

1ST CIVIL CHAMBER

26 January 1987

Members of the Court: Messr. Raschein, President; Leu and Bourgknecht, judges. Clerk: Mr Carruzzo

Ruling on the public law appeal filed by

1) _____

2) _____

3) Company _____, represented by Mr Georges-F Perréard,
attorney,

Against

the decision handed down on 15 July 1986 by the First Chamber of the Court of Justice of the Canton of Geneva in the dispute between the appellants and 1) company _____ SA and 2) _____, represented by Mr Jean-Louis Crochet, attorney;

(Art. 4 and 58 Cst; New York Convention; Intercantonal concordat on arbitration; action for legal declaration regarding arbitrators' jurisdiction)

Recital in law:

1. Subject to the exceptions for which the conditions are not met in the case at hand, a public law appeal may not seek to overturn the challenged decision (ATF 111 Ia 46/47 recital L c, 110 II 252 recital 2 c and cited decisions). Thus, the appellants' submissions requesting that the Federal Tribunal itself proceed with certain declarations and that it remand the case to the cantonal court are thus inadmissible.

2. In a first series of grounds, the appellants challenge the Court of Justice for having restricted its assessment to the appearance of an arbitration agreement. According to them, such restriction which was neither based on the New York Convention of 10 June 1958 for the Recognition and Enforcement of foreign arbitral awards (RS 0.277.12 ; hereafter : “the Convention”), nor on the guarantee of a natural judge, pursuant to Article 58 Cst., nor the Intercantonal concordat on arbitration (CIA), constitutes a denial of justice.

a) The appellants consider that the Court of Justice breached Art. II ch. 3 of the Convention which granted full and total jurisdiction to domestic courts for the purposes of declaring that an arbitration agreement is “void, inoperative or non-applicable”.

The provision relied upon does not bear the meaning or scope that the appellants attribute to it. It states the following: “The Court of a contracting State when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration unless it finds that said agreement is null and void, inoperative or incapable of being performed”. This provision only applies to situations in which a domestic court is seized of a dispute which should have been submitted to arbitrators (for an example of application, see ATF 111 II 62 et. seq.); it does not concern actions for legal declarations regarding the jurisdiction of arbitrators. Contrary to the appellants’ arguments, it does not impose the jurisdiction of domestic courts to declare the inexistence of an arbitration agreement. The Convention does not exclude the possibility of one party relying on the inexistence or non-validity of an arbitration agreement before national courts in an action for legal declaration, but it does not prescribe that this means and thus leaves it up to courts to decide whether they would rather let the arbitrators rule on their own jurisdiction first (see Sanders, Convention de New York, in Arbitrage international commercial, publication de l’Union internationale des avocats, 1960, vol. 2, p. 306). The aforementioned provision was thus not breached in this case.

b) Neither did the Court of Justice disregard the guarantee of a natural judge under Art. 58 Cst in restricting its assessment to the appearance of an arbitration agreement, as it did not breach any legal or constitutional rule of jurisdiction.

In the other cantons having signed the concordat, as in Geneva, Art. 8 CIA grants the arbitral tribunal jurisdiction to rule on its own jurisdiction “if the validity of arbitration agreement or its content or scope” are challenged before it. The Federal Tribunal

may have admitted that a party cannot be obliged to plead the issue of arbitral jurisdiction before the arbitrators, even where there is not even the appearance of an arbitration agreement (decision D. ____ c. E. ____ td, of 14 November 1979, published in SJ 1980 p. 444/445). However, as there is an undeniable appearance of an arbitration agreement in this case, despite the appellants' challenges to it, the situation is not that reserved by the Federal Tribunal, such that Art.8 CIA is applicable. In this situation, the cantonal Court did not breach Art. 58 Cst when it upheld its jurisdiction.

c) The appellants' grounds of a denial of justice have no scope of their own and they are linked to the grounds of a breach of the New York Convention and Art. 58 Cst; thus they cannot but be dismissed similarly to this ground.

