4A_250/2013[1]

Judgment of January 21, 2014

First Civil Law Court

Federal Judge Klett (Mrs.), Presiding
Federal Judge Kolly
Federal Judge Hohl (Mrs.)
Federal Judge Kiss (Mrs.)
Federal Judge Niquille (Mrs.)
Clerk of the Court: Mr. Carruzzo

X._____ Ltd.,
Represented by Mr. Daniel Guggenheim,
Appellant

*v.*

Société Z._____,
Represented by Mr. Homayoon Arfazadeh Casserly and Mr. Wolfgang Peter,
Respondent

Facts:

A.
A.a.
On October 18, 1977, the Iranian company Z._____ (hereafter: Z._____) and the Swiss company X._____ Ltd. (hereafter: X._____), based in Geneva, entered into a purchase and sale contract of Iranian crude oil for three Israeli companies (hereafter "the Israeli Companies"). The parties chose Iranian law to govern the contract. They also included an arbitration clause entrusting the settlement of disputes under the contract to a three-member arbitral tribunal sitting in Tehran (Iran).

A dispute arose and Z._____ initiated arbitral proceedings against X._____ on July 27, 1985, with a view to obtaining payment for five shipments of oil delivered at the end of 1978.

Translator's Note: Quote as X._____ Ltd. *v.* Société Z._____. 4A_250/2013. The original decision is in French. The full text is available on the website of the Federal Tribunal, www.bger.ch.

In 1991, the Claimant took the Israeli companies to the Arbitral Tribunal as joint defendants with X._____.

The three-member Arbitral Tribunal, sitting in Tehran, issued a partial award on March 3, 1999, in which it found, among other issues in dispute, that the Israeli companies had been properly brought to arbitration.

In a final award of June 8, 2001, the Arbitral Tribunal ordered X._____, jointly with the other three Defendants, to pay to Z._____ a total amount of USD 96'993'890 consisting of capital (USD 30'130'396), interest (USD 65'968'828) and fees (USD 894'666).

X._____ did not appeal the aforesaid award or demonstrate that it was prevented from doing so in an Iranian court as a consequence of a peculiar context of the relationship between Israel and Iran.

B.

B.a.

The debtors were given notice that they should comply with the final award. As they failed to do so, Z._____ asked the Debt Collection Office of Geneva to serve an order of payment to X._____ for an amount of CHF 93'994'800 on March 11, 2011, corresponding to the aforesaid amount in Swiss francs, with interest at 5% from June 8, 2001. X._____ objected to the payment.

On June 6, 2011, Z._____ filed a petition with the Court of First Instance of the Canton of Geneva, seeking the enforcement of the arbitral award of March 3, 1999, and June 8, 2001, in Switzerland and asking the Court to set aside the objection. X._____ submitted that the petition should be rejected and relied on the grounds to refuse enforcement found at Art. V of the New York Convention of June 10, 1958, on the Recognition and Enforcement of Foreign Arbitral Awards (RS 0.277.12; hereafter: the New York Convention or NYC) and invoked one of the defenses at Art. 81(1) LP.[2]

On September 25, 2012, the Court of First Instance recognized and declared the two arbitral awards enforceable in Switzerland. Moreover, it set aside the objection to the payment of CHF 93'994'800 plus interest.

B.b.

In a judgment of March 22, 2013, the Civil Chamber of the Court of Justice of the Canton of Geneva, which had been seized of an appeal by both parties, rejected them both except as to one issue. Indeed, concerning moratory interest, the Court held that to the extent that the Arbitral Tribunal did not award any for the time after June 8, 2001, the final award issued on this date was not an enforceable title with regard to that interest. Consequently, the Court modified the figure in the operative part of the first instance judgment and suppressed any reference to interest, limiting enforcement to the amount of CHF 93'994'800.

[2] Translator's Note: LP is the French abbreviation for the Swiss debt collection and bankruptcy law.

C.
On May 7, 2013, X._____ (hereafter: the Appellant) filed a civil law appeal with the Federal Tribunal to request a stay of enforcement. It invites the Federal Tribunal to annul the judgment under appeal and to refuse the enforcement of the award or, in the alternative, to send the case back to the Civil Chamber for a new decision.

