Unofficial translation

Heading

121 III 38

12. Excerpt from decision of 1st Civil Chamber of 16 January 1995 in Compagnie de Navigation et Transports SA versus MSC Mediterranean Shipping Company SA (appeal)

Summary

Art. II of the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (hereafter: the New York Convention).
1. A domestic court, before which an objection to arbitration is raised, based on Art. II para. 3 of the New York Convention, has full power to assess the formal validity of an arbitration agreement (recital 2b). The formal requirements set forth in Art. II para. 2 of the New York Convention on this matter are similar to those of **Art. 178 PILS** (recital 2c).
2. In certain situations, certain conduct, pursuant to good faith rules, may replace observance of formal requirements (recital 3).

Facts from page 39

BGE 121 III 38 S. 39

A.- In a contract of carriage concluded in the form of a bill of lading drawn up on 21 December 1991 in the name of Somatrans, Reunion, the consignee, Somatrans Z.A.E, having its registered office in Vaulx-en-Velin (France), as shipper or merchant entrusted MSC Mediterranean Shipping Company SA (hereafter: the carrier) in Geneva with the transport of a sealed container from Marseille to Reunion. The terms and conditions of the bill of lading were printed on the back, with point 2 stating:

> "LAW AND JURISDICTION. Claims and disputes arising under or in connection with this B/L shall be referred to arbitration in London or such other place as the Carrier in his sole discretion shall designate, one arbitrator to be nominated by the Carrier a second by the Merchant and a third by the two so chosen. The arbitrators to be commercial men engaged in shipping English law shall be applied, unless some other law is compulsorily applicable, except the claims and disputes relating to cargo carried to or from the United States shall be subject to the sole jurisdiction of the U.S. in the U.S. District Court, Southern District of New York, and U.S. law shall be applied."

The original bill was signed by MSC Mediterranean Shipping Company France SA as agent and representative of the shipper but it had not been signed in the designated area by the carrier. However, a copy of the document of title had been signed by Somatrans, Reunion, the consignee, on the back of the document with the hand-written statement: "certified copy of the original." When the goods were received in Reunion, the consignee moreover endorsed the original bill of lading by signing the section containing the terms and conditions.

While the goods were being unloaded, it appeared that the container had been forced open, that 56 parcels were missing and two others had been damaged. Compagnie de Navigation et Transports SA (CNT), which insured the goods, paid out an amount of FF 72,206,93 to carrier Somatrans Z.A.E to cover the loss and damage.

BGE 121 III 38 S.40

In a request filed on 19 January 1993, CNT brought an action against MSC Mediterranean Shipping Company SA before the Tribunal of First Instance of Geneva for payment of FF 19,532 plus interest at 5% as of 2 August 1992, corresponding to the insurance out payment that it claimed to have paid to the carrier. At the introductory hearing held on 20 April 1993, the defendant objected to the jurisdiction of that national court and relied on the arbitration agreement at point 2 of the terms and conditions of the bill of lading. In an interlocutory judgment of 7 September 1993, the Tribunal of First Instance held that had jurisdiction over the dispute.

As the respondent appealed, the Court of Justice of the Canton of Geneva, in a decision of 18 March 1994, set aside the judgement of 7 September 1993, admitted the objection to jurisdiction raised by MSC Mediterranean Shipping Company SA and held inadmissible CNT's request for payment.

B.- Compagnie de Navigation et Transports SA brought an appeal (*recours en réforme*) before the Federal Tribunal against the cantonal decisional, which it requested the court to set aside.
The Federal Tribunal dismissed the appeal.

