Unofficial translation

HEARING OF THURSDAY 23 SEPTEMBER 2004

1st Section
Ruling in summary proceedings
held in camera

Between

X _____, located in _____, Unites States of America, appealing a decision on an objection to seizure rendered by the President of the First Instance Court of this canton on 7 May 2004, represented by Mr Nicolas Genoud, attorney, rue Eynard 6, 1205 Geneva, at whose offices it elects domicile,

on the one hand,

And

Y _____, _____, Tortola B.V.I, appellee, represented by Mr Laurent Panchaud, attorney, Avenue Krieg 44, post box 45, 1211 Geneva 17, at whose offices it elects domicile,

on the other hand,

Communicated the present decision to the parties, as well as to the Bureau of Debt Collection, by registered letters dated

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- FACTS -

A. By an appeal filed with this Court's Registrar on 19 May 2004, X_____ (hereafter: "X_____") challenged the decision rendered by the First Instance Court on 7 May 2004, notified to the parties on that same day, dismissing its objection to the seizure ordered on 25 March 2004, for amounts of CHF 68,112.31 with interest at 5% from 16 July 2003 and CHF 1,439.49 with interest of 5% from 7 January 2004 of the assets held at BANK A_____ and BANK B_____, Geneva subsidiary, in favour of Y_____ (hereafter: "Y._____").

As well as requesting costs, the appellant seeks the annulment of the aforementioned decision because it dismisses appellant's objections to seizure and orders it to pay compensation for expenses of CHF 1,500. In addition, it requests that the Court of Justice order the appellee to provide surety of CHF 71,660 within 10 days of receipt of the new decision. The appellee seeks that the decision be upheld and costs awarded.

B. The proceedings revealed the following relevant elements:

a) The parties are two companies specialised in oil trading, specifically in the Baltic countries.

On 28 May 2003, they entered into contract no. 01-W/T-28-05-2003, according to which Y_____ committed to delivering to the border between Belarus and Latvia 10,000 tonnes of M-100 fuel oil at a price of US$ 110/mt.

X _____ paid 90% of the agreed price within the agreed time limit (Art. 3.2). The remaining balance of US$ 49,537.50 was to be paid after the goods were loaded on 15 July 2003 (Art. 4.2).

X_____ did not pay the outstanding balance.

b) On 13 October 2003 upon Y_____'s request, the Kurzeme District Court of the city of Riga rendered a decision (case no. 3-12/221/1-2003) against X_____ ordering "seizure of movable assets and monetary funds, wherever they may be, in the amount of LVL 28,731.75, prohibition on transferring funds or other assets to the respondent or third parties".

The Riga district court revoked this decision on 26 January 2004.

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c) Article 8.2 of 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. That tribunal''s decision would be final and binding on the parties (Art. 8.3).

At the same time, the creditor seized the Riga Tribunal of Commercial Arbitration, on 2 December 2003, and obtained a decision ordering X_____ to pay it an amount of LVL 28,434.53 (equivalent to US$ 49,537.50), as well as the costs of the proceedings and legal assistance, *i.e.* LVL 2,169.21 (US$ 1,162.70). This decision, which could not be appealed, was declared immediately enforceable and held 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 aforementioned Court held to be enforceable the aforementioned arbitral decision dated 2 December 2003; this decision could not be appealed. The corresponding document was given to Y_____ on 9 January 2004.

d) In parallel, on 18 September 2003, X_____ filed a request for the annulment of the contract dated 28 May 2003, from the Commercial Arbitral Tribunal of Riga, as well as for Y_____ to be ordered to pay damages for contract non-performance and arbitration fees, on the ground that Y_____ had not delivered the minimum quantity of fuel oil agreed upon.

In a hearing on 13 October 2003 which Y _____ did not attend, the tribunal annulled the aforementioned contract and ordered Y_____ 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 aforementioned District Court.

In a decision dated 12 January 2004, this court refused to grant the requested enforcement order as Y_____ had not been summoned to the aforementioned arbitral proceedings. This decision was upheld in two identical decision rendered by the Riga Department Court on 4 March 2004, cases no. 3011/10 2004 03 04 and 3012/10 2004 03 0.

C. a) Y_____ filed before the First Instance Court on 24 March 2004 a request against X_____, seeking seizure of its assets held at two banks in Geneva, on the basis of the decisions rendered by the Riga Court on 2 December 2003, 7 and 9 January 2004. It alleged that the conditions for the application of Art. 271 para. 1 ch. 1 LP were met, as the party had no fixed domicile; moreover, the Latvian court had held that there was no certainty as to the debtor's intentions to honour its commitments. The ground for seizure set forth in Article 271 para. 1 ch. 4 LP was also met: the party did not live in Switzerland and the aforementioned decisions were enforceable.

