Unofficial translation

HEARING OF THURSDAY 15 APRIL 1999

1st Section

Between

R_____ SA, located _____Geneva, appellant of a decision rendered by the 4th Chamber of the First Instance Tribunal of that canton on 28 January 1999, represented by Mr Claude Brechbuhl, attorney, place du Molard 3, post box 3199, 1211 Geneva 3, at whose offices it elects domicile for the purpose of the present proceedings,

on the one hand,

and

A_____ LTD, located _____, Hong Kong, China, appellee, represented by Ms Frédérique Bensahel, attorney, rue du XXXI-December 47, 1207 Geneva, at whose offices it elects domicile for the purpose of the present proceedings,

on the other hand,

- FACTS -

A. By a document filed with the clerk of the Court dated 12 February 1999, R_____ SA (hereafter "the appellant") appeals a decision of the First Instance Tribunal of 28 January 1999, recognising and declaring the enforcement of an arbitral award ordering payment of a sum of money, and declaring definitive dismissal of an objection to pay brought against case no. 98 _____ M of the Geneva Arve-Lac offices of payment orders for amounts of CHF 918,772.56 with interest and CHF 31,730.50 with interest, in other words the equivalent of the amounts set forth in the operative part of the arbitral award.

B. The following relevant facts appear from the proceedings:

On 5 June 1996 the parties entered into a sales contract in which the thirteenth and final paragraph stated that any dispute arising from the contract or its performance would be resolved, where the parties are unable to reach an amiable agreement, by arbitration by the Foreign Trade Arbitration Commission of the Chinese Council for the Promotion of International Trade (hereafter "the Chinese Arbitration Commission") and under the procedural rules put forward by this commission. In addition, it was added that the parties would consider the arbitral award to be final and binding.

The Chinese Arbitration Commission had to decide a dispute which arose among the parties during the performance of the contract. In an award dated 1 June 1998, it ordered R_____ SA to pay damages to A_____ Ltd, as well as to refund the arbitration fees paid by the latter. The award gave R_____ SA forty-five days to pay and provided, in the event of late payment, for interest at a rate of 8%. The award mentions that it is final.

Upon A_____ Ltd's request, the Geneva Arve-Lac debt enforcement office notified R_____ SA of debt collection order no. 98 _____M to which an objection was raised. A_____ Ltd attached to its request for enforcement and definitive dismissal, on the basis of Article 80 LP, the following three documents;

- a non-certified copy of the sales contract into which the parties entered, drafted in English,
- An original of the arbitral award in Chinese,

- a complete translation into French of the award whereby the first and last pages were certified as true copies of the original by an employee of the Swiss embassy in Beijing. It must be noted that on the first page appear the names and registered offices of the parties, the expression "Arbitral Award", the date of the award and the arbitral authority, in other words the Chinese Arbitration Commission. The last page contains the operative part of the award, *i.e.* the clauses ordering payment, the payment deadline and the statement that the decision is final, as well as the identity of the three arbitrators; the translator added that the award bore the stamp of the Chinese Arbitration Commission.

C. R_____SA challenged the Tribunal for having granted enforcement for the award whereas, in its decision, it had observed that A_____ Ltd had not produced the documents required by Article IV of the New-York Convention and consequently had not met the conditions set in the convention for recognition and enforcement of the foreign arbitral awards.

- LAW -

1. As it was filed in time and met the conditions as to its form, the appeal is admissible (Art. 347, 349 and 356 LPC).

When ruling on a request for exequatur, irrespective of the law governing the action for debt collection, the court rules as a first instance court (Bertossa/Gaillard/Guyet/Schmidt, Commentaire de la loi de procédure civile genevoise, n. 7 ad Art. 472A LPC). Inversely, when a creditor requests both enforcement of a decision and dismissal of an objection to pay, only dismissal is ordered if the conditions for enforcement are met. The proceedings remain the final instance proceedings pursuant to Articles 23 and 20 paragraph 1 let. b LALP, (SJ 1971 p. 4; SJ 1991 p. 611). Thus, the appeal will only be founded if said decision does not reveal a breach of the law, with a wrongful assessment of a factual point being equated to such breach (Art. 292 para. 1 let. c).