In a letter of May 27, 2013, the Cantonal Court stated that it made reference to the grounds in its judgment.

Z._____ (hereafter: the Respondent) submitted its answer on June 11, 2013. It principally submits that the matter is not capable of appeal and, in the alternative, that it should be rejected.

The Appellant confirmed its submissions in a reply filed on July 15, 2013.

Reasons:

1.

1.1. The decision concerning the enforcement of a foreign arbitral award and the setting aside of the objection to an order of payment may be the object of a civil law appeal to the Federal Tribunal (Art. 72(2)(a) and (b) LTF[3]; judgment 5A_68/2013 of July 26, 2013, at 1.2 with other references) when, as is the case here, it is a final (Art. 90 LTF) judgment made by a court of last instance (Art. 75(1) LTF) in a financial matter, the value in dispute of which reaches the CHF 30'000 threshold set at Art. 74(1)(b) LTF, for the appeal to be admissible. Filed within the legal time limit (Art. 100(1) LTF) which was suspended during the Easter recess (Art. 46(1)(a) LTF) and in the prescribed format (Art. 42 LTF), this appeal is admissible. The admissibility of the arguments invoked is reserved.

1.2. Decisions setting aside a debtor's objections are not provisional measures within the meaning of Art. 98 LTF. An appeal against such decisions may be made in particular for violation of federal law, which includes constitutional and international law (Art. 95(a) and (b) LTF). The Federal Tribunal addresses the alleged violation of constitutional law only if the grievance was raised and reasoned in detail by the Appellant, according to the principle of allegation (Art. 106(2) LTF). Moreover, this Court applies the law *ex officio* (Art. 106(1) LTF) without being limited by the arguments raised in the appeal or by the reasons of the decision under appeal; it may therefore uphold an appeal on grounds other than those invoked, or conversely, reject an appeal based on reasons differing from those of the lower court. However, in view of the requirement that reasons should be presented contained at Art. 42(1) and (2) LTF under penalty of inadmissibility (Art. 101(1)(b) LTF), the Federal Tribunal reviews in principle only the grievances invoked; it

[3] Translator's Note: LTF is the French abbreviation of the Federal Statute of June 17, 2005, organizing the Federal Tribunal, RS 173. 110.

does not have to address all the legal issues arising when they are no longer in discussion at this stage, as a court of first instance would do (aforesaid judgment 5A_68/2013 and the precedents quoted).

The Federal Tribunal conducts its legal reasoning on the basis of the facts established by the lower court (Art. 105(1) LTF). It may depart from them only if the facts were established in a blatantly inaccurate manner – a notion corresponding to arbitrariness (Art. 9 CST[4]) – or in violation of the law within the meaning of Art. 95 LTF (Art. 105(2) LTF), and only if the correction of the deficiency may affect the outcome of the dispute (Art. 97(1) *in fine* LTF). It behooves the Appellant to raise a specific grievance in this respect and to provide a clear and detailed demonstration (Art. 106(2) LTF; ATF 137 III 226 at 4.2 p. 234 and the cases quoted).

No new fact or evidence may be adduced except as a consequence of the decision of the lower court (Art. 99(1) LTF).

2.
In the lower court, the Appellant had argued several violations of its right to be heard committed by the first judge in connection with the application of the New York Convention, which governs the recognition and enforcement of foreign arbitral awards (Art. 194 PILA[5] applicable to the proceedings for setting aside a debtor's objections by reference from Art. 81(3) LP). The Civil Chamber rejected all the arguments raised in this context and stated the grounds for which it did so (judgment under appeal 2 to 4, p. 11 to 19). The debtor's appeal contains no criticism of the reasons of the cantonal judges in this respect. Consequently, this court shall not review their pertinence in accordance with the relevant practice (see 1.2, 1st § *in fine*).