3. a) In a second series of grounds, the appellants argue that rules of the CIA were breached. Their arguments are based on the absence of an arbitration agreement as well as a clause granting jurisdiction to the ICC.

d) These grounds are inadmissible. As mentioned above, the cantonal court declined jurisdiction to rule on perfectly valid grounds. In light of the undeniable appearance of the existence of an arbitration clause binding, *prima facie*, all the parties in question, only the judges empowered to assess the issue of the validity of the arbitration agreement in detail (in other words the arbitrators) could, in accordance with the proper application of the concordat, be considered to have jurisdiction to determine the actual scope and validity of said convention for each of the parties. Thus the Court of Justice did not breach the CIA by not ruling on the grounds of the appellants, such that, in the absence of a decision on the merits addressing these grounds, the Federal Tribunal cannot rule on them.

e) The Court of Justice assessed the appellants' submissions seeking a declaration to the effect that the appellees' refusal to pay the provision for fees requested by the ICC constituted a waiver of arbitration. It held that the appellees were still able to initiate arbitration at a later stage, under Art. 20 of the ICC Rules which departs from Art. 30 para. 2 CIA which is not a mandatory rule. The appellants criticise this point of view arguing that they did not sign an arbitration agreement granting jurisdiction to the ICC.

The cantonal court rightly dismissed this request by the appellants; but while the results of its ruling are founded, the grounds do appear questionable. The arbitrators have jurisdiction to rule over this matter and their decision will depend on their interpretation of the arbitration agreement and its validity. The non-admission of the appellant's submissions

on the grounds of Art. 30 para. 2 CIA must therefore be based on the cantonal court's jurisdiction over the matter. The appellants' ground must therefore be dismissed by substitution of grounds.

4. a) In a final series of grounds, the appellants argue that Art. 4 Cst. was breached. They first state that the factual declaration "the appellants do not maintain that this document (in other words the Joint Venture and Agency Agreement) is a false and contrived document, is arbitrary. They then mention a breach of the system of the burden of proof in the cantonal court's admonishment that they had not provided any proof suggesting that the aforementioned document was not a reflection of the parties' true will. Lastly, they claim that the arbitrators breached cantonal law provisions regarding the procedure for handwriting analysis (Art. 276 *et seq.*, esp. Art. 285 para. 2 LPC gen.); as well as a breach of the principle of good faith, related to their expectation of such procedure for analysis.

b) The reasoning behind the cantonal court's decision regarding the issue of jurisdiction to rule on issues raised by the appellants is two-fold. On the one hand, a declaration that the appellants do not maintain that the disputed document constitutes a false and contrived document and does not prove that it did not reflect the parties' true will. On the other hand, a consideration whereby the Court of Justice is not to assess whether the alterations to the document in question were founded to verify the authenticity and the quality of the signatures binding the parties as all those matters fall under the jurisdiction of the arbitral tribunal.

In the best-case scenario for the appellants, the reasoning is double. If the one does not breach any constitutional right, there is no need to examine the other. But that is the case here insofar as the second reasoning is concerned. Both the issue of the authenticity of the signatures, the quality, the consequences or the realisation of the alterations to the document in dispute, as well as the issue of whether the document was false or not, are bound by the validity of the arbitration agreement, its content or its scope; they thus fall under the jurisdiction of the arbitral tribunal under Art. 8 CIA. In recognising this jurisdiction, and excluding its own, the cantonal court thus breached neither the concordant, nor, consequently, Art. 4 Cst.

It is therefore irrelevant whether the first reasoning could breach Art. 4 Cst and the LPC gen. as it would have no effect on the provision of the challenged decision.

As the appeal is manifestly ill-founded, to the extent that it is admissible, it cannot but be dismissed.

For these reasons,

the Federal Tribunal

Given Art. 92 para. 1 OJ:

1. Dismisses the appeal to the extent that it is admissible;
2. Orders the appellants to bear, jointly and severally:
 - a) legal fees of CHF 6,000,
 - b) postage of CHF 144,
 - c) down payment to the chancellery of CHF 27,
 - d) compensation of CHF 8,000 to the appellees, creditors in solidum, for costs and fees;
3. Communicates copies of the present decision to the parties' representatives and to Court of Justice of the Canton of Geneva.

Lausanne, 26 January 1987

In the name of the 1st Civil Chamber of the SWISS FEDERAL TRIBUNAL
President

Clerk