Unofficial translation

Heading

111 II 62

Decision of the 1st Civil Chamber of 22 May 1985 in the case of Company X versus Company Y. (appeal)

Summary

New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards. Objection to the jurisdiction of ordinary domestic courts.

Art. II para. 3 of the New York Convention only grants parties to the arbitration agreement the right to avail themselves of the Convention in order to object to the jurisdiction of an ordinary domestic court; the formal requirements of the matter, however, are governed by the domestic law of each Contracting State (recital 2).
Art. 2 CC, 43 OJ.
When they apply to matters which do not fall under federal law, the prohibition on abuse of law and the duty to act in good faith are not considered rules of federal law and cannot be relied on as grounds for appeal (recital 3).

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A.- On 17 May 1977, Company Y in London sold some 50 tonnes of coffee to Company X in Lausanne, through the intermediary of a French company. The contract notably included the following clause:

"Terms and Conditions of the European Coffee Contract. Arbitration, if required, in Le Havre."

Difficulties arose between the parties regarding deliveries. Relying on the above mentioned arbitration clause, Company Y sent a request for arbitration to *the Chambre arbitrale des cafés et poivres* in Le Havre. On 23 March 1978, the arbitrators rendered an award in which they first, upheld their own jurisdiction over the dispute and second, settled various substantive issues. On 13 June 1978, the President of the Tribunal de Grande Instance of Le Havre granted an enforcement order for the award, which was upheld by the French appellate courts, most recently on 27 April 1983.

B.- On 15 February 1980, Company Y sued Company X for the payment of 909,694.85 francs capital plus interest before the Civil Court of the Cantonal Tribunal of Vaud. The claimant

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requested compensation for the damage which it attributes to the respondents' failure to fulfil its duties as a buyer.
In a request dated 8 April 1980, the respondent petitioned the court to stay the proceedings until such time as a decision was made as to the jurisdiction of the *Chambre arbitrale des cafés et poivres* of Le Havre and the validity of the award of 23 March 1978. This request was dismissed by the examining magistrate of the Civil Court and then—on appeal—by the Appellate Chamber of the Cantonal Tribunal of Vaud, on the grounds that there were no parallel proceedings, as the subject-matter of the two proceedings were not identical.

Following the final dismissal of its request, the Respondent filed a reply on 23 June 1981, in which it sought dismissal of the request.
The claimant replied on 21 September 1983.
On 16 December 1983, the claimant filed a request before the examining magistrate of the Civil Court of the Cantonal Tribunal of Vaud for it to decline jurisdiction.
On 11 May 1984, the examining magistrate dismissed this request. In short, the magistrate held that, as the respondent did not file its request in a timely manner, *i.e.* before entering a defence on the merits, it had lost its right to do so at a later stage, pursuant to the applicable provisions of Cantonal procedure and to Art. II para. 3 of the 1958 New York Convention.
On 25 September 1984, the Appellate Chamber of the Cantonal Tribunal of Vaud dismissed the respondent's appeal of the previous decision.

C.- Company X then appealed this decision. It requested that the Civil Court Appellate Chamber of the Cantonal Tribunal of Vaud decline jurisdiction over the dispute brought before it by Company Y, and that Y be excluded from the proceedings.
The Federal Tribunal dismissed the appeal.

Recitals

In law:
1. The challenged decision is a preliminary ruling regarding jurisdiction, handed down in a civil matter in which the amount at stake is of at least 8,000 francs. An appeal for breach of federal law regarding subject-matter jurisdiction may be filed (**Art. 49 OJ**).