3.
3.1. In a first argument, the Appellant argues a violation of Art. 5(4) CST, according to which the confederation and the cantons shall comply with international law, as well as Art. 30(a) LP which reserves international treaties and the provisions of the December 18, 1987, Private International Law (PILA). In this context, it also invokes Art. 184(3) CST, which authorizes the Federal Council,[6] among other possibilities, to take the necessary decisions when required to safeguard the interests of the country. As an example of the "safeguard," which it finds in the latter provision and in the former two, the Appellant quotes the intervention of the Federal Council in the so-called *Mobutu* case (ATF 131 III 652) and in the case of the seizure of the paintings of the Moscow (Russia) Pushkin museum exposed in Martigny (see Jérôme Candrian, *Les tableaux du Musée Pouchkine de Moscou: poursuites, immunité et arbitrage sous le signe de l'Etat de droit*, in BISchK 2007, p. 85 ff). From the provisions quoted, illustrated by these two examples, the Appellant draws a general rule according to which any judicial body, such as a court deciding a debtor's objection or an administrative court, would have a duty to correct an application of Swiss law provisions, albeit a correct one, when this would create a situation inconsistent with the fundamental principles of

[4] Translator's Note: CST is the French abbreviation for the Swiss Federal Constitution.
[5] Translator's Note: PILA is the most commonly used English abbreviation for the Federal Statute on International Private Law of December 18, 1987, RS 291.
[6] Translator's Note: In Switzerland, the Federal Council is the executive branch.

international law. Similarly, it refers to a "directive" issued on March 21, 1974, by the International Law Division of the Federal Political Department (JAAC 1975, fasc. 39/I, n. 64), which acknowledges in principle the possibility for a belligerent state to take measures concerning foreign assets, even with regard to states that are not implicated in the conflict, as long as such measures are not tantamount to final confiscation.

According to the Appellant, the measures taken by the state of Israel to prevent the Islamic Republic of Iran from benefiting from additional financial resources enabling it to acquire a nuclear strike force with the intent of "wiping Israel off the map" clearly stated by its leaders and a matter of public knowledge, would fall squarely within this directive. They would be even more legitimate because the resolutions adopted by the United Nations and the European Union go in the same direction and demonstrate that the international community recognizes as a fundamental principle of international law the present prohibition for the economic players to provide the Islamic Republic of Iran with financial means of whatever format. Hence, according to the Appellant, the Geneva Court of Justice violated Art. 5(4) CST and Art. 30(a) LP by failing to take into account this embargo based on international law. To comply with it, the Court should have refused to grant the enforcement requested by the Respondent.

3.2. The argument does not appear to have been submitted to the lower court and moreover, it does not appear admissible as presented because of its lack of reasons. Based indeed on some abstract considerations concerning international policy and, in particular the conflict existing between the state of Israel and the Islamic Republic of Iran, the argument merely contains some general statements as to the reach of international law over domestic law and does not enable the court to understand why setting aside the objection raised by a Swiss company (the Appellant) to an order of payment concerning the amount awarded to an Iranian company (the Respondent) pursuant to an enforceable arbitral award would be incompatible with Swiss public policy when the latter sought payment by its contractual counterpart of unpaid invoices concerning shipments of oil delivered 34 years earlier.

The examples quoted by the Appellant to demonstrate that the principle of primacy of international law may exceptionally justify departing from the solution resulting from correct application of domestic law are not very helpful to it because they concern the sovereign immunity of foreign state assets (the paintings of the Pushkin Museum; along the same lines, also see the third example mentioned by the Appellant drawn from a judgment of the Paris Court of Appeal quoted in ATF 134 III 122 at 5.3.2) and the freezing of assets of a late former head of state (the *Mobutu* case, namely some issues differing from those involved in the case at hand, specifically the possibility for a private company governed by Swiss law to object to the payment of a receivable belonging to an Iranian company.

Similarly, the connection that the Appellant attempts to establish between the case at hand and the "directive" of the federal administration it mentions (see 3.1, 1st § *in fine*) is not clear. Moreover, it is doubtful that the document could be considered to be a directive because it instead appears to be a legal opinion. As to its title – "Guaranteeing of personal property according to international law in favor of enemies and other foreign persons in time of war" – and its contents, they confirm, if necessary, that the opinion of the administrative authority has very little to do with the problem to be addressed in the case at hand.

