

Supreme Court decision No. 23893, rendered on 24 November 2015

CL: Republic of Iraq

RS: ARMAMENTI E AEROSPAZIO S.P.A., FINMECCANICA S.P.A., SELEX ES. S.P.A. a FINMECCANICA COMPANY, FIAT CIEI S.P.A. IN LIQUIDAZIONE (controricorrenti) and BANCA INTESA S.P.A., RAFIDAIN BANK, SO.GE.PA SOCIETA' GENERALE DI PARTECIPAZIONI S.P.A. (intimati)

Headnote

The Supreme Court rules on the invalidity of an arbitration agreement facing embargo.

Summary

Facts of the case

In 1983 Agusta S.p.a. (today Finmeccanica S.p.a., hereinafter Finmeccanica) – as the Seller - and the Iraqi Government and Ministry of Defence – as the Buyer - signed a Contract for the sales of 5 helicopters. According to the said agreement, the Seller issued a bank guarantee for the amounts paid as advanced deposits of the price. The Contract contained an arbitration clause providing (i) for the parties to act in good faith, then (ii) for a contractual definition of any dispute (so called “arbitrato irrituale”), and finally, in case of failure of the above mentioned provision, (iii) for arbitration in Paris under the ICC Rules.

In 1986 the Buyer failed to pay one of the agreed instalment, therefore the helicopters were not delivered. In 1990, following Iraq’s invasion of Kuwait, the UN and the European Economic Community CEE (Comunità economica europea) ordered an embargo on Iraq. Consequently, in 1991 the Seller filed an action before the Court of First Instance (Tribunale) of Busto Arsizio, Italy, against the Iraqi Government and Ministry of Defence, Rafidain Bank and Banca Commerciale Italiana, in order to ascertain and declare the termination of the contract, which could not be performed because of the Buyer’s conduct; the Seller also claimed for damages and for a declaration that any bank guarantees were annulled.

Firstly, the Iraqi Government and Ministry of Defence and Rafidain Bank did not appear before the Court. After the first hearing took place, Respondents filed their statement of defence and raised an objection for the lack of jurisdiction of the Italian Court on the ground of Iraq’s sovereign immunity; subordinately, they grounded their objection on the fact that the contract contained an arbitration agreement.

On 18 November 2003 the Court of First Instance declared that the Seller’s claims could not proceed because of the existence of the arbitration agreement.

On the contrary, the Seller filed other claims before the Court of Appeal of Milan, which - by its decision rendered on 27 December 2012 - ordered the termination of the contract on the ground that its performance became impossible (“impossibilità sopravvenuta”) because of Iraq’s conduct, which was consequently condemned to pay damages in favor of Claimant. The Court of Appeal reasoned *inter alia* that, despite the arbitration clause, the subject matter of the dispute was not capable of settlement by arbitration in view of the international sanctions against Iraq, therefore the arbitration clause could no longer be performed; in this regard, the Court of Appeal pointed out that its decision was not altered by the revocation of the embargo, since the termination did occur by the moment when the action was filed. The Court of Appeal further considered that the parties’ Contract was a *jure privatorum* agreement, and Iraq performed no *jure imperii* act, so that no sovereign immunity exception could be raised. On the contrary, the Court considered that Claimant’s request to declare the termination of the Contract was well grounded, since the impossibility to perform was due to Iraq’s offensive behavior, which determined the international sanctions.

the Iraqi Government and Ministries (hereinafter, Iraq) brought a recourse against the Court of Appeal's decision before the Supreme Court.

Arguments of the Parties

Iraq's recourse was grounded *inter alia* on (i) the fact that the Court of Appeal's decision was in contract with international law on sovereign immunity of States, (ii) as well as with Article 2, Para. 1 and 3, of the New York Convention, as the Italian Court could not examine either the merits of the claims, or the validity of the arbitration agreement, the latter being separable from the main contract; furthermore, (iii) the Court's decision violated French law, which should apply to the arbitration agreement, as well as (iv) the international rules of law, since the embargo did not impact on parties' right to refer their disputes to arbitration.