2. Both France and Switzerland are parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (RS 0.277.12; hereafter the Convention), which applies to this case.
According to Art. II para. 3 of this Convention:
"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 the said agreement is null and void, inoperative or incapable of being performed".
The appellant argues that the expression "at the request of one of the parties" should be interpreted to mean that the Court has no choice but to examine such request, at any time during the course of the proceedings; it considers that if this meaning is not clear in the interpretation of the provision, it is a short coming of the law which the judge should remedy in this way.
However, an analysis of the provisions does not allow to follow the theory put forward by the appellant. Indeed, the said provision does not govern the procedure to be followed before the ordinary domestic courts; it only grants parties to the arbitration agreement the right to avail themselves of this provision as a ground on which to object to the jurisdiction of an ordinary domestic court. Absent any obligation for contracting parties, the Convention does not restrict their decisions on this procedure. As is contrary to the text and system of the Convention, the suggested interpretation would also be contrary to its objective. In light of the fact that the Convention seeks to facilitate the resolution of disputes by arbitration (**ATF 110 II 59**), it is in keeping with the economy of the proceedings that jurisdiction-related issues be settled upfront, and that, if necessary, the parties be swiftly sent to an arbitral tribunal and that a late request to decline jurisdiction may not be used as a delaying tactic; thus the Convention cannot be reasonably interpreted in such a way as to prevent Contracting States from requiring objections to jurisdiction to be raised at the beginning of proceedings. There is also no evidence to suggest that they would have wanted such restriction; Art. II of the New York Convention adopts, on this matter, the rule contained in Art. 4 of

the Protocol on Arbitration Clauses adopted in Geneva on 24 September 1923 (see, FF 1964 II p. 631; and **ATF 110 II 57**).

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Moreover, in the domestic law of Contracting States, the requirement that objections to jurisdiction be raised in the beginning of proceedings is very common (see, *e.g.* rules to that effect applicable at the time or having replaced equivalent rules: in Switzerland, RÜEDE/HADENFELDT, Schweizerisches Schiedsgerichtsrecht, p. 67 and references; in France, RENÉ DAVID, L'arbitrage dans le commerce international, p. 295, 298, JEAN ROBERT, L'arbitrage, droit interne, droit international privé, p. 103; in the Federal Republic of Germany, SCHWAB, Schiedsgerichtsbarkeit, Kommentar, 3rd edition, p. 41 *et. seq.*; regarding European States, FOUCHARD, L'arbitrage commercial international, p. 128 *et. seq.*). The same rule was also recently expressed in the form of Article VI, para. 1 of the European Convention on International Commercial Arbitration entered into in Geneva on 21 April 1961 (see, DAVID, *op. cit* p. 300 and 596), which States having entered into the New York Convention have also signed. That clearly demonstrates that States also felt that this matter was determined otherwise in the New York Convention. Moreover, the authors who expressed their opinion on the matter also consider, with regard to Art. II para. 3 of the New York Convention, that the procedure for raising objections to jurisdiction is not governed by the Convention but by the *lex fori* (SCHWAB, *op.cit.*, p. 356, VAN DEN BERG, The New York Arbitration Convention of 1958, p. 137 *et. seq.* esp. p. 138/9, FOUCHARD, *op.cit.*, p. 128, BERTHEAU, Das New-Yorker Abkommen vom 10. Juni 1958 über die Anerkennung und Vollstreckung ausländischer Schiedsprüche, thesis Zurich 1964, p. 37, SCHLOSSER, Das Recht der internationalen privaten Schiedsgerichtsbarkeit, vol. I, p. 383).
In applying cantonal procedural law in order to determine up until which time the objection was admissible, the cantonal authority and the first court before it, thus did not breach federal law.

3. The appellant also challenges the cantonal authority for having breached **Art. 2 CC** in not penalizing the other party's abuse of law. However, the appeal may only concern a breach of federal law (**Art. 43 *et. seq.* OJ**). While **Art. 2 CC** naturally expresses a general principle of law, which also applies to procedural matters (see **ATF 96 II 169**, **ATF 84 I 62**, **ATF 83 II 348** *et. seq.*), the prohibition of abuse of law and the duty to act in good faith are not federal rules of law—which can be relied on in an appeal — when they are applied to matters not governed by federal law (see. **ATF 83 II 351**). However, it is exactly with regard to the application of certain rules of cantonal procedure that the appellant alleges abuse of law on the part of the cantonal authority. The argument is thus inadmissible.