In an order of 25 March 2004, the First Instance Tribunal granted this request on the grounds of Art. 271 para. 1 ch. 4 LP, on condition of prior payment of a surety of CHF 5,000.

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X_____ was informed of the seizure on 26 March 2004, by BANK A_____. The corresponding minutes were notified to it on 11 May 2004.

b) On 5 April 2004 X_____ filed an objection to this measure. It sought annulment of the aforementioned order. In the alternative, it requested that the other party be ordered to provide surety of CHF 100,000. In essence, it explained that the request, which is the object of these proceedings, was based on a decision dated 13 October 2003 which had been annulled by a decision dated 26 January 2004. The contract dated 28 May 2003 was also annulled by the decision of the Commercial Arbitral Tribunal of Riga on 13 October 2003. The Ziemeliai Regional Tribunal's decision dated 7 January 2004 was based on the following erroneous recital: "by virtue of solution no. 33/2003 of the documents relating to decision 13.10.2003 of the third-party commercial tribunal, it is clear that contract no. 03-W/T-08-07-2003 is annulled on 8 July between, X_____ and Y_____, but that is not contract 01-W/T-28-05-2003 dated 28 May 2003 between X_____ and Y_____ ; the Tribunal did not receive arguments that the contract entered into on 28 May 2003 between X_____ and Y_____ no. 01-W/T-28-05-2003 was annulled." Yet the operative part of the decision dated 13 October 2003 showed that the latter contract had been annulled. Moreover, the decision dated 7 January 2004 had been obtained by bribery; and the managers of the company were being tried in criminal proceedings. It appeared that the debt relied upon did not exist and thus the requirements of Art. 271 para. 1 ch. 4 LP were not met. As for Art. 271 para. 1 ch. 1 LP, the appellant maintained that it had not changed its address. Lastly, it stated that the frozen assets amounted to CHF 230,000, that it needed to be able to access these funds in order to carry out its oil trading business, that the seizure was disproportionate, and that a surety of CHF 100,000 should be ordered. The exhibits produced showed that a criminal investigation involving Y_____ had been opened in Belarus in September 2003 for an abuse of power with regard to the commodities import-export business.

c) At the 3 May 2004 hearing, the parties persisted in their requests. Y_____ noted that the present proceedings were based on the decision dated 7 January 2004, which held that the contract dated 28 May 2003 had not been annulled, contrary to that of 8 July 2003. On 4 March 2004 the Riga Department Court upheld this decision; it thus was enforceable. In addition, the appellee stated that it was unaware of any criminal proceedings for corruption. Lastly, it accepted that frozen funds in excess of the debt be freed.

The appellant reiterated that the decision dated 13 October 2003 did indeed annul the contract dated 28 May 2003, such that the decision dated 7 January 2004 which disregarded the principle of *res judicata* was void. Given these conflicting decisions, the request for surety was justified.

d) As a basis of its decision, the First Instance Court held that Y_____ had produced a partial translation of the arbitral award rendered on 2 December 2003 by the Riga Commercial Tribunal, ordering X_____ to pay it the amount of LVL 28,434.53 (equivalent to US$ 49,537.50). This amount was that of the balance of the sales price that Y_____ claimed pursuant to the contract dated 28 May 2003. The decision dated 2 December 2003 was held enforceable on 7 January 2004 by a Court of the city of Riga; no procedural elements showed that this declaration was void; no evidence supported the appellant's allegations of corruption. The

enforceable nature of the arbitral award dated 2 December 2003 must therefore be accepted (Art. 194 PILS and Art. V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In any event, the Tribunal cannot rule on whether the enforcement order was founded, as this matter falls under the exclusive jurisdiction of the Latvian judicial authorities. For its part, the appellee had provided the arbitral award of 13 October 2003 annulling the contract dated 28 May 2003; it did not appear that the decision had been granted enforcement in Latvia; it even seemed that the order had been refused by the Riga District Court as Y_____ had not been summoned to said arbitration proceedings. It was not contested that the other conditions for seizure were met; the objection to the seizure thus had to be dismissed.