Finmeccanica filed an opposition against Iraq's recourse, rebutting that it was prejudicially affected by the following arguments: (a) Iraq had never properly applied the dispute resolution clause provided for by the Contract, as it had never made any mediation attempt, nor any attempt for a contractual definition of the dispute; (b) besides, Iraq filed a counterclaim before the Italian State Court, therefore it should be considered to have withdrawn from the arbitration agreement; and finally (c) Iraq's ground of recourse should not be accepted as it was new, and it had never been raised in the previous State court proceedings, therefore it was untimely.

Judgment of the Court

The Supreme Court considered Finmeccanica's arguments (a) and (b) to be ill-grounded. Indeed, the Supreme Court reasoned that any lack of the mediation attempt or of a contractual definition of the dispute does not affect the issue of jurisdiction, while it may impact on the admissibility of any claim. Also, the Supreme Court could not detect in the reasoning of the Court of Appeal's decision that a counterclaim was filed: Finmeccanica should have supported its opposition by submitting all the extracts from the parties' previous and respective briefs that were necessary to prove its objection, so that the Supreme Court could have found that the counterclaim was not filed in the alternative of Iraq's objection on jurisdiction.

Still, the Supreme Court observed that Iraq grounded its objection on jurisdiction before the Court of First Instance and the Court of Appeal on the existence of the arbitration agreement and on its sovereign immunity. On the other hand, Iraq appeared to have added grounds (ii) and (iii) before the Supreme Court for the very first time. While Iraq remained initially absent from the proceedings before the Court of First Instance, so that the Court should have detected its own lack of jurisdiction *ex officio*, Iraq then filed a full statement of defence which did not contain arguments (ii) and (iii), therefore it must be considered to have accepted Italian State Court's jurisdiction.

The Supreme Court also dismissed Iraq's argument based on its sovereign immunity, since the parties entered a sales agreement, and they signed it thanks to their respective contractual autonomy (*jure privatorum*). In the Court's opinion, the fact that the helicopters were bought in view of a public purpose (they were to be used by Iraq in an international conflict) does not per se cover this sales Contract with the aura of a sovereign act.

As for Iraq's procedural objection on the New York Convention and the application of French law, the Supreme Court considered it to be ill-grounded. The Court reasoned that the arbitration agreement, which was originally valid, then became null because the parties could no longer settle their dispute through arbitration because of the UN and CEE embargos. The Court further considered that the super national nature of the international sanctions implied that no private judge (i.e. arbitrator) could ascertain the validity or the invalidity of the arbitration agreement.

The Court dismissed also Iraq's argument that in any case French law should have been applied to the arbitration agreement, which provides for any State court to refer the parties to the arbitrators when facing an arbitration agreement unless it finds that the said agreement is manifestly null or inoperative. The Court reasoned that *jus superveniens* should prevail on the parties' contractual determinations. The Supreme Court pointed out that the same principle applies to Iraq's argument based on the New York Convention: no violation of the New York Convention occurred, as a subsequent and imperative international public policy provision was issued, and it prevented the performance of the Contract between the Italian Seller and Iraq, therefore overcoming any specific rules contained in the contract, both on the merits and on the procedure. Iraq's objection on the Italian State Court's jurisdiction was untimely, as it was first filed before the Supreme Court, while the Court of Appeal correctly rendered its decision by applying its own rules and by making reference to Article II, Para. 1, of the New York Convention, providing for the recognition of an arbitration agreement as long as the subject matter of the difference is capable of settlement by arbitration, and unless the Court finds that the said agreement is null and void, inoperative or incapable of being performed, as for the case at hand.

Furthermore, the Supreme Court observed that the arbitrability of the disputed is not recovered by the revocation of the embargo. Embargo was not an interim measure, nor it intended to make a stay of the pending commercial relationships; while, the international sanctions affected the admissibility of any arbitration. Consequently, the Supreme Court dismissed the recourse and referred the decision on the merits of the case to its Civil Session.