2. Article 194 PILS provides that recognition and enforcement of foreign arbitral awards are governed by the New York Convention of 10 June 1958. This convention, that Switzerland initially ratified on condition of reciprocity, is applicable *ergo omnes* since 23 April 1993. It is applicable wherever there is a foreign arbitral award, *i.e*. when the appeal in question was rendered by an arbitral tribunal not seated in Switzerland (Bucher, Le nouvel arbitrage international en Suisse, 1988, n. 427, p. 138 sv; Dutoit, Droit international privé

suisse. Commentaire de la loi fédérale du 18 décembre 1987, 1997, n. 1 ad Art. 194; Siehr, IPRG Kommentar, 1993, n. 7 sv ad Art. 194).

As the arbitral award concerns a financial obligation, it must be enforced through an action for debt collection (Art. 272 para. 1 LP). Thus, the court deciding on the dismissal must rule on enforcement (Art. 81 para. 3 LP; SJ 1991 p. 611 and cited decisions).

3. Article IV of the New York Convention indicates the formal conditions that the appellant must meet when filing its request. It states the following:

> "1. To obtain recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:
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> a. The duly authenticated original award or a duly certified copy thereof;
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> b. The original agreement referred to in Article II - the arbitration agreement or duly certified copy thereof.
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> 2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition or enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

4. The New York Convention was created in the aim of replacing the Geneva Protocol on Arbitration Clauses of 24 September 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 26 September 1927. The New York Convention mainly differs from the aforementioned texts in the sense that it considerably improves the position of the party seeking recognition and enforcement of the arbitral award (Van den Berg, The New York Arbitration Convention of 1958, 1981, p. 246 sv; Klein, La Convention de New York pour la reconnaissance et l'exécution des sentences arbitrales étrangères, in: RSJ 1961 p, 229/247). Its only obligation is of a formal nature and consists in producing the exhibits prescribed in Art. IV: "While the Geneva Convention (Art. 4) requires that the applicant provide, along with supporting documents, a whole series of evidence often so hard to provide that enforcing the award becomes problematic, in this regard the New York

Convention marks considerable progress. Based on the principle that the arbitral award and the arbitration agreement are *bona fide* documents, in the possession of the party availing itself of them and until proof of the contrary, the New York Convention shifts the burden of proof onto the respondent" (Message of the Federal Council to the Federal Assembly regarding approval of the convention for recognition and enforcement of foreign arbitral awards, FF 1964 II 625/634). In producing the required documents, the appellant proves the probability of it being the beneficiary of a final and binding arbitration award, rendered on the basis of a valid arbitration agreement. Thus, the respondent, in the enforcement proceedings, must prove the existence of a ground on which not to grant recognition and enforcement of this award.

The text of the convention does not describe any further the nature of the formal obligations that it imposes, neither does it indicate what sanctions apply in the event of non-compliance. The Court believes that Art. IV must be interpreted in accordance with the spirit of the convention described above. The contracting States wanted to reduce, as far as possible, the number of obligations imposed on the party seeking recognition and enforcement of a foreign arbitral award (Message of the Federal Council, *ibidem*; Van den Berg, The New York Convention: Summary of Court Decisions, in: The New York Convention of 1958, ASA Special Series no. 9, 1996, p. 46/47).

Regarding the documents to be produced, it must be said, in agreement with Van den Berg, that the applicant must at least provide a copy of the arbitration clause and the arbitral award. Where that is not the case, the court petitioned shall not accept the request for enforcement. However, the court must be flexible in assessing the manner in which the documents are produced, in other words, whether authenticated originals or certified copies are produced (Van den Berg, The New York Arbitration Convention of 1958, p. 249). As for the translation of such documents into one of the official languages of the country in which enforcement is sought, part of doctrine even considers that the applicant can waive the translation if the court is expected to understand the original language. In that case, it may only be obliged to have the documents translated if the court or the other party so request (Van den Berg, The New York Arbitration Convention of 1958, p. 259)

5. Practice shows that Swiss courts are flexible when it comes to ruling on allegations that Art. IV of the New York Convention was breached (Patocchi, The 1958 New

York Convention, The Swiss Practice, in: The New York Convention of 1958, ASA Special Series n° 9, 1996, p. 145/162, n. 14).

