Contract” clause referred. It appointed Auguste Tavernier as arbitrator. As “Transshipping” refused to appoint an arbitrator, the Executive Committee appointed Jean Vandriessche, LL.D. On 6 July 1951, the two arbitrators rendered an award; ruling on the objection to jurisdiction raised by the respondent, they upheld their jurisdiction and ordered “Transshipping” to pay “Utexbel” the difference between the price of 45 tonnes of Iranian cotton and that of the substitute goods bought in Argentina, *i.e.* 904,500 Belgian francs, plus 2,906 Belgian francs to cover the cost of opening a credit line.

On 7 April 1952, on “Transshipping’s” appeal, the appeals arbitrators declined jurisdiction and referred the parties to a domestic court for a ruling on arbitral jurisdiction.

The domestic courts examining the matter (the Ghent Commercial Court, then on appeal at the Brussels Appeal Court, and then the *Cour de Cassation*) held that the arbitrators had jurisdiction to rule over the merits.

On 5 June 1961, the appeals arbitrators held that due to decisions rendered by domestic courts which were *res judicata*, “Entreprise Générale Transshipping” was bound to “Utexbel” under the conditions of the “Ghent Contract”. Consequently, while holding that the sale of 4 December 1950 was null and in awarding statutory and legal interest to “Utexbel”, they upheld the first arbitral award dated 6 July 1951.

The appeals arbitrators’ decision was held enforceable by Belgian Courts: the Ghent First Instance Tribunal, then, on appeal the Ghent Court of Appeal and the Cour de Cassation, which rendered a decision on 11 June 1965.

D.- On 6 September 1965, “Utexbel” filed a suit in Geneva against “Egetran SA”, who opposed the payment order. The Geneva First Instance Tribunal dismissed the request for definitive dismissal of the objection to pay, holding that the award dated 5 June 1961 was not rendered pursuant to a valid arbitration agreement and that, moreover, it was contrary

BGE 93 | 49 S. 53

to Swiss Public Policy, as it had been rendered by an Arbitral Tribunal of a professional organisation in a dispute between a member of that organisation and a third-party.

Ruling on “Utexbel’s” appeal, the Geneva Court of Justice overturned the First Instance Tribunal’s decisions and pronounced the definitive dismissal of the objection to pay.

E.- By way of a public law appeal, “Egetran SA” requested that the Federal Tribunal overturn the Court of Justice decisions and, as necessary, uphold the First Instance Tribunal’s decisions. It argued breach of the Convention on the Enforcement of Foreign Arbitral Awards of 26 September 1927, as well as of Article 4 Cst. Its arguments are reproduced hereafter to the extent necessary.

F.- “Utexbel” requested that the action be dismissed.
The Court of Justice referred to its decision.

Recitals

In law:

1. According to Art. 84 para. 1 c OJ, a cantonal decision may be challenged by way of a public law appeal on the basis of a breach of international treaty, unless it concerns the civil or criminal law provisions. In this specific case, the petitioner challenges the cantonal court primarily for having disregarded the conditions set forth at Article 1 para. 2 letter a and e of the Convention dated 26 September 1927 on the Enforcement of Foreign Arbitral Awards, *i.e.* provisions which are neither of civil nor criminal law (RO 75 I 148, 81 II 81). The appeal is thus admissible to the extent that it is based on these provisions. It is also admissible insofar as it relies on Art. 4 Cst.

2. The Swiss Courts in the first and second instance rightly ruled on the basis of the Convention dated 26 September 1927, to which both Belgium and Switzerland are parties. The Swiss-Belgian Convention dated 29 April 1959 on the Recognition and Enforcement of Judicial decisions and Arbitral Awards (ROLF 1962, p. 936) does not apply - pursuant to Art. 11 of this Convention - to decisions rendered before its entry into force, *i.e.* before 15 October 1962; it thus does not govern the award dated 5 June 1961. The same is true of the Convention dated 10 June 1958 (the New York Convention) on the Recognition and Enforcement of

5. BGE 93 | 49 S. 54

Foreign Arbitral Awards (ROLF 1965, p. 797) which only entered into force in Switzerland on 3 August 1965 and which Belgium has not yet ratified, according to information provided by the Legal Division of the Department of Federal Policy.

When examining an action for breach of an international treaty, the Federal Tribunal rules freely in fact and in law (R 89 I 117 and cited decisions). Thus it is not necessary to determine, as the claimant maintains, whether the challenged decision contains arbitrary statements; it may simply examine whether the decision is wrong. On the other hand, while not bound by the grounds raised in the cantonal proceedings, it is restricted to examining those raised before it in compliance with procedural rules (RO 85 I 44).

