

The Supreme Court of Georgia
Chamber of Civil, Entrepreneurial and Bankruptcy Cases

With the following composition:

M. Gogishvili (President),

R. Nadiriani,

M. Tsikvadze

Subject matter of the dispute: Recognition and enforcement on the territory of Georgia of the London Arbitral Tribunal award of 25 April 2003

D e s c r i p t i v e s e c t i o n :

On 24 May 2002, Joint-Stock Company “Z. Factory” and “R.L.” Ltd concluded contract no. 326 whereby the parties agreed on the delivery of bulk silicon manganese. Article 9 of the contract determined the London Arbitral Tribunal as a competent authority to decide on any differences between the parties. English law was chosen as the applicable law.

Ltd “R.L.” approached the London Arbitral Tribunal claiming the non-performance of contractual obligations by the other party. By its award of 25 April 2003, the London Arbitral Tribunal ordered JSC “... Factory” to pay USD 750,100 plus 5% interest per year, accruing as of 1 September 2002 until the date of payment. The arbitral award is final and entered into force on 25 April 2003.

The representatives of Ltd “R.L.” addressed the Supreme Court of Georgia with a motion to have the award of the London Arbitral Tribunal dated 25 April 2003 recognized and enforced in Georgia.

The representative of JSC “... Factory” stated that the Supreme Court should reject the motion under paragraphs “a” and “d” of Article 5 of the Convention on Recognition and Enforcement of Foreign Arbitral Awards. In particular, pursuant to Article 4 (g) of the Statute of the Ministry of Justice of Georgia, approved by Decree of the President of Georgia No. 544 dated 31 December 2001, the Ministry of Justice is the competent authority that approves contracts granting jurisdiction to private arbitral tribunals located either in Georgia or abroad

entered into by an enterprise in which the State holds controlling stock or more than 50% of shares. The State of Georgia holds controlling stock in JSC "... Factory".

The representative of JSC "... Factory" argues that, because the contract envisages dispute resolution between the parties by arbitration, the contract should have been approved by the Ministry of Justice, and that approval had not been granted. On this ground, he asserts that the contract cannot be deemed to have any legal force, since a voidable transaction under Articles 54, 59(1) and 61(1) of the Civil Code of Georgia is void.

In the opinion of the representative of JSC "... Factory", the word "legal capacity" mentioned in the text of the Convention refers to the capacity of the parties to enter into a contract. Since the contract has not been approved by the Ministry of Justice of Georgia, the parties should be regarded to have been "under incapacity" to enter into the contract within the meaning of the Convention.

The representative of the JSC "... Factory" also deems that the arbitral proceedings were not in accordance with the parties' agreement; in particular, pursuant to the contract, a dispute between the parties should have been dealt with by an arbitral tribunal composed of three arbitrators, while the dispute was in fact adjudicated by a single arbitrator. In addition, the Factory was unaware of the date of the hearing at the London Arbitral Tribunal.

R e a s o n i n g :

The Cassation Chamber of the Supreme Court of Georgia examined the case materials, heard the parties' position and deems that the motion of Ltd "R.L." should be upheld for the following reasons:

The Supreme Court of Georgia is not authorized to examine the legality or the reasoning behind the decision rendered by a foreign court (or arbitral tribunal). Pursuant to Article 3 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (to which Georgia acceded in 1994), each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure on the territory where recognition and enforcement of such awards are sought.

Furthermore, pursuant to Article 5(1) of the Convention, recognition and enforcement of the award may be refused only if:

(a) The parties to the agreement were, under the law applicable to them, under some incapacity, or the said agreement is not valid pursuant to the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

The representative of JSC "... Factory" submitted that the award rendered by the London Arbitral Tribunal must not be recognized on the territory of Georgia under paragraphs "a" and "d" of Article 5 of such Convention.

Pursuant to Article 2(1) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

According to Article 35(1) of Law of Georgia on Private International Law, the laws of a country chosen by the parties shall govern the determination of rights and obligations within a contractual relationship - including interpretation, performance and termination of a contract as well as the consequences of declaring the contract void, in violation of contractual obligations and in breach of pre-contractual and post-contractual obligations.

Pursuant to Article 9.1 of the contract between the disputing parties, the disputes that arise out of or in relation to the contract would be referred to the London Arbitral Tribunal for resolution. Article 9.2 of the same contract stipulates that the contract is governed by the laws of England; i.e., the parties chose English law as the applicable law and the London Arbitral Tribunal as the entity entrusted to decide the disputes. The parties had the right to do so under both the domestic legislation and the international convention.

