

Docket no. 12.2002.121	Lugano 2 April 2003/fb	In the name of the Republic and the Canton of Ticino
Second Civil Chamber of the Court of Appeal		

Members of the Court: Cocchi, Presiding judge,
Chiesa and Epiney-Colombo

Clerk: Cernecca-Cassayianni, Deputy clerk

Ruling on a decision, docket no. LA.2002.43, issued by the First Instance Court of the District of Lugano, Section 4 regarding a request for eviction filed on 18 February 2002 by

represented by _____, Attorney-at-law

versus

Represented by _____, Attorney-at-law

As well on the latter's challenge to the termination notice of 2 January 2002 filed before the Lugano Rental Conciliation Bureau and deferred to the First Instance Court pursuant to Art. 274g CO¹.

And now on the objection to the court's jurisdiction on the ground, raised by defendants _____ and dismissed by the First Instance Court in a decision of 20 June 2002, that there was an arbitration agreement.

The appellants, those same defendants, in their appeal of 1 July 2002 request that the first decision be reformed in the sense that the objection be admitted and the eviction proceedings consequently be dismissed, whereas the appellee, in submissions dated 2 August 2002 requests that the appeal be denied.

Having read and examined the case documents.

¹ Codice delle obbligazioni. Code governing Debt

Considering

<p>in fact and in law</p>	<p>1.</p>	<p>_____ obtained from _____, the rental of an apartment located in via _____/via _____ to _____ with a lease dated 26 February 2011 for an initial period from April 2001 to March 2006 and an annual rent amount of CHF 38,400 to be paid in quaterly instalments of CHF 9,600, as well as a parking spot within the buildings parking garage; use of the apartment was exclusively reserved for spouses _____ and _____. At the time, _____ was a partner through other companies and CEO of Italian company _____.</p> <p>Then, on 1 May 2001, _____ sublet this same apartment to _____, until 1 May 2004 for rent of CHF 3,600 per annum to be paid in two half-yearly instalments.</p>
	<p>2.</p>	<p>On 6 June 2001 _____, at _____, entered into a private agreement with the other partners of _____, and with _____, in which he undertook to transfer his capacity as partner to other persons yet to be identified and resigned from all his functions within _____.</p> <p>The same agreement, to the extent relevant here, _____, stated that “_____ is not required to pay any further fee for his residence in _____” and that any dispute regarding those agreements would be resolved by the decision of an arbitral tribunal composed of three arbitrators empowered to decide <i>ex bono et aequo</i>, and also included a description of the procedure for the appointment of arbitrators.</p>
	<p>3.</p>	<p>In a letter dated 17 October 2001, _____ demanded payment from spouses _____ of rent, for which the payment deadline had passed, in the amount specified in the main lease, but the latter only paid CHF 1,800 which was the amount stipulated in the sublease. On 5 December 2001, _____ gave them notice of lease termination for non-payment effective 31 January 2002.</p>
	<p>4.</p>	<p>_____ and _____ challenged the termination notice on 2 January 2002 before the Rental Conciliation Bureau, while, on 18 February 2002 _____ filed for the eviction of the subtenants before the First Instance Court of Lugano.</p> <p>During the hearings before the Court, spouses _____ objected to that Court’s jurisdiction, stating that by virtue of the arbitration</p>

		<p>clause contained in the private contract relating to the agreement of the partners in _____ and _____, jurisdiction to rule over the dispute did not lie with a domestic court but with an arbitral tribunal.</p> <p>With the decision of 20 June 2002 appealed here, the First Instance Court dismissed the objection and upheld its jurisdiction over the matter. It held that the arbitral clause had been validly agreed, that it also applied to the rental dispute but deduced, from the fact that spouses _____ directly seized the Conciliation Bureau, that they had waived the agreement.</p>
	5.	<p>In the present appeal, spouses _____ challenge the First Instance Court's subject-matter jurisdiction over the rental as they consider that the lease was not just an ordinary lease agreement but also a substantial component of benefit, meaning that it was not just a simple lease agreement that could be submitted before a Court deciding on eviction matters. Moreover, they criticise the Court's finding that they had implicitly waived their right to arbitration, on the grounds that they challenged the notice before the Rental Conciliation Bureau.</p> <p>The appellees' submissions seeking dismissal of the appeal shall, where necessary, be discussed in the following recitals.</p>
	6.	<p>The ground relied upon by the appellants regarding the lack of subject-matter jurisdiction is not founded. In fact, in proceedings regarding eviction, the validity of the notice of termination on the grounds of non-payment must be ascertained. That is the subject-matter of the dispute over which the First Instance Court undoubtedly has jurisdiction; according to the procedural rule set forth in Art. 247 CO stating that if the tenant challenges, as is the case, an extraordinary notice of termination while eviction proceedings are pending against it, the Court having jurisdiction over the eviction proceedings also rules on the challenge to the notice of termination.</p> <p>Then, if the agreement binding the two parties cannot be considered to be a mere lease agreement, if the amounts claimed for non-payment are not identifiable as corresponding to rent or if there are other grounds excluding the tenants from being in arrears, the Court examining the eviction request shall decide these matters in the relevant ruling, while these arguments which could lead to the denial of the eviction request, cannot undermine the court's</p>

		jurisdiction.
	7.	<p>In their second ground, the appellants, reiterating the validity of the arbitration clause, as admitted by the First Instance Court, hold that their involvement of the Rental Conciliation Bureau, in a matter of its remit, did not deprive them of the possibility to rely on the arbitration agreement, such that an ordinary court would not have jurisdiction over the matter.</p> <p>The tenants' theory is tenuous and inconsistent as their own arguments show. These infer that the arbitration agreement, contained in the private agreement entered into in _____, on 6 June 2002 (doc. E), is not applicable to _____. Indeed, in the appeal (point 1, pg. 5) it is stated that that agreement, to which _____ was not even a party, did not concern an amendment to the sublease agreement. And if _____ was not a party to it, as he indeed was not, he can obviously not be bound by an arbitration agreement to which he did not consent and the validity of which is contingent on it being in written form, requiring the signatures of all parties bound by it or an exchange of written correspondence (Art. CIA, Art. 178 PILS, Art. II n. 1 and 2 New York Convention of 10 June 1958), at least as proof of its existence. Already for this reason, in the absence of any proof that _____ consented to that arbitration clause, a situation not mentioned in the objecting party's statements, disputes relating to the sublease agreement of spouses _____ do not, even if they could, escape the jurisdiction of the Courts.</p>
	8.	<p>However, even if the arbitral agreement had validly been entered into by both parties in this dispute, it could still not be taken into consideration. Eviction proceedings are not arbitrable as they fall under the imperative jurisdiction of the courts (COCCHI/TREZZINI, CPC-TI, at Art. 506 no. 20 and 21). Even the mere preliminary issue of the validity of the notice of termination, in this case regarding the rental of residential premises, cannot be decided by way of arbitration. Art. 274c CO precludes this and states that, with regard to residential premises, parties may not grant jurisdiction to arbitral tribunals designated in agreements to the exclusion of conciliation authorities or of the courts. This provision, even if there were to be elements governed by international law in play which has not been proven, would be applicable to an international dispute as it concerns a building located in Switzerland and which serves as a residence for a tenant</p>