Recitals

Excerpt from recitals:

2. Both France and Switzerland, where the parties are domiciled, as well as the United Kingdom, where the seat of the arbitral tribunal constituted in accordance with the terms and conditions copied on the bill of lading was located, are signatories of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (RS 0.277.12, hereafter: the New York Convention), the applicability of which is not contested in this case. Art. II of the Convention states the following:

"1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
2. An "agreement in writing" refers to an arbitration clause contained in a contract or a submission agreement signed by the parties or contained in an exchange of letters of telegrams.
3. 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

BGE 121 III 38 S. 41

of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

In this case, it must first be determined whether the shipper and carrier Somatrans Z.A.E are bound by a valid arbitration agreement. However, if that is the case, it is not contested that the arbitration agreement would apply to the claimant to which the carrier's rights were transferred.
a) The respondent does not claim that the arbitral tribunal constituted by point 2 of the terms and conditions has its seat in Switzerland. **Art. 178 PILS** (RS 291) is thus not applicable, and therefore there is no need to discuss the relationship between this provision and Art. II of the New York Convention regarding the form of an arbitration agreement (**Art. 176 para. 1 PILS**; Handelsgericht Zürich in ZR 91/1992 n. 23 recital 3.2; for a clash of provisions see, VOLKEN, IPRG-Kommentar, n. 12 ad Art. 7 and n.9 ad **Art. 178 PILS**; LALIVE/POUDRET/REYMOND, Le droit de l'arbitrage interne et international en Suisse, n. 3 ad Art. 7 and n. 6 *et seq.* ad **Art. 178 PILS**).
b) Swiss law grants priority to arbitral tribunals to rule over their own jurisdiction, when an objection to jurisdiction is raised before them (known as compétence-compétence or Kompetenz-kompetenz); however, as a last resort, the matter of jurisdiction is decided by a domestic court if it is validly petitioned with a request to do so; it then has full power to examine the arbitrators' decision (Art. 8 and 36 letter b CIA (RS 279)); **Art. 186 and 190 para. 2 letter b PILS**; **ATF 120 II 155** recital 3b/bb p. 164 and cited doctrinal references). For some authors, the domestic court should not be able to rule on jurisdiction if an arbitration is already pending or can be initiated without any particular difficulty (BUCHER, Le nouvel arbitrage international en Suisse, p. 55 n. 139) or courts, when examining an objection to arbitration, must only conduct a summary review in order to ascertain the prima facie existence of an arbitration agreement, in order to avoid prejudging the arbitral tribunal's decision on jurisdiction (LALIVE/POUDRET/REYMOND, *op.cit.*, n. 16 ad Art. 186 PILS). BUCHER's opinion—taken formulated in the context of parallel proceedings—is not acceptable, it is not compatible with the principle whereby the petitioned authority, pursuant to the right to obtain justice, must rule on jurisdiction as requested, nor with legislation as per **Art. 7 PILS**, according to which a domestic court must rule on

BGE 121 III 38 S. 42

the objection to jurisdiction and must therefore also proceed to a preliminary assessment of the arbitral tribunal's jurisdiction excluding its own, as it would do in the case of an extended court in domestic matters (LALIVE/POUDRET/REYMOND, *op.cit*., n. 5 ad **Art. 7 PILS**; POUDRET, Une action en constatation de droit au sujet de l'existence ou la validité d'une clause arbitrale est-elle recevable en droit fédéral ou cantonal?, in: Recht und Rechtsdurchsetzung,Festschrift für Hans Ulrich Walder, p. 348; WALTER/BOSCH/BRÖNNIMANN, Internationale Schiedsgerichtsbarkeit in der Schweiz, p. 94 *et seq*.). As for the LALIVE/POUDRET/REYMOND theory, based on Art. 1458 para. 2 of the New French Code of Civil Procedure which grants validity to the objection if there appears to be a valid arbitration agreement, it is hardly compatible with domestic courts' duty to carry out a full assessment of jurisdiction before ruling on the merits as well as the potential effects of the entry into force of a domestic decision holding the action inadmissible. Neither is this understanding supported by **Art. 179 para. 3 PILS**, (contrary to the statements of LALIVE/POUDRET/REYMOND, *op.cit*., no. 6 ad Art. **186 PILS**, where such provision concerns the domestic court's support during an arbitration, while it is a matter of the admissibility of the merits of a court decision. These authors' opinion can only be shared to the extent that domestic courts, as a last resort, rule on the issue of an arbitral tribunal's jurisdiction, which means that arbitration is governed by the Swiss Concordat on Arbitration or the federal Public International Law Statute (VOLKEN, *op.cit*., n. 26/7 ad **Art. 7 PILS**). However, if the arbitral tribunal is seated abroad and if an objection is raised before Swiss courts, they shall rule on the ground, shall have full power to assess the claims raised, in particular that stemming from Art. II para. 3 of the New York Convention and shall not be limited to a prima facie assessment (SCHLOSSER, Das Recht der internationalen privaten Schiedsgerichtsbarkeit, p. 302 *et seq*., n. 400 *et seq*.). In other words, Art. II para. 3 of the New York Convention enshrines the domestic courts' duty to freely rule over an objection raised in light of the criterion determining the validity of international agreements, but prohibits them from applying other grounds invalidating the agreement which are not a part of the international legal order (SCHLOSSER, *op.cit*., p. 188 *et seq*., n. 247 *et seq*.). While the Federal

