4A_396/2017

Order of 23 November 2017
First Civil Law Court

Federal Judge
Kiss (Mrs), presiding.

Parties
Country X,
represented by
Elliott Geisinger and Dr. Christopher Boog
and Dr. Annabelle Möckesch,
Appellant,

V

A._____,
represented by Dr. Marc D. Veit and Michael Schneider as well as Dominik Elmiger, Respondent.

Reasons:

1.

A._____ (Respondent) is asserting claims against Country X (Appellant) based on the Bilateral Investment Treaty between Country X and Country Y dated November 27, 1998 (hereinafter: BIT).

On June 3, 2015, the Respondent initiated an arbitration before the Permanent Court of Arbitration (PCA) against the Appellant, referring to Art. 9 BIT.

The PCA Arbitration Tribunal, with its seat in Geneva, by a Decision dated June 26, 2017, found that it had jurisdiction to adjudicate the dispute.

By written submission of August 14, 2017, the Appellant filed a Civil law appeal from that Decision. By order of August 17, 2017, the Respondent and the Arbitral tribunal were invited to submit comments on the appeal and to state their positions regarding the Appellant's request for a stay of enforcement.

By written submission of August 29, 2017, the Respondent thereupon submitted a Request to the Court to require the Appellant to pay security for the Respondent's potential costs within the meaning of Art. 62(2) BGG.[12] By order of the Presiding Judge of August 31, 2017, the Appellant was granted leave to comment on the Request for Security on or before September 18, 2017. By written comments of September 18, 2017, the Appellant applied to the Court to dismiss the Request. By a written submission of September 25, 2017, the Respondent stated that it was maintaining its Request, and on October 4, 2017, the Appellant again requested that it be dismissed.

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1 Quote as *Cojnutry X. v. A____,* 4A_396/2017. The decision was issued in German. The full text is available on the web site of the Federal Tribunal www.bger.ch

2 Translator's note: BGG is the German abbreviation for the Federal Statute of June 17, 2005, organizing the Federal Tribunal, IS 173.110

2.

A party with no established domicile in Switzerland may, upon request of the opponent, be required to pay security for costs (Art. 62(2) BGG).

2.1. The Respondent is basing its Request primarily on the Appellant's status as a foreign state; it submits that, according to the jurisprudence of the Federal Tribunal on Art. 62(2) BGG, as a general matter foreign states and public entities may be required to post security for costs; there is no state treaty that would present an obstacle to requiring the Appellant to pay security for costs.

In its Response to the Request, the Appellant disputes that there is no state treaty in the present case which would present an obstacle to imposing an obligation to pay security for costs; it states that Country X, just as Switzerland, is a contracting state of the Hague Convention of March 1, 1954 on Civil Procedure (SR 0.274.12; hereinafter: Hague Convention 1954), Art. 17 of which provides that no obligation to pay security may be imposed on nationals of the Contracting States based on a lack of domicile or residence at the place of the proceedings (in another Contracting State); pursuant to the jurisprudence of the Swiss Federal Tribunal (BGE 77 I 42) and the writings of legal scholars, not only nationals of the contracting states, but the convention states themselves, are entitled to invoke this provision.

In its comments on the point, the Respondent argues, to the contrary, that as a Contracting State of the Hague Convention, the Appellant is not entitled to rely on Art. 17 of that convention, and is specifically not entitled to do so in the present matter. In its written submission of October 4, 2017, the Appellant disputes this.

2.2. It is undisputed, and comports with the consistent jurisprudence of the Swiss Federal Tribunal, that under Art. 62(2) BGG, it is generally possible for courts to impose a duty to pay security for costs not only on natural persons or legal entities under private and public law, but such an obligation may also be imposed on foreign states, because they have no domicile or seat within Switzerland (*see e.g.* Orders 4A_570/2011 of November 23, 2011; 4A_541/2009 of January 21, 2010 E. 6; 4C.380/2004 of November 30, 2004).

However, the obligation to pay security does not apply if an international treaty precludes this. Both Switzerland and Country X are Contracting States of the Hague Convention of 1954. Art. 17 of that convention prohibits the imposition of security for costs on nationals of one of the contracting states who have their abode within any contracting state and who are appearing in one of the other contracting states as a claimant or intervenor based on their status as an alien or because they have no domicile or residence in Switzerland.

2.2.1. The Respondent disputes that it was ever the intention of the Contracting States of the Hague Convention of July 17, 1905 on Civil Procedure (SR 0.274.11; hereinafter: Hague Convention 1905) or of the successor convention, the Hague Convention of 1954, that the states themselves should fall within the scope of the conventions. In saying this, it casts doubt on the jurisprudence in BGE 77 I 42 on Art. 17 of the Hague Convention of 1905, which holds that Art. 17 of the Hague Convention of 1905 exempts

not only the nationals of the Contracting States, but also exempts the Contracting States themselves from the duty to post a bond or security.