D. a) In support of the appeal against the decision, X_____ repeated all the facts and arguments developed before the First Instance Tribunal, challenging it for having accepted the likelihood of the debt, for not having ruled on surety, and for having ordered it to pay the costs. In addition, the appellant argues that the seizure order that it received from the appellee also referred to the ground for seizure in Art. 271 para. 1 ch. 1 and did not mention any surety. Thus, in its objection to the seizure it discussed points which seemed to have been approved by the court ordering seizure and did not know that was not the case. As this document was incomplete, it is unjustified to consider, as the first court did, that it had been unsuccessful.

As regards the rest, the appellant mentioned that the amount frozen had been reduced to the base amount for seizure established by the Debt Bureau, *i.e.* CHF 112,281.70, however, the appellee did not follow through on its proposal to lift the measure for the amount of the alleged debt. According to Art. 273 LP, the court may impose surety, in particular, where it cannot be excluded from the circumstance, considered when examining likelihood in unilateral summary proceedings, is different to that which would be accepted following an in-depth, adversarial assessment. Yet the First Instance Tribunal based its decision on an enforcement order which in turn was based on an easily recognisable and manifest error. At the very least, the first court should have considered that there were serious doubts as to the validity of the declaration dated 7 January 2004 and consequently, as to the related debt. It had, incidentally, set a surety. In addition, even if it had not bee held enforceable, the arbitral decision dated 13 October 2003 noted that the appellee was indebted to it by US$ 161,000; the debt alleged by the latter was thus more than offset. Lastly, the appellant alleged that in order to access an amount equal to that of its frozen assets, it would have to take out a bank loan, which would cost it CHF 78,610 over 10 years, from that amount should be deducted the financial products corresponding to the frozen assets whereas procedural fees of at least CHF 10,000 should be added to it. The total surety to be provided should amount to at least CHF 71,600.

b) In its statement of reply dated 21 June 2004, Y_____ noted that it had, in a message dated 14 April 2004, confirmed to the Bureau of Debt Collection, its agreement to partially lift the seizure, within the base amount for seizure determined by said bureau. It had done the same with regard to the appellant's counsel on 19 May 2004. The difference between the amount frozen and the alleged debt did not justify the payment of the requested surety. In any event, the challenge of the base amount for seizure had to be filed before the Debt Bureau's Oversight Authority. The order to bear the costs was justified as X_____ had not challenged the conditions of the seizure.

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E. During the hearing of 8 July 2004 before this Court, the parties persisted in their claims. The appellant noted that it had demonstrated its damage and that the appellee had not criticised its calculation of expenses.

- IN LAW -

1. As it was filed on time and met the conditions as to its form, the appeal is admissible (Art. 354 para. 1 LPC, Art. 278 para. 3 LP and 22 para. 4 LALP).

2. The President of the First Instance Tribunal ruled in first instance (Art. 23 LALP) summary proceedings (Art. 22 para. 3 LALP). The court accepted the case with full powers of examination (Art. 291 LPC).

3. Under Art. 278 LP, whoever's rights are infringed by a seizure may object to such before the court of seizure within ten days; The decision on the objection may be deferred to a higher judicial authority before which new facts can be alleged; new evidence may be produced in that case (REEB, Les mesures provisoires dans la procédure de poursuite, RDS 1997 II p. 482).

According to Art. 278 para. 4 LP, an objection and appeal do not stay the effects of a seizure. Objection proceedings have no suspensive effect, either in first of second instance (AMONN/ GASSER, Grundriss des Schuldbetreibungs- und Konkursrechts, 1997, p. 420 ; STOFFEL, Le séquestre, Cédidac 1997, p. 291).

4. The creditor requesting seizure must demonstrate the likelihood of the debt, the ground for seizure and that the debtor does have assets (Art. 272 para. 1 LP).

Simple probability is sufficient and the administration of evidence is restricted to grounds which are immediately available. The court ordering the seizure rules in light of the evidence produced (ACJ/984/1997 of 4.9.97 ; ACJ/841/1998 of 3.9.98). However, it must not be accepted too easily that the condition of the likelihood of the debt is met (ACJ/343/1998 du 23.4.98); the objecting party must, for its part, demonstrate, using all evidence available, that its point of view is even more likely than that of the creditor requesting the seizure (REEB, op. cit., p. 478).

In the appeal proceedings against the decisions on the objection, both the first court and the higher cantonal court ruled only on the likelihood of the conditions of the seizure being met. Whether the degree of likelihood is met is a question regarding the assessment of evidence (SJ 1998 p. 146).

It is not arbitrary to use a strict assessment of probability given the rigorous effects of the seizure (SJ 1998 145 and references cited). Thus, the more the consequences of the measure sought affects the interests of the other party, the more rigorous the assessment of the circumstances alleged by the party seeking the seizure must be.