BGE 121 III 38 S. 43

Tribunal, in *Shobokshi* of 26 January 1987, published in SJ 1987 p. 230/231 (Bull. ASA 1987 130), considered that the cantonal authority had not disregarded the guarantee of a natural judge within the meaning of Art. 58 Convention by only conducting a *prima facie* assessment of the action to declare the arbitration clause void, it expressly mentioned the diverging rule set forth in the New York Convention. Thus we cannot agree with the cantonal court or the respondent, when they only grant the court before which the objection was raised the power to examine, summarily, whether the arbitration agreement was valid with regard to an international agreement. On the contrary, the issue of the formal validity of the disputed arbitration agreement must be comprehensively and freely examined from a legal point of view in the case of an appeal (Art. 63 para. 2 OJ).

c) The arbitration agreement on which the respondent relies is only valid if it complies with formal requirements set forth in Art. II para. 2 of the New York Convention. On this topic, it must be noted that, according to the international agreement, this requirement is somewhat less stringent than Art. 6 CIA, that must be understood to apply Art. 13 CO by analogy, and stricter than **Art. 178 PILS** which merely defines a means of communication to establish proof of an arbitration agreement by a text (LALIVE/POUDRET/REYMOND, op.cit., n. 5 ad Art. 178 PILS).

Art. II para. 2 of the New York Convention requires the arbitration agreement to have been signed by the parties or to be contained in an exchange of letters or telegrams. Although the Federal Tribunal did indeed equate faxes to telegrams, parties do, however, need to have expressed their intention to arbitrate disputes in writing (**ATF 111 Ib 253**; see also VAN DEN BERG, The New York Arbitration Convention of 1958, p. 204). In the majority's opinion, the aforementioned provisions must be interpreted in light of the UNCITRAL model law (UNCITRAL = "United Nations Commission on International Trade Law"), in which the drafters sought to adapt the New York Convention rules to the contemporary situation without modifying them (BUCHER, *op. cit*., p. 49 n. 123; VOLKEN, *op.cit*., n. 12 ad Art. 7 PILS; SCHLOSSER, *op.cit.*, p. 267 *et seq*. n. 368 *et seq*.). This model law states the following at Art. 7 para. 2 *in initio* (see, HUSSLEIN-STICH, Das UNCITRAL-Modellgesetz über die internationale Handelsschiedsgerichtsbarkeit, p. 38 *et seq.* and 238):

BGE 121 III 38 S. 44

[English original]
"The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunications which provide a record of the agreement..."

Art. 178 para. 1 PILS is clearly based on this wording. This article, which takes into account developments in modern technology, must thus also be the basis for the interpretation of Art. II para. 2 of the New York Convention. Therefore, the formal requirements of this international treaty are decidedly the same as those of **Art. 178 PILS** (VOLKEN, *op.cit.*, n. 12 ad **Art. 7 PILS**). Thus, in light of these criteria and the power of free assessment, it must be ascertained whether the arbitration agreement on which the respondent relies was adopted by the shipper and carrier in the required manner.

