

Unofficial translation

Federal Tribunal
Federal Tribunal

{T 0/2}
4A_436/2007

Decision of 9 January 2008
1st Civil Law Chamber

Members of the Court
Judge Corboz, President, Judges Rottenberg Liatowitsch and Kolly.
Clerk: M. Thélin.

Parties in the proceedings
X. _____ ,

respondent and appellant, represented by Mr Jean-Luc Herbez, versus

H.Y. _____ ,
claimant and appellee, represented by Mr Damien Bonvallat.

Object

Civil procedure, objection to arbitration

appeal against a decision rendered on 14 September 2007 by the Court of Justice of the Canton of Geneva.

Facts:

A.

X. is an attorney in Geneva. In 1997, H.Y. and spouse, both French, domiciled in France and wanting to move to Geneva consulted Ms X. In a proxy signed by the couple on 11 July 1997, the attorney was mandated to "undertake any action necessary for domiciliation (B permit) in Geneva." The text, printed in advance, stated in bold type the following clause:

For any dispute resulting from the present mandate, the client and attorney declare that they expressly accept the jurisdiction of the Taxation Committee for attorney's fees, seated in Geneva in its capacity as arbitral tribunal, pursuant to Article 46 of the Geneva law governing the legal profession.

Following Ms X's actions, the spouses Y. obtained residency permits in Geneva and they also obtained local taxation at an annual amount of CHF 200,000. They moved to Geneva end 1997.

During the course of 1998, the Y. spouses consulted Ms X. in order to ascertain whether the purchase of property in Geneva - two apartments for a total cost of CHF 2,420,000 - would increase their rate of taxation. The attorney said it would not; nonetheless, subsequent to the purchase, the tax authorities re-evaluated the Y. spouses' annual amount at CHF300,000.

B.

On 19 October 2006, H.Y., who was widowed in the meantime, filed a suit against X. before the First Instance Tribunal of the Canton of Geneva. H.Y. sought payment of damages in the amount of CHF 46,808; he argued that the respondent had provided him with inaccurate information and that he had suffered damage, in the form of additional taxation, equal to that amount. From the outset, the respondent submitted claims that the request be held inadmissible; arguing that the court did not have jurisdiction, the respondent relied on the arbitration agreement entered into by the claimant on 11 July 1997, designating the Taxation Committee for attorney's fees as arbitral tribunal.

The First Instance Tribunal rendered a decision on 8 February 2007; it upheld its jurisdiction and dismissed the objection to arbitration. It held that the clause relied upon by the respondent concerned the client's debt for attorney's fees and did not include any of the former's claims in the event of misperformance of the attorney's mandate.

As the respondent appealed to the Court of Justice, the Court rendered a decision on 14 September 2007. It upheld the decision. While, contrary to the first court's opinion, the arbitration clause also concerned claims other than the outstanding fees, the ascertainment of the fiscal impact of the purchase of apartments was not covered by the mandate of 11 July 1997, which only covered the clients' domiciliation in the Canton of Geneva.

C.

Acting through a civil law appeal, the respondent requested that the Federal Tribunal reform the Court of Justice's decision such that the First Instance Tribunal be held not to have jurisdiction over the appeal; in the alternative, it requested that the decision be overturned and that the case be referred back to the Court of Justice for a new ruling. The claimant requested that the appeal be dismissed.

In law:

1.

With regard to Art. 92 para. 1 LTF, the Court of Justice's decision is an incidental decision concerning the jurisdiction of the First Instance Tribunal according to this provision and it may be appealed. Moreover, the appeal is brought against a decision handed down in civil matters (Art. 72 para. 1 LTF) and at the highest Cantonal level (Art. 75 para. 1 LTF). The amount in dispute exceeds the legal minimum of CHF 30,000. (Art. 51 para. 1 let. c and 74 para. 1 let. b LTF). The appeal was brought by a party having unsuccessfully participated in the previous proceedings (Art. 76 para. 1 LTF). As it was submitted in time (Art. 100 para. 1 LTF) and in compliance with formal requirements (Art. 42 para. 1 to 3 LTF), the appeal is, in principle, admissible. An appeal may be brought in the event of a breach of Federal Law (Art. 95 para. a LTF). The Federal Tribunal automatically applies this law, save for fundamental rights (Art. 106 LTF). It is not bound by the parties' arguments and is free to evaluate the legal scope of the facts. However, it usually restricts itself to legal questions raised by the petitioner in compliance with the legal requirements for grounds for appeals (Art. 42 para. 2 LTF; ATF 133 II 249 recital 1.4.1 p. 254) and does not rule on breaches of fundamental rights unless it is petitioned to rule on a claim raised and reasoned in a detailed manner (Art. 106 para. 2 LTF; same decision, recital 1.4.2). It thus holds its legal reasoning on the basis of facts observed against the challenged decision (Art. 105 para. 1 LTF).

2.