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5. Pursuant to Art. 271 para. 1 ch. 4 LP, when the debtor does not reside in Switzerland and when there is no other ground for 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 such a debt under Art. 82 para. 1 LP; these conditions are alternative and not cumulative (REEB, op. cit., p. 436 and ref.; ATF n. p. of 15 June 1998, in *V. SA v. A.*). Moreover, in such cases, the debt must have matured (art. 75 CO and 271 para. 2 LP).

5.1 The notion of enforceable judgments arises from Art. 80 para. 1 and 80 para. 1 LP. Such judgments can be legally enforced (REEB, op. cit., p. 438). They must be final, be issued by a civil court and must concern the substantive law governing payment of debts and must indicate the amount of the debt (PANCHAUD/CAPREZ, La mainlevée d''opposition, op. cit. p. 237, and La mainlevée d'opposition, Lausanne 1939, p. 191 and 209 ; GILLIERON, Commentaire de la loi fédérale sur la poursuite pour dettes et la faillite, Lausanne 1999, ad n. 38 Art. 80 LP ; JÄGER, Commentaire de la Loi fédérale sur la poursuite pour dettes et la faillite, French edition, n. 1 ad Art. 80 LP ; STAEHELIN, Kommentar zum Bundesgestz über Schuldbetreibung und Konkurs, Basel 1998, n. 38 ad Art. 80 LP ; FRITSCHE/WALDER-BOHNER, Schuldbetreibung und Konkurs nach schweizerischem Recht, Band I, 1984 p. 232 ; RJJ 1995 p. 43 ; RSJ 1986 p. 30-31).

5.2 In order to determine whether a foreign decision is enforceable under Art. 271 para. 1 ch. 4 LP, one must assess whether it could receive recognition in Switzerland (STOFFEL, op. cit., in reference to principles established in the PILS, notably in application of Art. 25 and 27 PILS).

Pursuant to Article 194 PILS, the court must refer to the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards. This article obliges Swiss courts to directly apply an international treaty, *erga omnes*, even if the award was rendered by an arbitral tribunal of which the tribunal was located in a country that did not sign the New-York Convention (HONSELL/VOGT/SCHNYDER, Internationales Privatrecht, Commentaire bâlois, p. 1743).

A foreign arbitral award need not be enforceable in its country of origin, pursuant to Art. V para. 1 let. e of the New York Convention. It merely has to be binding ("obligatoire", "verbindlich") 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.

The court examining a request to enforce a foreign arbitral award ordering payment of a sum may only reject the request if the party against which enforcement is sought produced proof (Beweis erbringt, art. V ch. 1 de la Convention de New-York):

- that the parties having requested arbitration lacked legal capacity or that the arbitration agreement was invalid,

- that it was not aware of the arbitration proceedings, or was not able to defend its case,

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- that arbitration proceedings did not apply to the dispute in question,

- that the arbitral Tribunal had been improperly constituted or that the arbitral procedure was not complied with,

- that the arbitral award had not yet become binding on the parties (noch nicht verbindlich) or that an order had been issued to stay its effects, or that the arbitral award had been set aside (aufgehoben) by the relevant legal authority in the country in which it was rendered.

5.3. In this case, the appellant did not raise any of the grounds mentioned above with regard to the decision rendered by the Arbitral Tribunal of Riga on 2 December 2003, ordering it to pay the amounts of LVL 28,434.53 (equal to US$ 49,537.50) and LVL 2,169.21 (equal to US$ 1,162.70). This decision was final and binding on the parties, pursuant to Art. 8.3 of the contract that they entered into on 28 May 2003. In light of the above, the enforceable nature of this decision can be accepted, at this point, irrespective of the enforcement order issued by the Zimeliai district court on 7 January 2004, which is the only decision challenged by the appellant.

The latter argues 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 said judge had considered that the contract dated 28 May 2003 existed, even though it had been annulled by the Riga Commercial Arbitral Tribunal's decision dated 13 October 2003.

5.4 Indeed, it seems that a criminal investigation was ongoing involving one of the appellee's managers, however that case was opened in Belarus and not in Latvia; in addition no evidence connected those proceedings to any alleged acts of bribery committed by the manager concerned with regard to the Riga judicial authorities.