3. The Court of Justice, in a decision binding the Federal Tribunal held that both the companies of the MSC group and shipper Somatrans Z.A.E were specialized in maritime transport, that they had a long-standing business relationship and regularly used, to that effect, bills of lading printed on MSC letterheads, such that the shipper was perfectly aware of the terms and conditions on the back of those documents. Moreover, the cantonal court held that the carrier itself had filled in the bill of lading of 21 December 1991. It arrived at the conclusion that Somatrans Z.A.E expressed, in writing, both its acceptance of the bill of lading and its consent to the arbitration agreement printed on the bill; thus the New York Convention's requirement that the agreement be in writing was met, even though only the carrier, acting through an agent, had signed the bill of lading. The cantonal authority further stated that, therefore, the consignee, a member of the Somatrans group, had signed a copy of the bill of lading and had endorsed the original document upon receipt of the goods. According to the claimant, the arbitration agreement was not valid as the shipper had not signed the bill of lading.
In **ATF 110 II 54**, the Federal Tribunal recognised that, in the case of two trading companies with regular business relations, a reference to the conditions of a charter party (Frachtvertrag)—of which the parties had knowledge and which contained an arbitration clause—contained in the bill of lading signed by the carrier and the shipper on behalf of a company belonging to the same group as the charterer, was a

BGE 121 III 38 S. 45

valid arbitration clause (approved by LALIVE/POUDRET/REYMOND, *op.cit.*, n. 13 **Art. 178 PILS**). However, this case is different to the basic circumstances of the case in that decision: firstly, the disputed arbitration agreement was contained in the bill of lading itself and not in a document to which reference is made in the document of title, secondly, the shipper had not signed the bill of lading of 21 December 1991 and did not refer to it by way of its signature in any other way. The question is thus whether the arbitration agreement was valid, given that no document regarding the shipment of the goods had been signed by Somatrans Z.A.E.
According to the formal requirements applicable to the case at hand, arbitration agreements contained in signed contracts are considered valid, as well as those contained in an exchange of letters, telegrams, faxes and other means of communication. In other words, a distinction must be made between agreements contained in a document, which must, in principle, be signed, and those resulting from an exchange of written documents, which do not need to be signed (SCHLOSSER, *op. cit*., p. 270 *et seq*., n. 373 *et seq*.; VAN DEN BERG, *op.cit.*, p. 192 *et seq*.). If this distinction is strictly observed, the arbitration agreement should not be held valid, unless the signature of Somatrans, Reunion, on both the original and copy of the bill of lading is considered to bind the shipper. It should not be forgotten that with the development of modern telecommunications, unsigned documents are more widespread and increasingly important, that the requirement of a signature is somewhat diminished especially in the field of international commerce and that the different standards applied to documents which are signed and those which are not, are called into question. Added to that is the fact that in certain situations, a certain conduct, pursuant to good faith rules, may replace observance of formal requirements (SCHLOSSER, *op. cit.*, p. 272, n. 374). And that is exactly the case here. Thus, the parties had a business relationship for many years, which was governed by the legal framework of the terms and conditions contained in point 2 of the disputed arbitration agreement. Moreover, the shipper itself filled in the bill of lading before communicating it to the carrier, which signed it. Irrespective of the fact that this is no different to an exchange of correspondence by telex or similar documents, the carrier could rightly presume, in good faith,

BGE 121 III 38 S. 46

that the shipper, its longstanding business partner, consented to the contractual documents that it had filled in itself, including the terms and conditions on the back of the document which contained the arbitration agreement (see, SCHLOSSER p. 272 *et seq*. n. 374). Thus, the Court of Justice in no way breached federal law when, with regard to all the circumstances, it held the aforementioned arbitral clause to be valid.