In 1990, the Zurich Commercial Court thus held that the breach of Art. IV observed in that case, *i.e*. production of a non-certified photocopy of the arbitral award does not prevent recognition of the award as it is not contested that it became *res judicata* and that there are no grounds to refuse such pursuant to Article V of the Convention. The Zurich tribunal held that the formal requirements of Art. IV must not be given too much importance where the conditions for recognition are not challenged and seem to be met beyond any doubt (Decision of the Zurich Commercial Court of 20 April 1990, ASA 1990 p. 183/185 sv).

Moreover, the Zurich tribunal cites various decisions of the Federal Tribunal where it holds that relying on the non-production of these documents is excessive when the merits of the decision in question are not challenged. The Federal Tribunal thus held that failure to have a document certified could not be relied on if the authenticity of that document is not also challenged (ATF 46 I 458 relating to the Franco-Swiss Treaty of 15 June 1869). Neither do such flaws inevitably dismiss the applicant's request when the other party does not challenge that the decision for which enforcement is sought has become *res judicata* (ATF 57 I 19 regarding the Swiss-Austrian Convention of 15 March 1927 on the recognition and enforcement of judicial decisions = JdT 1932 I 474/479) or when this fact can be established by a means other than the production of the requested documents (ATF 102 Ia 76 regarding the Swiss-Belgian Convention of 29 April 1959 on the enforcement of judicial decisions and arbitral awards = JdT 1977 I 119/123).

In 1997, this Court, for its part, recognised and declared enforceable a foreign arbitral award, despite the fact that one of the contracts binding the parties, and thus the arbitral agreement which it contained, were not produced. The Court at the time had stated that it would be guilty of excessive formalism if it had sustained the respondent's objection, while it had not even challenged the arbitration (ACJ of 11 December 1997, ASA 1997 p. 667/671 sv).

Lastly, in 1995 the Federal Tribunal upheld an unpublished decision of the Court of Justice dated 17 March 1994, in which the Court recognised and granted enforcement to an arbitral award. The Federal Tribunal, which observed that the applicant had breached Art. IV para. let. b in producing a mere photocopy of a fax of the arbitration clause, held that the

appellant had not challenged the validity of that arbitration clause and that that flaw thus did not affect the outcome of the case (ATF of 9 January 1995, International Arbitration Report, Vol. 10, Issue 9, September 1995, p. D1/D3).

7. Given the arguments set forth above, the Court holds that the Tribunal rightly recognised and granted enforcement to the award rendered by the Chinese Arbitration Commission despite the breaches of Art. IV of the Convention.

First of all, the applicant is criticised for having produced the original award without first having it authenticated. The Court notes that the appellant admits that it is the original award that was produced and that it did not contest that, on the final page, it bore the official stamp of the Chinese Arbitration Commission. The only objection raised by the appellant regarding this document is the lack of authentication as per Art. I para. 1 let. a of the Convention. This criticism is of a purely formal nature and the appellant did not contest the authenticity of the decision and therefore the Tribunal rightfully disregarded it in order to avoid excessive formalism.

The appellee provided a French translation of the arbitral award of which only the first and last pages were certified by a diplomatic agent of the Swiss embassy in Beijing. The Court, like the Tribunal, noted that the two pages in question were the two most important as they mention the exact identities of the parties, the operative part of the award and state that it is final. Moreover the Court notes that this criticism is of a purely formal nature and the appellant in no way alleged that the translation was not faithful to the original text. The ground must consequently be disregarded.

8. The decision is thus upheld. R_____ SA, the unsuccessful party, shall bear the costs of the appeal and shall pay compensation to the other party to cover the requested costs. (Art. 62 OELP ; SJ 1984 p. 595 recital 5a).

For these reasons

the Court:

As regards the form:

Holds R_____ SA's appeal against decision no. JTPI/1489/1999 rendered on 28 January 1999 by the First Instance Tribunal in case no. C/32234/1998-4 to be admissible.

On the merits:

Upholds this decision

Orders R_____ SA to bear the costs of the appeal and to pay CHF 9,000 to the other party for expenses.

Dismisses all the parties' other claims.

Judges:

Mr Pierre-Yves Demeule, president; Mr Stéphane Geiger, Ms Laura Jacquemoud-Rossari, judges; Ms Fatina Schaerer, clerk.