3. For an arbitral award to be enforceable, it must have “been rendered following a valid submission agreement or arbitration clause under the legislation applicable to it” (Art. 1 para. 2 letter a of the 1972 Convention). The appellant, stating that it was not bound by the contract dated 4 December 1950 or the clauses of the “Ghent Contract” to which it refers, challenged the existence of a valid arbitration agreement and, consequently, maintains that the conditions set forth in the above-mentioned provision were met. This ground is ill-founded.

The 1927 Convention does not establish the law applicable to arbitration clauses; it leaves that determination up to the Court ruling on the enforcement of arbitral awards, in this case, the Swiss Court. According to Swiss case law, that law is the law of the State in which the arbitrators were seated, *i.e.* in this case, Belgian law (RO 57 I 302 ss., 76 I 349; GULDENER, Das internationale und interkantonale Zivilprozessrecht der Schweiz, p. 110

ss.; HOMBERGER, RDS vol. 51 p. 18). There is no reason to disregard this solution, which, moreover, corresponds to that suggested by the Institute of International Law (French Yearbook, 1952, p. 596) and that adopted by the New York Convention dated 10 June 1958; indeed, the latter at various occasions refers, where there is no agreement between the parties, to the law of the country where the arbitration took place (see Art. V para. 1, letters a, d and e). Moreover, authors who object to the standard application of the law of the seat, do endorse it when, as in this case, permanent arbitral courts are concerned (KLEIN, *Considérations sur l'arbitrage en droit international privé*, p. 235 *et seq.*, esp. 244; cf. *Annuaire suisse de droit international*, 1963, p. 45 *et seq.*)

BGE 93 | 49 S. 55

b) When ruling on the enforcement of a foreign arbitral award, the Federal Tribunal itself generally applies the foreign law to which it submits the dispute. Thus, it ruled in accordance with German law in *Goldschmitt* (RO 57 I 306 ss.), *Schöni* (unpublished decision of 27 October 1933) and *Silvana* (unpublished decision of 26 October 1934). It ruled on the basis of Swiss law in *Exportchleb* (unpublished decision of 10 May 1936) and *Spuhler* (RO 76 I 349), as it considered that the applicable foreign law rules were the same as those in force in Switzerland.

However, in this case, the situation is different. In the cases cited above, the domestic courts of another country could have examined, at the utmost, the validity of the arbitration clause only when ruling on the enforcement of the award, and even then it is less than certain that they would have taken the time to do so. Here, however, the matter was first raised in incidental proceedings before three domestic courts: after the appeals arbitrators held that their jurisdiction was uncertain on 7 April 1952, “Utexbel” petitioned the Antwerp Commercial Court which held “Entreprise Générale Transshipping” and two of its associates to be bound by the contract dated 4 December 1950, including the clause of the “Ghent Contract”; the Brussels Court of Appeal upheld this decision with regard to “Entreprise Générale Transshipping”, which filed an unsuccessful appeal before the *Cour de Cassation*. In addition, after the arbitrators had ruled on the merits in an award dated 5 June 1961, the Belgian domestic courts (Ghent First Instance Tribunal, Ghent Court of Appeal and *Cour de Cassation*) once again held the arbitration clause to be valid, during proceedings initiated with a view to the enforcement of the award.

As Belgian domestic courts, in proceedings where the parties were able to present their case, considered the arbitration clause to be valid under Belgian law, the Federal Tribunal must not rule on the same matter with regard to the same law. It is clearly not qualified to review the application of Belgian law by the Belgian *Cour de Cassation*. As it is bound by the decisions already handed down, it must simply confirm that the arbitration clause is valid.

c) Moreover, even if it did review the solution adopted by

the Belgian courts, it would only be permitted to endorse it. From these courts' decisions it appears that Belgian and Swiss law decide in exactly the same manner the matter on which the validity of the arbitration clause depends, *i.e.* the interpretation of the expression of "Transshipping's" will; Yet, according to Swiss law, "Transshipping" actually abided by the disputed clause.

The contract dated 4 December 1950, signed by Florkin and two divisions of "Utexbel" referred to the "Ghent Contract", and thus obliged the parties to bring disputes before the arbitrators appointed by the Ghent Cotton Exchange. It is not at all necessary to ask whether Florkin had authorisation to represent "Transshipping" and whether the formers' signature bound the latter. What is certain is that "Transshipping" replaced Florkin and thus was bound by the jurisdiction clause. In its telegram dated 4 January 1951, where it mentioned "our forty-five tonnes of Utexbel" and outstanding bills of lading, it already expressed its intention to honour Florkin's obligations. Then in letters dated 6 and 8 January it confirmed this stance. On 15 January again it claimed that it controlled the sale of the 45 tonnes, which were at its exclusive disposal, beyond Florkin's reach. This showed that it had taken over Florkin's rights and obligations, such as they resulted from the contract dated 4 December 1950. Yet the grounds that the appellant raised in objection to this statement are irrelevant.