Furthermore, under the guise of alleged notoriety and by departing from the case law definition of this notion (ATF 135 88 at 4.1 and references), the Appellant departs from the factual findings in the judgment under appeal and issues a value judgment when it peremptorily asserts the legitimacy of the efforts of the state of Israel to prevent Iran from using new financial resources to constitute a nuclear arsenal with a view to annihilate Israel as clearly stated by its leaders. By arguing in this way, the Appellant forgets that the Federal Tribunal issues its decision on the basis of the facts established by the lower court (Art. 105(1) LTF).

Neither is it admissible for the Appellant to merely refer – without any further explanation – at page 11 of its brief (footnote 22) to three exhibits in the cantonal file which allegedly demonstrate that the United Nations and the European Union took measures to set up the prohibition on economic players to furnish financial means to the Islamic Republic of Iran as a fundamental norm of international law. It is not the role of the Federal Tribunal to go and verify itself if the – relatively voluminous – exhibits in question endorsed the Appellant's conclusion. As to the short additional information given by the Appellant in its reply (p. 2, 2nd §), it may not be taken into consideration either. Indeed, according to case law, the purpose of a brief in reply is not to empower the Appellant to supplement, after the time limit, some reasons which, if not inexistent, would not be sufficient to lead the Federal Tribunal to admit the grievance considered (judgment 4A_232/2013[7] of September 30, 2013, at 3.3.2 and the case quoted). This being so, it is not possible to address the merits of the first argument.

4.
4.1. Secondly, the Appellant argues a violation of the right to be heard guaranteed by Art. 29(2) CST and of Art. 81(1) LP and 320(a) CPC.[8] Its criticism of the Civil Chamber in this framework may be summarized as follows.

One of the aspects of the right to be heard is the obligation for a court to give reasons for its decision. On the basis of Art. 81(1) LP, the debtor argued in the first instance and on appeal that the debt was extinguished after the arbitral award due to an impossibility of performance. The Civil Chamber held that the first judge had implicitly rejected the argument. It refused to address it any further because the court setting aside a debtor's opposition did not have to analyze a delicate legal issue of substantive law. By limiting its judicial review in this manner and that of the first judge when faced with a real *novum* invoked by the debtor as a defense, the lower court violated Art. 81(1) LP and Art. 320(a) CPC. However, the debtor had raised two essential and undisputed arguments which could impact the outcome of the dispute: the first was the fact that the Israeli companies and the Appellant had been jointly ordered to pay the Respondent; the second was the Appellant's total economic dependence on the Israeli companies. Yet, according to the legal opinion of an Israeli professor, the latter would face criminal prosecution if they made any payment to

[7] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/resorting-auxiliary-performance-contract-does-not-affect-arbitration-clause

[8] Translator's Note: CPC is the French abbreviation for the Swiss Code of Civil Procedure.

the Respondent, considered as an enemy of Israel. Moreover, in a letter sent to counsel for the Appellant on December 14, 2011, the Israeli consignee of enemy property had pointed out that the prohibition of payment applied to the Appellant as well, provided – as was the case here – that the Swiss company was controlled by Israeli interests. All these elements demonstrated the impossibility for the Appellant and the Israeli companies to pay the debt contained in the final award. Therefore, the debt was extinguished pursuant to Art. 81(1) LP which should have led to the rejection of the petition for enforcement presented by the Respondent. The Civil Chamber therefore violated the right to be heard of the Appellant and Art. 320(1) CPC and 81(1) LP by refusing to address this defense.

4.2

4.2.1. The right to be heard guaranteed by Art. 29(2) CST requires in particular the authorities to reason their decisions. According to case law, it is sufficient for the court to briefly mention the reasons guiding it and on which the decision is based, so that the addressee may understand its scope and appeal it in full knowledge. The authority has no obligation to set forth and discuss all the facts, evidence and arguments invoked by the parties and it can limit itself to those that appear pertinent (ATF 138 I 232 at 5.1 and the cases quoted).

4.2.2. The Appellant's criticism of the two cantonal courts from the point of view of the right to be heard and in particular with regard to its right to a reasoned decision is unconvincing because the defense based on the impact of the Israeli embargo measures against the Respondent in the case at hand did not escape the lower courts.