2.2.1.1. In BGE 77 I 42 E. 4, p.49, the Swiss Federal Tribunal stated that Art. 17 of the Hague Convention of 1905 uses the term 'national', which is clear in and of itself, not in contrast to the state as the superordinate body politic, but rather it apparently considers this term to mean the legal subjects associated with it through citizenship rights (in the case of natural persons) and by the corporate seat (in the case of legal entities), by contrast with persons and entities which have no such ties with the Contracting State. However, in this same sense, the state itself, to the extent that it is a legal body with private rights and acts as a party of equal standing vis-à-vis other legal persons or entities, is considered one of its nationals. There are, the Court said, no apparent reasons why the Contracting States of the Hague Convention should rule out the exemption from the duties of paying security, which applies without exception to natural persons and legal entities which are their nationals, for the states themselves. If the state initiates civil litigation abroad and thus submits to the jurisdiction of foreign courts, just as a private individual would do, it would be entirely justified also to permit that state to avail itself of the advantages enjoyed by a private individual in the same position. So far as legal scholarship has dealt with this issue, it is likewise assumed that the Contracting States themselves are likewise able to invoke Art. 17 of the Hague Convention.

2.2.1.2. In its Reply to the Request, the Respondent argues in rebuttal that this jurisprudence cannot simply be transposed to the Hague Convention of 1954 which applies as between Switzerland and Country X; it states that the European Convention on State Immunity of May 16, 1972 (SR 0.273.1) is clear evidence that it was not the assumption of all of the states who were already Contracting States of the Hague Convention of 1954 that the latter should also cover sovereign states; the Hague Convention of 1954 was, the Appellant argues, ultimately transposed (for the signatory states) into the Hague Convention on International Access to Justice on October 25, 1980 (SR 0.274.133), in which the Contracting States had eliminated the ambiguities present in the Hague Convention of 1954; thus, it argues, Art. 14 of the Hague Convention of October 25, 1980, on International Access to Justice (SR 0.274.133; hereinafter: Hague Convention of 1980), which corresponds to Art. 17 of the Hague Convention of 1954 and which covers, *inter alia*, exemption from the duty to pay security for costs, expressly includes legal entities, whereas the Contracting States themselves were not referred to; they did not fall within the scope of the Hague Conventions.

2.2.1.3. This Court is unable to agree.

Art. 17 of the Hague Convention of 1954 corresponds (in terms of its *verbatim* text and contents) to the corresponding Article 17 of the Hague Convention of 1905, and was not changed at all relative to that provision (LEUENBERGER/UFFER-TOBLER, Kommentar zur Zivilprozessordnung des Kantons St. Gallen, 1999, no. 3a with respect to Art. 276 of the ZPO[3]/SG; ANDREAS SCHULZ, in: Münchener Kommentar zur Zivilprozessordnung, 5th ed. 2016, no. 19 with respect to Sec. 110 ZPO). It was already universally recognized and undisputed with respect to the Hague Convention of 1905 that the term 'national' under Art. 17 of the Hague Convention of 1905 covered not only the natural persons with

[3] Translator's note: ZPO is the German abbreviation for the Swiss Code of Civil Procedure

domiciliary rights in the Contracting States, but rather also legal entities under private and public law whose seat or registered office is located in one of the Contracting States (BGE 77 I 42 E. 4b p.48).

No other conclusions can be inferred from the mere fact that the text of Art. 14 of the Hague Convention of 1980 expressly refers also to legal entities in addition to natural persons, but not to Contracting States. This is because the main new feature of that convention relative to the Hague Conventions of 1905 and 1954 consisted of the fact that the focus (in terms of exemption from the obligation to pay security) is no longer on nationality but rather that the natural persons or legal entities referred to appearing in the courts of one (of another) Contracting State have their habitual residence in a Contracting State; thus, the Hague Conventions of 1905 and 1954 did not, for example, speak only of natural persons by contrast with legal entities, but rather spoke in comprehensive terms of "nationals" of the Contracting States (*see* SUTER/VON HOLZEN, in: Kommentar zur Schweizerischen Zivilprozessordnung [ZPO], Sutter-Somm/Hasenböhler/Leuenberger [Eds.], 3rd ed. 2016, no. 21 with respect to Art. 99 ZPO; LEUENBERGER/UFFER-TOBLER, *op cit*., no. 3a with respect to Art. 276 ZPO/SG; ALFRED BÜHLER, in: Kommentar zur Aargauischen Zivilprozessordnung, Bühlmann und andere [Eds.], 2nd ed. 1998, no. 8(f) with respect to Sec. 105 ZPO/AG; LEUCH/MARBACH/KELLERHALS/STERCHI, Die Zivilprozessordnung für den Kanton Bern, 5th ed. 2000, no. 4d with respect to Art. 70 ZPO/BE). It is unsurprising that Contracting States were not expressly exempted from the duty to pay security at the time of the drafting of the Hague Convention of 1980, since the constellation involving a foreign state as a party in civil litigation is not the usual case that the Contracting States may have primarily envisaged, so that it would have been obvious to them to make express provision for such case.