The argument of the representative of JSC "... Factory" that the Factory was incapable of entering into the contract cannot be sustained since, pursuant to Article 5(1)(a) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the recognition and enforcement of the award will be refused if the party against whom it is invoked furnishes proof that the arbitration agreement in writing between them is not valid under the law pursuant to which the parties have subjected it or if the parties were under incapacity under the law applicable to them. In present case, the application of English law was intended. The party has not provided the Supreme Court of Georgia with any proof that the arbitration agreement concluded in writing has been invalidated under the English law or that JSC "... Factory" was under incapacity under the same law.

It should also be noted that legal entities exercise their legal capacity through their agents and thus, in discussing the capacity of a legal entity, what matters is who is acting on behalf of the legal entity, who represents the entity in relations with third parties and who makes decisions of legal importance within the entity.

Both the Civil Code and the Law on Entrepreneurs precisely determine agents vested with the authority to represent various legal entities as well as the bodies responsible for making important decisions for the legal entity and their competences.

Pursuant to Article 9.4 of the Law of Georgia on Entrepreneurs, directors represent a company in relations with third persons. The authority to represent before the third persons cannot be restricted. Article 55.9 of the same Law defines a number of activities which directors may perform only with the consent of a supervisory council. The consent of a supervisory council, as a rule, is formalistic. Third persons are not required to ascertain whether the director was properly authorized to conclude an agreement. If a director concludes an agreement which he was not authorized to so conclude, he will be liable to the company and there will be no grounds for declaring such an agreement void pursuant to Article 9.7 of the Law.

In the present case, the Court has not been provided with any proof that the powers of the director to represent JSC "... Factory" were in any way restricted. Therefore, the contract is not void under the Georgian law.

Furthermore, the Supreme Court does not share the position of the representative of JSC "... Factory" that the composition of the arbitral tribunal was chosen not in accordance with the contract concluded between the parties.

The parties concluded the contract under standard sales terms and conditions.

According to Article 9.1 of the Contract, the parties submitted their dispute to the London Arbitral Tribunal composed of three arbitrators. The contract provided that of these arbitrators, one be appointed by the seller, one by the buyer and the third arbitrator by the arbitrators selected by the parties. The award rendered by the Arbitral Tribunal is final and binding upon the parties.

Pursuant to Clause 13.2 of the Standard Purchasing Conditions, any dispute deriving from or arising in relation to the contract shall be decided by London Arbitral Tribunal in accordance with the Arbitration Act 1996 or its later adopted amendments. A party shall appoint its arbitrator within 7 days after receiving a notification from the other party on their appointment of an arbitrator. Should the party fail to appoint its arbitrator within such a period, the arbitrator already appointed will be deemed the sole arbitrator.

Pursuant to Article 17 of the Arbitration Act 1996, if the party in default does not, within 7 days of notice being given, make the required appointment, the other party may appoint his arbitrator as the sole arbitrator, whose award shall be binding on both parties as if he had been so appointed by agreement.

Pursuant to the case materials, it is determined that the respondent was served a notice of appointment of an arbitrator as well as copies of the claim and its supporting documentation. The respondent was informed that if it failed to appoint its own arbitrator, the arbitrator appointed by "R.L." would be deemed the sole arbitrator and decide the dispute on the basis of materials provided by "R.L." The plaintiff-appointed arbitrator sent a letter to the respondent four times by facsimile transmission. In his last letter, the arbitrator categorically demanded that the respondent provide its submission. In other words, the arbitrator took all necessary measures to ensure the respondent's participation in the proceedings but these were in vain. JSC "... Factory" neither appointed its arbitrator nor defended itself in the arbitration. The arbitrator appointed by "R.L." heard the case and upheld the claim.

On these grounds, the Cassation Court finds that the composition of the arbitral tribunal was in accordance with the agreement of the parties as well as the law of the country where the arbitration took place.

Consequently, there are no grounds provided by Article 5 of the Convention to refuse recognition of the foreign arbitral award; in particular, according to the parties' agreement, the dispute was subject to arbitration, the agreement is valid under the law to which the parties have subjected it, the respondent was given proper notice about the arbitration proceedings, the arbitration proceedings were in accordance with the parties' agreement and the law of the country where the arbitration took place, and the arbitral award is final and binding. It follows that, pursuant to Article 3 of the Convention, the award of the London Arbitral Tribunal shall be recognized as binding and enforceable on the territory of Georgia.

R e s o l u t i o n :

In accordance with Article 68(1) of the Law of Georgia on Private International Law,

T h e C h a m b e r H o l d s t h a t :

The motion of Ltd "R.L." shall be upheld.

The award of the London Arbitral Tribunal dated 25 April 2003 shall be recognized as binding and be enforceable on the territory of Georgia.

JSC "... Factory" shall pay Ltd "R.L." USD 750,100 plus 5% interest per year accruing as of 1 September 2002 until the date of payment.

A copy of this Court order and the enforcement writ shall be forwarded to the relevant enforcement bureau through the Enforcement Department of the Ministry of Justice.

The Order is final and not subject to an appeal.