The Court of First Instance summarizes, in the chapter "In Fact" of its judgment, both the Appellant's arguments (p. 6, n. 15, § before last and p. 10, n. 21, last §) and those made by the Respondent (p. 8/9, n. 20, § before last) concerning this defense. Then, in the chapter "In Law" of the aforesaid judgment, it reviews the arguments (D, p. 15 to 18). Indeed, after pointing out the legal limits to the judicial review by a judge asked to set aside a debtor's objection (Art. 81(1) LP) and the consequences of one of the joint debtors being freed without the debt being paid (Art. 147(2) CO[9]) the Court conducts a legal analysis of the the facts, drawing the following conclusions. First, the documents produced by the Appellant concern only the measures taken by the state of Israel, therefore they are not conclusive documents demonstrating that the debt is extinguished; moreover, the application of these foreign-state measures to a Swiss company debtor, which owes money to an Iranian company pursuant to an arbitral award, cannot be decided by the judge setting aside the debtor's opposition. The same applies to the issue as to whether the Respondent abused its right. It must however be recalled that Swiss law specifically provides, at Art. 144(1) CO, the creditor the option to only go after one of the joint debtors to obtain payment of the full debt. Secondly, there is no objective or subjective impossibility to pay for the Appellant, which has already paid an amount to the Respondent in March 2009. Thirdly, assuming subjective impossibility to pay for Israeli companies as a consequence of the measures taken by the state of Israel against the Respondent, such impossibility could not release the Appellant from its obligation; it is indeed connected to political problems that do not

[9] Translator's Note: CO is the French abbreviation for Swiss Code of Obligations.

concern the obligation as such, which arises from a commercial relationship going back many years and it must therefore be considered to be a personal defense which cannot release the Appellant from the payment of its debt to the Respondent.

In the judgment under appeal, the Civil Chamber first summarizes the reasons of the court of first instance as to the issue in dispute (E, p. 9, § before last, to 10, 2nd §). The court then sets forth the Appellant's criticism of the judgment under appeal (5, p. 19), and recalls the defenses available to a debtor of an amount upheld by an enforceable foreign arbitral award and the power of judicial review of the court in this context (5.1, p. 19 to 21). Finally, in their subsumption, the cantonal judges hold that the court of first instance duly reviewed the arguments and evidence invoked by the Appellant and that it clearly stated why they were rejected. Indeed, according to them, the first judge implicitly held that the Israeli measures did not concern the Appellant directly as it is a Swiss company; moreover, it addressed the various exhibits produced by the Appellant, in particular various legal opinions, and specifically found that these documents were not conclusive to establish the alleged extinction of the debt. In this regard, the Civil Chamber itself held that the document involved cannot be equated with some perfectly clear conclusive documents which would show, unequivocally, on the one hand the impossibility for the Appellant to comply with its obligation and on the other hand, the extinction of the debt. In its view, the strenuous legal argument submitted by the Appellant on the basis of Art. 144 ff CO demonstrated that the issues raised by the debtor require a legal analysis according to substantive law, which does not fall to the court addressing a debtor's opposition. Moreover, still according to the Cantonal Court, the first judge could not be criticized for finding *prima facie*, that the Appellant, since it had already paid an amount to the Respondent, could not claim impossible or subjective impossibility to pay its debt. Thus, in the eyes of the cantonal judges, the judgment under appeal was well founded and sufficiently reasoned.

This summary of the reasons contained in the two cantonal decisions issued in this case shows that the judgment of the Civil Chamber, which is the only decision that can be appealed to the Federal Tribunal, satisfies without any possible discussion the requirements of the aforesaid federal case law. By reading the judgment, the Appellant could certainly grasp the reasons – founded or not, which is irrelevant from the point of view of the right to be heard – for which its arguments had been rejected by the Cantonal Court, so that it was able to appeal in full knowledge the judgment issued by that Court.

Under such conditions, there is no way the Civil Chamber can be criticized for a violation of the right to be heard of this party.

4.3
4.3.1. Pursuant to Art. 80(1) LP, the creditor availing himself of an enforcement judgment may ask the court to set aside the debtor's objections. Case law equates arbitral awards with court judgments (ATF 130 III 125 at 2, p. 128).