The situation was entirely different at the time of concluding the Treaty on State Immunity. The subject of that treaty was precisely the immunity of contracting states, for which reason it seems obvious that in its drafting, the drafters availed themselves of the opportunity to provide an exemption for the Contracting States from the duty to pay security. Thus, the Respondent cannot derive anything from the fact that in the Convention on State Immunity, exemption of Contracting States from a duty to pay security in court proceedings in another Contracting State was expressly codified for the first time.

In further and other respects, the same applies as the Court in BGE 77 I 42 held previously with respect to the Hague Convention of 1905, specifically that legal scholarship (to the extent that it deals with this issue) unanimously takes the view that Contracting States may, as well, invoke Art. 17 of the Hague Convention of 1954; to the extent that reference is made to BGE 77 I 42, the jurisprudence contained in that case has not been subject to any criticism whatsoever, but rather is reported in a manner which indicates agreement and/or without further comment (*see* POUDRET/SANDOZ-MONOD, Commentaire de la loi fédérale d'organisation judiciaire du 16 décembre 1943, 1992, no. 2.2 with respect to Art. 150 OG p. 103; FRANK/STRÄULI/MESSMER, Kommentar zur zürcherischen Zivilprozessordnung, 3rd ed. 1997, p. 12 with respect to Sec. 73 ZPO/ZH; LEUENBERGER/UFFER-TOBLER, *op cit*, no. 3a with respect to Art. 276 ZPO/SG; LEUCH/MARBACH/KELLERHALS/ STERCHI, *op cit*, no. 4c with respect to Art. 70 ZPO/BE; HANS ULRICH WALDER, Einführung in das internationale Zivilprozessrecht der Schweiz, 1989, p. 244 margin no. 4 and fn. 11; ADOLF F. SCHNITZER, Handbuch des internationalen Privatrechts, Bd. II, 4th ed. 1958, p. 846 fn. 24 referring to confirmatory language in BGE 80 III 149 E. 4a p. 157; GEORGES BROSSET, La cautio judicatum solvi selon l'article 17 al. 1 de la Convention de

La Haye concernant la procédure civile et la jurisprudence du tribunal fédéral, in: Recueil de travaux, publié à l'occasion de l'assemblée de la Société suisse des juristes, à Genève, du 3 au 5 octobre 1969, 1969, p. 7-8.; MAX GULDENER, Das internationale und interkantonale Zivilprozessrecht der Schweiz, 1951, p. 16 fn. 34 [Convention of 1905]; OLAF MUTHORST, in: Kommentar zur Zivilprozessordnung, Stein/Jonas [Eds.], Vol. 2, 23rd ed., Tübingen 2016, no. 24 fn. 35 with respect to Sec. 110 ZPO; GEIMER/SCHÜTZE, in: Internationaler Rechtsverkehr in Zivil- und Handelssachen, Geimer/Schütze [Eds.], 53rd supplemental loose leaf section 2017, Munich 2017, A.I.1.b, fn. 72 with respect to Art. 17 Hague Convention of 1954). The fact that, according to the Respondent's argument, the commentary by the Council of Europe on the Convention on State Immunity referred to application of Art. 17 of the Hague Convention of 1954 to the Contracting States as being doubtful is unable to prevail against that.

2.2.2. The Respondent then argues that, pursuant to jurisprudence of the Federal Tribunal, a state can only invoke the Hague Convention if it is vested with private rights and deals as an equal partner with other parties/entities; however, it states, the present case is not dealing with a dispute under civil law as in the case decided in BGE 77 I 42 in respect of the Hague Convention of 1905, but rather with a question of jurisdiction under the Bilateral Investment Treaty between Country X and Country Y of November 27, 1998, to adjudicate a claim for compensation for wrongful expropriation; Country X is appearing in those proceedings not as an entity vested with private rights/obligations, but rather as a sovereign state; pursuant to Art. 1 of the Hague Convention, it applies only to civil law and commercial matters, and it is obvious that there are no such matters underlying the present proceedings.

The Respondent is likewise unsuccessful with this argument.

