

Heading

122 III 139

29. Decision of the 1st Civil Chamber of 29 April 1996 in the case of M Foundation versus Bank X (appeal – *recours en réforme*)

Summary

Jurisdiction in international matters; objection to arbitration (**Art. 7 let. b PILS**).

When an objection to jurisdiction is raised before a domestic court in favour of an arbitral tribunal seated in Switzerland, that Court must decline jurisdiction if its summary assessment of the arbitral agreement does not show it to be void, inoperable or non-applicable.

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On 23 January 1990, the heirs of the late C. entered into an agreement regarding the deceased's finances held by two foundations under Liechtenstein law, which had been transferred to Bank X in Geneva. In the agreement, it was decided that the assets of both foundations would be split into equal parts and that one of those parts would be allocated to a new foundation under Liechtenstein law, M Foundation, of which the beneficiary would be Mr C., son of the deceased.

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According to Art. 6 of said convention, Mr L, a Geneva lawyer and director of Bank X since January 1989, was, *inter alia*, mandated to set up M Foundation. Art IV of the foundation's auxiliary bylaws provided that said bank would be appointed as controlling body of the foundation.

By a mandate contract entered into at the same date between the two representatives of the heirs mentioned above, Mr L was invited to set up M Foundation and to appoint Bank X as controlling body. Art VI of the contract stipulated that the mandate would be governed by the rules of the Geneva bar association found on the proxy signed by the representatives of the heirs.

On 25 January 1990, M foundation, of which the creation was underway, represented by Mr L and Bank X signed an agreement in which the bank was appointed controlling body and would receive in payment of such, CHF 6,000 per annum debited from M Foundation's bank account. The agreement of 25 January 1990 moreover, contained the following clause:

"For any dispute, the parties agree to turn to a sole arbitrator appointed by mutual agreement and, failing that, by the President of the Court of Justice of the Canton of Geneva. Swiss law shall apply."

In February 1993, the attorney of M Foundations' board members instructed Bank X to transfer all of the Foundation's assets to Bank Y in Geneva. At the end of that month, the bank complied. The statement of M Foundation's account at Bank X showed that a total amount of CHF 44,605 was debited, of which CHF 24,000 covered the controlling body's fees. The foundation challenged the validity of the transactions and unsuccessfully requested that Bank X pay it said amount.

On 9 March 1994, M Foundation sued Bank X before domestic courts in Geneva, seeking payment of the aforementioned CHF 44,605, plus interest. In its reply, the respondent raised an objection to arbitration requesting that that court decline material jurisdiction and rule on the request for the restitution of the CHF 24,000 francs for the payment of the controlling body included in the overall claim.

In a decision of 1 March 1995, the First Instance Tribunal of the Canton of Geneva found in favour of the respondent. On M Foundation's appeal, the Court of Justice of the Canton of Geneva:

upheld this ruling in a decision of 28 September 1995.

M Foundation filed an appeal for reform with the Federal Tribunal. It requests that the court hold that Liechtenstein law was exclusively applicable to the issue of whether it is bound by the agreement of 25 January 1990 containing an arbitration clause, and that the case be referred to the Court of Justice for it to assess the validity of the clause under that law before ruling on its material jurisdiction. In the alternative, the claimant requests that it be held that it was not bound by the agreement including the arbitration clause, such that the Geneva domestic courts do have material jurisdiction to rule over all the entire dispute and, consequently, that the dispute be referred to the Court of Justice for it to order a substantive examination.

The respondent suggests that the appeal be dismissed and the challenged decision upheld.

Recitals

Recital in law:

1. The decision was rendered by the Supreme Court of the Canton during a civil law appeal to the value of CHF 8,000. The challenged decision, which puts an end to the procedure yet does not rule on the claimant's action, constitutes an incidental decision which is separate from the merits, pursuant to **Art. 49 para. 1 OJ** (recital 1, unpublished, if **ATF 121 III 38**; POUDRET, COJ, n. 1.2 ad Art. 49, p. 327 in fine). As the claimant argued a breach of a federal rule on material jurisdiction (**Art. 7 let. b PILS**; RS 291), its appeal for reform is admissible by virtue of the cited provision.

2. The cantonal court rightly based its decision on jurisdiction on **Art. 7 let. b PILS**. The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards ((RS 0.277.12) is not applicable in this case as the future arbitral tribunal would be seated in Switzerland (see, on this topic, WERNER WENGER, in: Kommentar zum schweizerischen Privatrecht, Internationales Privatrecht, Basel, n. 7 ad **art. 7 PILS**). As for the Agreement between Switzerland and Liechtenstein on the Recognition and Enforcement of Judicial Decisions and Arbitral awards in Civil Matters (RS 0.276.195.141), it does not contain any specific provisions on objection to arbitration

contrary to the New York Convention (Art. II para. 3). Thus the Federal Private International Law Statute of 18 December 1987 is applicable to the objection to arbitration raised by the respondent (**Art. 1 para. 1 PILS**).

b) According to **Art. 7 let. b PILS**, if parties enter into an arbitration agreement regarding an arbitrable dispute, Swiss courts shall decline jurisdiction unless they observe that the arbitration agreement is void, inoperative or non-applicable. This provision allows domestic courts to conduct a preliminary examination of the validity of an arbitration agreement in order to rule on their jurisdiction. This leads to the controversial question of the domestic courts' power of examination.