Pursuant to Art. 7 of the Federal Statute on Private International Law (PILS; RS 291), Swiss domestic Courts must decline jurisdiction when the dispute before them is arbitrable and where the parties have entered into an arbitration agreement covering that dispute. In the various situations, provided in Art. 7 let. a - c PILS, domestic arbitral tribunals uphold their jurisdiction notwithstanding the existence of an arbitral agreement; this is particularly true where the court observes that the agreement is void, inoperative or non-applicable. (Art. 7 let. b PILS).

The previous judges held that, in this case, an arbitration agreement was entered into by the parties on 11 July 1997; that as the spouses Y. were domiciled in a foreign State at the time, this agreement concerns international arbitration, according to Art. 176 para. 1 PILS, and that, as the seat of the arbitral tribunal was to be in Switzerland, the objection raised by the respondent does not fall under Art. II ch. 3 of the 1 let b of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention, RS 0.277.12). Lastly, this objection is governed by Art. 7 PILS mentioned above. These points are not challenged and there is thus no reason to discuss them further.

3.

The respondent alleges that the Court of Justice breached Art. 7 let. b PILS in holding that the arbitration agreement did not cover the appeal filed against it on 19 October 2006. According to its title, the agreement signed on 11 July 1997 covered "all disputes resulting from the present mandate" regarding "all necessary action with a view to domiciliation (B permit) in Geneva". The expression "any action" is very vague but nonetheless one can hold that the mandate was accomplished at the latest when spouses Y obtained their residency permits and moved to Geneva. In fact, their expected outcome was reached. During the course of the year 1998, when inquiring as to the impact of the property purchases on their taxation, the spouses Y. once again entrusted the respondent with a mandate. This additional task was related to the initial mandate concerning the domiciliation of those same individuals in Geneva, as the attorney knew of their tax position for having personally negotiated with the competent authorities. Nonetheless, the initial mandate had been completed. The respondent thus had a new separate mandate to fulfil which was not that designated in the agreement of 11 July 1997. Thus, and pursuant to the decision of the Court of Justice, the agreement did not cover the current dispute regarding the allegedly incorrect performance of the new mandate. According to case law relating to Art. 7 let. b PILS, with a view to holding that in this case the arbitration agreement was void, inoperative and non-applicable, the domestic court merely conducted a summary assessment of this agreement as, in principle, only the arbitral tribunal designated in the agreement may perform a more in-depth

assessment (ATF 122 III 139 recital 2b p. 142; Werner Wenger and Markus Schott, Commentaire bâlois, 2nd ed., ch. 7a and 7b ad Art. 186 PILS). It would seem that this also concerns whether the agreement covered the parties' dispute. The respondent wrongly challenged the Court of Justice for having disregarded the restrictions of a summary assessment. It is clear, without an in-depth study, that the agreement of 11 July 1997 did not cover the dispute relating to the information given by the respondent in 1998 concerning the tax repercussions of the purchase of property; a summary assessment is quite sufficient for that purpose. The ground based on Art. 7 let. b PILS is thus unfounded.

4.

The respondent maintains that it was not given the opportunity to comment on the Court of Justice's legal reasoning and argues that Art. 29 para. 2 Cst was breached.

The right to be heard guaranteed in this constitutional provision gives all persons the right to make their case before a decision is made against them, to access the case file, to submit evidence regarding facts which can influence the decision, to participate in the administration of evidence and to communicate their position with regard to it (ATF 129 II 497 recital 2.2 p. 504; 127 I 54 recital 2b p. 56; 126 I 97 recital 2b p. 102). Generally speaking, it is not mandatory for the person concerned to be invited to comment on the legal evaluation of facts nor, more generally, on the legal reasoning to be held. However, the court must request the person's input when it considers founding its decision on a legal rule or ground not raised during the proceedings, when neither party availed itself thereof, nor could estimate its relevance (ATF 115 Ia 94 recital 1b p. 96/97; see also ATF 131 V 9 recital 5.4.1 p. 26; 129 II 497 recital 2.2 p. 505).

In applying Art. 7 PILS, the First Instance Tribunal focused its assessment on whether the arbitration agreement concerned the dispute between the parties. The respondent's appeal regarded that very legal issue. The appellant could and should have anticipated that the Court of Justice would potentially discuss, in addition to the scope of the words "all disputes" in the agreement, the words "the present mandate". It cannot, in good faith, claim to be surprised by the Court's reasoning. Thus, the ground set forth in Art. 29 para. 2 Cst is also bound to fail.

5.

As the unsuccessful party, the respondent must bear the fees owed to the Federal Tribunal and any expenses the other party may claim to have incurred.

For these reasons, the Federal Tribunal:

1.

The action is dismissed.

2.

The respondent will pay the Court fees of 2,000 francs 3.

3.

The respondent will pay compensation of 2,500 francs to the claimant for expenses.

4.

Copies of the present decision are communicated to the parties' representatives and to Court of Justice of the Canton of Geneva.

Lausanne, 9 January 2008 In the
name of the 1st Civil Law Chamber of
the Swiss Federal Tribunal

President

Clerk:

Corboz Thélin