5.5. As for the contract dated 28 May 2003, it was annulled in the operative part of the aforementioned arbitral award of 13 October 2003. However, the decision dated 4 March 2004 rendered by the Riga Departmental Court shows that the corresponding enforcement could not be granted as the claimant, in other words the opposing side???) had not been summoned to said arbitration proceedings. Thus the decision dated 13 October 2003 does not meet the aforementioned requirements of Art. V ch. 1 let. b of the New York Convention and can thus not be an enforceable decision under Art. 271 para. 1 ch. 4 LP. The two decisions are thus not incompatible, such that the probability of the debt alleged by the appellee must be admitted.

Consequently the conditions for the application of Art. 271 para. 1 ch. 4 LP appear to be met in this case as the appellant did not raise any other complaints in this regard. The decision shall thus be upheld on this point.

6. The appellant then criticises the first court for not having accepted its request to increase the surety. Its initial claim was for CHF 100,000. As a portion of the amount had been freed in the meantime, it decreased its claim before this court to CHF 71,660. Contrary to the

appellee's arguments, the appellant rightly did not request that base amount for seizure set by the Debt Bureau be altered as such a request falls under the remit of the Bureau's Oversight Authority.

6.1. The court ruling on the seizure must assess, *sua sponte*, whether the creditor should be ordered to provide surety to guarantee the debt against damages. The higher court, if the ruling on the objection is appealed and until a decision on such appeal is made, may freely decide or modify a first decision on surety with a view to a comprehensive examination. On this point, the assessment must be carried out *sua sponte* (GILLIERON, Le séquestre dans la LP révisée, in BlSchK 1995, p. 133).

According to Art. 273 para. 1 LP, the creditor is responsible for the damage that an unjustified seizure may cause both the debtor and third-parties, especially in the event of a dubious debt or seizure (SJ 1987 p. 140). It freely assesses the circumstances for calculating said surety, on the sole condition that the estimate not be arbitrary. (SJ 2000 p. 403).

6.2. In this case, given the dispute, there is no need to consider the requested seizure to be dubious. Moreover, the appellant merely provided figures related to the cost of any bank loan it may have 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 there is a risk of insolvability in the event of an action seeking damages for unjustified seizure, due to the appellee's precarious financial situation. In these conditions, there is no reason to accept the appellant's request on that point.

7. Lastly, the appellant holds that it was not unsuccessful in the first instance as it was forced to elaborate arguments on the basis of an incomplete order for seizure.

7.1. According to Art. 62 OELP, the court can, upon a request from the winning party, order the losing party to pay fair compensation equal to the costs.

Winning the trial is a decisive factor in the decision on costs. The only factor to consider is the success in court of the final submissions presented, and not the time saved by one or other party, or the economic or fiscal savings generated by the proceedings, or even the moral (or psychological) satisfaction of one or the other party regarding the proceedings. This compensation must serve to refund the winning party for any costs incurred and not in respect of the rashness or faults of the unsuccessful party.

7. 2. It is true that appellant only received the minutes regarding the seizure and the order on 11 May 2004, in other words after it had filed its objection to the measure. However, it indicated that it had been informed of the seizure on 26 March 2004 by BANK A_____. On that occasion it most likely received a copy of the order as issued on 25 March 2004.

In any event, the Court rightly ordered it to bear the costs of the first instance proceedings.

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This party's primary claim was for the aforementioned order to be annulled irrespective of the grounds for seizure relied upon. Yet each one of the grounds provided in Art. 271 para. 1 LP is a sufficient basis for the requested seizure. As the latter proved to be founded on the basis of para. 4, the party failed in its submissions objecting to the disputed measure, irrespective of the argumentation developed in support of said conclusions.

The same is true for the altenative claims requesting that its opponent be ordered to pay surety of CHF 100,000 as the Court kept to the prior guarantee of CHF 5,000 because this assessment must be carried out *sua sponte*. Also, it is not clear how this requirement, which it claims to have ignored, obliged it to waive its claims on that point, evidently holding that amount to be insufficient to cover the damage it allegedly suffered as it continued to request an increase of said surety in its appeal.

8. The unsuccessful appellant 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:

On the form:

Holds X____'s appeal against decision no. OSQ/20/2004 rendered on 7 May 2004 by the First Instance Tribunal in case no. C/6165/2004-14 to be admissible.

On the merits:

Upholds this decision.

Orders X_____ to bear the costs of the appeal and to pay CHF 2,000 to the other party for expenses.

Dismisses all the parties' other claims.

Members of the Court:

Mr Louis Peila, presiding judge ; M François Chaix and M. Daniel Devaud, judges ; Ms Fatina Schaerer, clerk.

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