It is unnecessary to examine whether, when taking over the company, "Transshipping" was aware of the content of the contract and the scope of the "Ghent Contract" clause. Even if it was careless enough not to fully inform itself as to the exact scope of the obligations it was undertaking, it was nonetheless under obligation to honour them. It would only be otherwise if "Utexbel" had known or should have known that "Transshipping" intended to escape the "Ghent Contract" clause, which no evidence seems to suggest (*cf.* RO 76 I 350 s.). It is moreover significant that, on 29 January 1951, the day that it admitted to having received the text of the contract from Hubain, "Transshipping" did not immediately request clarification regarding the clause which it supposedly did not understand.

Notwithstanding the fact that, under paragraph 4 of its letter dated 6 January 1951 to Hubain, in a passage in which it states that it is willing to take on

the performance of contracts "previously entered into with Mr Florkin under confusing conditions", "Transshipping" only bound itself to these obligations conditionally. The word "previously" infers that this passage refers to transactions negotiated before the sale of Iranian cotton to "Utexbel". The matter does thus not concern the present cause. Witness paragraph 1 of the same letter where "Transshipping" recalls the provisions made to send the goods bought by "Utexbel".

In addition, it matters not that in a note filed before the Antwerp Commercial Court "Utexbel" alleged that "Transshipping" "never ratified the arbitration clause agreed by Florkin". The Federal Tribunal is not bound in these proceedings to factual observations made by a party in other proceedings. Yet the above developments show

that “Transshipping” implicitly ratified the arbitration clause as it took over the obligations arising from it.

Lastly, the appellant wrongly argues that, in a statement filed before the Antwerp Commercial Court, “Utexbel” “waives...the benefit of the arbitration clause contained in the contract dated 4 December 1950 and consequently withdraws the appeal brought before the Ghent Cotton Arbitral Chamber...” As “Entreprise Générale Transshipping”, which was involved at this point, should have realised, such declaration meant that “Utexbel” waived arbitral jurisdiction in favour of Belgian national courts, on condition that they uphold their jurisdiction; moreover, “Utexbel” could only retract its request for arbitration with the approval of the other party and after payment of all the costs (Art. 32 of the “Ghent Contract”). Yet these conditions were not met: first of all, instead of upholding their jurisdiction, the Belgian courts referred the case to arbitrators; secondly, “Entreprise Générale Transshipping” did not intend to submit the dispute to either Belgian courts or arbitrators; it thus was not supposed to have consented to “Utexbel’s” statement. Moreover, it is not established that “Utexbel” had already paid the arbitration costs at the time its statement was drafted.

4. The second ground raised by the petitioner consists in claiming that enforcement of the arbitral award dated 5 June

BGE 93 | 49 S. 58

1961 is contrary to Swiss public policy and, thus, excluded by Art. 1 para. 2 letter e of the 1927 convention. Of course not only the content but also the proceedings giving rise to an arbitral award may be incompatible with public policy (RO 85 I 47 s., 87 I 78). But, in one way or another, it would then have to damage the sentiment of law in an intolerable manner or undermine the fundamental rules of the legal order; on this point the Federal Tribunal is more reserved when it comes to the enforcement of arbitral awards than when it is a matter of directly applying a foreign law (RO 90 I 118).

a) Case law distinguishes between arbitral tribunals appointed by professional organisations and those established by chambers of commerce.

Generally speaking, the main objective of the former is to enforce rules governing a group from within; the members of the group do not freely choose arbitration, but, as members of a group, are often obliged to do so in order to safeguard their professional interests (RO 84 I 48). When an arbitral tribunal is a body of a Swiss professional organisation, or if it is appointed by such an organisation, the awards cannot be assimilated into the decisions governed by Art. 80 and 81 LP - at least when they decide a dispute between a group and one of its members or between a member of a group and a third-party (RO 80 I 341 and the cited awards, 81 I 327 s.).

However, arbitral tribunals of chambers of commerce are at the disposal of businessmen seeking quick dispute resolution by qualified judges, in the jurisdiction of which they are free to accept or decline (RO 84 I 48). As regards arbitrators of foreign chambers of commerce, the Federal Tribunal in each case assesses whether they are sufficiently impartial for their awards to be enforced in Switzerland without public policy being breached. On more than one occasion, it has given a positive response (RO 84 I 48 ss., 59 ss.).

The appellant wrongly deduced from this distinction that awards rendered by arbitral tribunals of foreign professional organisations, in a dispute between a member and a third-party, are necessarily contrary to Swiss public policy and can never be enforced in Switzerland. On the contrary, where such

BGE 93 | 49 S. 59

tribunals are similar, as to their design and organisation, to tribunals of chambers of commerce the same rules should apply to the awards rendered by both types of tribunals. The enforceability of the award depends on the degree of independence of the arbitrators.