It is generally accepted that when a domestic court rules on an objection to arbitration and the arbitral tribunal is seated in Switzerland, the court merely conducts a summary assessment of the *prima facie* existence of an arbitration agreement, so as not to prejudge the decision before the arbitrators have ruled on their own jurisdiction (BERNARD DUTOIT, Commentaire de la loi fédérale du 18 décembre 1987, n. 1 ad art. 186; LALIVE/POUDRET/REYMOND, Le droit de l'arbitrage interne et international en Suisse, n. 16 ad **Art. 186 PILS**). The Federal Tribunal shares this point of view. In a recent decision the 1st Civil Chamber stated that if the seat of an arbitral tribunal is abroad and if an objection to arbitration is raised, Swiss domestic courts must rule with full powers of examination; it added that the opinion of the aforementioned authors could not be endorsed to the extent that the issue of jurisdiction is decided as a last resort by domestic courts petitioned to rule on the arbitral tribunal's jurisdiction, which implies that the arbitral proceedings in question must be governed by the Swiss concordat on arbitration or the Federal Private International Law Statute (**ATF**

121 III 38 recital (ATF 121 III 38 recital 2b p. 42, which refers to the opinion of PAUL VOLKEN, IPRG-Kommentar, no. 26/27 ad art. 7).

WERNER WENGER (*op.cit.*, n. 6/7 ad **Art. 186 PILS**), contrary to the above-mentioned authors and the Federal Tribunal, believes that a domestic court deciding on an objection to arbitration, pursuant to Art. 7 PILS, must proceed to conduct an unrestricted assessment of the validity and scope of the arbitration agreement even if the future arbitral tribunal is to have its seat in Switzerland. This author states that a decision in which a domestic court declines jurisdiction does not necessarily award jurisdiction to an arbitral tribunal, as the recognition of the validity of an arbitration agreement

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is just a ground on which the domestic court declines its jurisdiction and is not *res judicata*.

There is no decisive reason for the Federal Tribunal to change its point of view, even if expressed in an *obiter dictum*. Not only is this point of view in line with the dominant doctrinal opinion, it also corresponds to **Art. 7 let. b PILS** (as well as Art I para. 3 of the New York Convention), which prescribes that a domestic court (“shall”) decline jurisdiction when there is an arbitration agreement, unless it is void, inoperative or non-applicable. Yet such observation cannot be reasonably made unless it appears evident, without an in-depth examination of the matter as, in any event, if it is not evident, the arbitral tribunal may rule, if necessary, on its jurisdiction pursuant to **Art. 186 PILS**, if the arbitral tribunal is seated in Switzerland.

Thus, it must be accepted, in line with the view expressed in the aforementioned decision, that if a domestic court is petitioned to rule on an objection to arbitration and if the arbitral tribunal is seated in Switzerland, that court shall decline jurisdiction if the summary assessment of the arbitral agreement does not show that it is void, inoperative or non-applicable.

c) The disputed arbitration agreement appears perfectly valid and does not, as far as a *prima facie* assessment can ascertain, obviously demonstrate characteristics amounting to it being void, inoperative or non-applicable. The physical persons wishing to create M Foundation entrusted Mr L, by contract of 23 January 1990, with a mandate to setup up said foundation and to appoint Bank X as controlling body. In this contract, they stated that the performance of the mandate was governed by the rules of the Geneva bar association, as they appear on the copy of the “proxy” appended to said contract. These rules, which appear on the proxy of that same date, grant very broad powers to Mr L, including the power to enter into arbitration. Then, in a contract dated 25 January 1990 entered into by Bank X, this lawyer, acting on behalf of M Foundation on the basis of the mandate, appointed Bank X controlling body of the foundation and established the means of the Bank’s remuneration. The challenged arbitral clause was included, in capital letters, in the latter contract.

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With the existence of such a clause, which was perfectly clear and signed by a representative with power to do so, the domestic court could without hesitation accept the *prima facie* existence of an arbitration agreement; it did not need to then assess whether Liechtenstein law, upon which M. Foundation relied, restricted the powers expressly awarded to the representative by virtue of a proxy governed by Swiss law, according to its own text. Asking more of the domestic courts would amount to instrumentalising **Art. 7 PILS** to paralyse arbitral proceedings.

Thus it was rightly and without breaching this provision that the first court declined its jurisdiction and the cantonal court approved its decision. The claimant’s action must thus be dismissed.