If the court acknowledges the authority of the foreign judgment and rejects the defenses invoked by the debtor on the basis of an applicable international treaty, it still has to review the possible objections

afforded by Swiss law originating in a fact after the judgment, to the extent that the debtor invokes them, if they may be invoked validly and can lead to the petition being rejected; these are the exceptions set forth at Art. 81(1) LP (ATF 105 Ib 37 at 4c p. 43).

Pursuant to Art. 81(1) LP, when the collection procedure is based on an enforceable judgment issued by a Swiss court or administrative body, the judge sets aside the debtor's objection unless he proves by conclusive documents – among other possible defenses – that the debt was extinguished after the judgment. Extinction of the debt in the law does not merely mean payment but also any other civil law cause. It falls to the debtor to establish that the debt is extinguished (ATF 124 III 501 at 3a and b, p. 503 and references). As opposed to what applies to provisional debt collection (Art. 82(2) LP), the debtor cannot merely show that he is *likely* to have been liberated; to the contrary, he must bring conclusive evidence (ATF 136 III 624 at 4.2.1 and the cases quoted). Moreover, the summary nature of the debt collection procedure based on a judgment does not allow the court to decide any delicate issues of substantive law or those for which the court's discretion plays an important role, as such issues belong exclusively in the court addressing the merits. Moreover, Art. 81(1) LP requires proof by conclusive documents of the extinction of the debt in order to uphold the objection. The enforcement title within the meaning of Art. 81(1) LP creates a presumption that the debt exists and this presumption may be reversed only by conclusive evidence to the contrary (ATF 136 III 624 at 4.2.3 and references).

4.3.2. In this case, the two Cantonal Courts did not at all disregard these principles of case law, which the Appellant does not challenge as such. Contrary to what the Appellant implies, it is not the complexity of the legal issues to be addressed which explains the refusal of the lower courts to address them but respect for well-established case law as to the judicial review that the court addressing a debtor's objection may perform with regard to defenses concerning substantive law. Moreover, the Appellant is wrong to claim that the judgment published at ATF 124 III 501 at 3b would show no indication of any alleged limitation of the judicial review by the court in collection proceedings with regard to such defenses. Indeed, the limitation clearly appears from paragraph 3(a) *in fine* of the case quoted; it was also confirmed subsequently in the aforesaid case published at ATF 136 III 624 at 4.3.2, p. 626. Moreover, the defenses invoked by the Appellant – the legal opinion to which it refers, the decree of July 31, 2011, of the Israeli Ministry of Commerce, the position as joint debtors of the Israeli companies which would control the Appellant from an economic point of view or the letter of the Israeli consignee of enemy property of December 14, 2011, – cannot be considered as conclusive documents within the meaning of Art. 81(1) LP and the case law as to this issue, as was rightly found by the two Cantonal Courts. Consequently, the Appellant's second argument does not appear better founded than the first one.

The appeal must consequently be rejected to the extent that the matter is capable of appeal, which renders moot the application for a stay of enforcement presented by the Appellant.

5.
The costs of the federal proceedings (Art. 66(1) LTF) and the costs of the Respondent (Art. 68(1) and (2) LTF) shall be borne by the Appellant.

6.
The attention of the parties is drawn on the fact that the receivable for which the Respondent succeeded in having the Appellant's objection set aside definitively may fall within the provisions of the Decree of the Swiss Federal Council of January 19, 2011, instituting measures against the Islamic Republic of Iran (RS 946.231.143.6). Hence, in accordance with article 11 of the Decree, a copy of this judgment shall be communicated to the State Secretariat of Economy (SECO) for information.

Therefore the Federal Tribunal pronounces:

1.
The appeal is rejected to the extent that the matter is capable of appeal.

2.
The judicial costs set at CHF 80'000 shall be borne by the Appellant.

3.
The Appellant shall pay to the Respondent an amount of CHF 90'000 for the federal judicial proceedings.

4.
This judgment shall be notified to the representatives of the parties and to the Civil Chamber of the Court of Justice of the Canton of Geneva.

Lausanne, January 21, 2014

In the name of the First Civil Law Court of the Swiss Federal Tribunal

| Presiding Judge: | Clerk: |
| --- | --- |
| Klett (Mrs.) | Carruzzo |