It is, of course, true that BGE 77 I 42 E. 4b p. 49 first states that the Hague Convention does not use the term 'national' in contrast with the state as the superordinate body politic, and to the extent the state is an entity vested with private rights and deals as an equal party with other persons or legal entities, it itself is one of its own nationals. However, the Respondent disregards the Swiss Federal Tribunal's further remarks. Thus, one sees further from the cited considerations in BGE 77 I 42 that the Swiss Federal Tribunal deems it to be justified to allow a state which initiates civil proceedings abroad and thus submits to foreign jurisdiction just as a private individual would to enjoy the same benefits a private individual in the same position would have, as well. If, then (as the Federal Tribunal went on to say), any conclusion might be drawn with respect to the contentious question from a French Judgement which was invoked by the Respondent in that case, then in any event it would only be that a state conducting civil litigation abroad should generally be treated as a private individual, i.e. that it was also entitled to claim for itself the same benefits as were granted to private individuals in state treaties (E. 4b p. 49-50.). It clearly follows from this that the Federal Tribunal did not consider the question decisive whether the foreign state was, in the underlying relationship, acting as a body vested with private rights and thus not as a corporate entity vested with sovereign powers; it would indeed create frequent, major difficulties of delineation to differentiate along these lines, and this should be avoided in interlocutory proceedings on security for costs, in order not to pose a risk to expeditious disposal of the case and potentially to pre-empt the final decision on the merits. What, rather, is decisive is whether a state is submitting in civil proceedings to the jurisdiction of foreign courts and/or is being involved in civil proceedings before a

foreign court in which it is being treated as a private party and in which it enjoys no preferential rights at all vis-à-vis its opponent.

This is the case in respect of the Appellant. In the present case, it was involved in an international arbitration before an arbitral tribunal with a Swiss seat. It is pursuing a civil law appeal in civil matters under Art. 77 BGG from the jurisdictional decision of the arbitral tribunal, based on the grounds of appeal under Chapter 12 of the PILA[4] (SR 291). It is thus submitting to the jurisdiction of the courts of a foreign state (in this case: Switzerland) just as a private party does, and may accordingly be charged with costs just as a private party may and occupies the same legal position as private party does.

2.3. The Appellant may thus invoke Art. 17 of the Hague Convention of 1954, for which reason its obligation to pay security for potential party costs based on its lack of a seat or domicile within Switzerland must be left out of consideration.

3.

3.1. In its Request for Security, the Respondent further argues that security for costs in the present case is particularly indicated because the enforcement of court judgements against the Appellant is generally extremely difficult if not in fact impossible; the Respondent argues that the Appellant takes a view of its immunity from enforcement as being comprehensive and is notorious for resisting acts of enforcement, as various events cited by way of example show.

3.2. Art. 62 (2) BGG contains an exhaustive list of the grounds for security (THOMAS GEISER, in: Basler Kommentar, Bundesgerichtsgesetz, 2nd ed. 2011, no. 20 with respect to Art. 62 BGG; BERNARD CORBOZ, in: Commentaire de la LTF, Corboz *et al* [Eds.], 2nd ed. 2014, no. 31 with respect to Art. 62 BGG). As a further, alternative prerequisite to imposing a duty on a party to pay security for potential party costs, Art. 62 (2) BGG – in addition to the lack of a fixed abode within Switzerland – solely cites to that party's proven insolvency. According to the jurisprudence of the Swiss Federal Tribunal, proven insolvency within the meaning of the above-referenced provision will be deemed present if loss certificates or lien loss certificates have been issued against the party in question, if insolvency proceedings have been opened or a composition moratorium has been requested or approved (*see* BGE 111 II 206 E. 1; GEISER, *op cit* no. 22 with respect to Art. 62 BGG, with citations). It is not considered an assertion of illiquidity when a party requesting payment of security for potential litigation costs asserts that the opponent merely lacks a willingness to pay, i.e. a willingness to comply with any potential duty to pay party costs.

The Respondent is not asserting any illiquidity in its arguments, but rather the alleged lack of willingness on the part of the Appellant to pay. In saying this, the Respondent fails to assert a statutory ground for security.

4.

[4] 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.

The Request for Security should thus be dismissed.

Accordingly, the Presiding Judge orders:

1.

The Request for security for costs is dismissed.

2.

The Court will separately set a new time limit for the Respondent and the arbitral tribunal to file a Reply to the Appeal and to comment on the Appellant's Request for a stay of enforcement

3.

This Order is being notified in writing to the parties and the arbitral tribunal, the seat of which is in Geneva.

Lausanne, November 23, 2017

On behalf of the First Civil Courtof the
Swiss Federal Tribunal

Presiding Judge:

Kiss