The Ghent Cotton Exchange, although a professional union, did not constitute an arbitral chamber to ensure adherence to internal rules, but rather provided judges well versed in the specificities of the cotton trade to those in the cotton business (see Art. 23 and 25 of the Bylaws). In addition, no member is obliged to make use of arbitration; quite the contrary, those who so wish to stipulate that in clauses such as the “Ghent Contract”, the “Ghent conditions and arbitration”, and the “Ghent Arbitration” (see Art. 3 of the “Ghent Contract”). Thus, both the objective and method of constitution of the arbitral tribunals of the Ghent Cotton Exchange are the same as those of a chamber of commerce. The mere fact that they are set up by a professional union does not suffice to prevent the enforcement of their awards in Switzerland.

b) The “Ghent Contract” provides that during the first instance each party may appoint its own arbitrator; parties choose from a “list of persons able to act as arbitrators”; each person is a member of the Exchange - traders, brokers, overseers - who are considered to have sufficient technical knowledge for such a role (Art. 25 of the bylaws) they are suggested by the Executive Committee of the arbitral chamber and the list is approved by the Exchange Management Council. As for appeals arbitrators, the Executive Committee appoints two, while the Management Council appoints the third, who may be chosen from outside the Exchange (Art. 36 of the “Ghent Contract”). Thus the Executive Committee and the Management Council have considerable influence over the composition of the arbitral tribunal.

But, contrary to the appellant’s opinion, it does not follow that the award dated 5 June 1961 is not enforceable in Switzerland on the grounds of public policy. While “Utexbel” is a member of the Ghent Cotton Exchange, it is not an “effective member”, but only an “affiliated member” with no consultative vote in General Assemblies (Art. 30 of the Bylaws); it most probably participated as much

BGE 93 | 49 S. 60

as the appellant in the election of the Management Council, which itself appointed the Executive Committee (Art. 24 of the Bylaws). On the other hand, the Federal Tribunal held that the influence of the bodies of a chamber of commerce over the choice of arbitrators, in a dispute between a member and a third-party, does not run counter to the principle of party equality to the point of excluding an arbitral award (RO 84 I 51 s., 60 s.); there is no reason to be more stringent in this case, as the arbitral tribunal created by the Ghent Cotton Exchange is similar to that of a chamber of commerce.

c) On 21 April 1951, the Ghent Cotton Exchange invited “Transshipping” to appoint

an arbitrator, or the “person entrusted with defending your interests”; in letters dated 25 May and 8 June 1951, it used the same or similar expressions. Jean Vandriessche, the arbitrator appointed in place of the arbitrator “Transshipping” should have chosen, refers to himself as “arbitrator-defender” in a letter dated June 1951 and, in another letter dated 1 August 1951, refers to the “defense” which he led. However, there is no need in this case to assess whether the role of representative that a part of Belgian doctrine attributes to the arbitrator (KLEIN, *op.cit.*, p. 53), could make an arbitral award unenforceable. It suffices to observe that instead of acting as “Transshipping’s” defender or representative, Jean Vandriessche joined the second arbitrator in ordering “Transshipping” to pay the damages claimed by “Utexbel”; he thus did act as a judge. Also, even if the first instance proceedings had been affected by some irregularity, it would have been corrected by the appeals arbitrators, none of whom were appointed by the parties.

d) In his letters dated 20 June and 1 August 1951, addressed to “Transshipping”, Jean Vandriessche mentioned the “damning exchange of letters” and “Transshipping’s” “undefendable situation”. While it challenges the arbitrator for having considered himself “Transshipping’s” defender, the appellant accuses him of having supported “Utexbel’s” cause from the outset. However, this ground was raised belatedly as it did not avail itself of its right to challenge (see *L’arbitrage commercial et la loi belge*, publication de la Chambre de commerce internationale, p. 11; cf. Also Art. 1014 Belgian CCP). Moreover, the alleged partiality of one of the first instance arbitrators would not affect the judgment in the second instance, for which enforcement is sought. In addition, the fact that Jean Vandriessche

BGE 93 | 49 S. 61

does not credit “Transshipping” with any chance of success from his appointment is not proof of bias but rather an indication that, after having carefully assessed the facts submitted to him, he came to a logical conclusion. At the most, he could be criticised for having expressed his opinion before the judgment hearing. But that is no reason to refuse to enforce the arbitral award dated 5 June 1961, of which he is not even an author, as that award was rendered by the appeals tribunal.

Swiss public policy, on which the appellant relies, does thus not prevent the enforcement of the appeals arbitral award dated 5 June 1961.

Operative part

For these reasons, the Federal Tribunal:
Dismisses the appeal.