Switzerland*

I. The Practice of Swiss Courts in the Field of Recognition of Foreign Corporations

Residence is generally the most important connecting factor between a corporation and the governing legal system. In most European countries it is well established that although the place of incorporation is of importance as evidence of the residence of the corporation it is by no means conclusive.[1]

The practice of Swiss courts in this field has followed a very cautious line. By its February 1987 decision in the case of *Earl Orient Shipping Co.* the Geneva Court of Justice[2] confirmed this trend by ruling that a foreign corporation shall be recognized in Switzerland if it exists according to the statutory incorporation requirements of the law of the country where it is registered or created. This prevailing rule is subject to exceptions only if specific conditions are met. Only then may Swiss courts apply the law of the country where the center of control of the corporation's affairs is situated.

A. Issues Raised by the Facts of the Case

Earl Orient Shipping Co., Inc. (EOSC) was incorporated in Monrovia (Liberia) in 1979 in compliance with statutory incorporation requirements of that country. Its registered domicile had always been in Monrovia. In 1981 EOSC conducted a substantial activity in international trade and in oil products refining.

In April 1985 EOSC acted before the Tribunal of First Instance of Geneva against a Belgian company, MV Rossell (MVR), primarily involved in marketing refined oil products. The companies had formed a joint venture together, but disputes had arisen to the point that EOSC claimed payment of approximately U.S. $1.5 million. MVR filed a counterclaim for the amount of U.S. $1,164.000. It also maintained that EOSC's action should be dismissed from the outset on the ground that EOSC did not have a corporate personality, since its registered domicile was a fiction.

The Tribunal of First Instance accepted this argument and dismissed the case. The tribunal held that EOSC's registered domicile was a fiction

*Prepared by Olivier Dunant, Partner in the law firm of Borel, Barbey, de Charmant, Dunant & Hafner, Geneva, Switzerland. The author was assisted in the preparation of Section I of this article by Nicolas Piérard and of Section II by Philippe Szokoloczy, both of the same firm.

1. For example, see the leading English case of Cesena Sulphur Co. v. Nicholson, [1876] 1 Ex. D. 428, and also Unit Construction Co. Ltd. v. Bullock, 1960 App. Cas. 351 (H.L.).

2. Semaine Judiciaire 1987 at 369.

and that the issue of its recognition should be governed by Swiss law since Geneva was the center of control of its business. Furthermore, the tribunal concluded that EOSC did not meet the Swiss statutory incorporation requirements and could not be considered as a Swiss corporate entity.

B. The Court of Justice Decision

In its analysis, the court first recalled that as a general rule the law of the place of incorporation shall apply when determining the existence or the recognition of a foreign corporation. This general principle is subject to exceptions only when two conditions laid down by the Federal Tribunal and confirmed in a 1983 decision,[3] are met: First, the center of control or administration of the corporation must differ from the place of its registered domicile; second, the registered domicile must have been chosen solely to evade some major and mandatory provisions of the law of the country where the corporation is de facto administered or where its business is de facto conducted (its effective residence). When both conditions are present, Swiss courts will not recognize the foreign corporation.

As to the first condition, the court noted that EOSC was incorporated in compliance with Liberian corporate law, but pointed out that its registered agent did not have any decision-making power. The corporation was managed by two individuals domiciled in Geneva where EOSC had its offices and received its mail.

The court emphasized that the Federal Tribunal grants more importance to the place of the center of corporate management as a connecting factor, than to the place where the corporation's main activities are effectively conducted.[4] On the basis of the facts, the court found that EOSC was not administered at its Liberian registered domicile but in Geneva.

As to the second condition, the court pointed out that Liberia was generally known as a tax haven and that obviously only tax reasons motivated the choice of Liberia as the registered domicile. Nevertheless, and most important from the standpoint of the international community, the court held that incorporation for the sole purpose of avoiding taxes is not in itself *in fraudem legis*. The court insisted on the importance of ensuring recognition to a foreign corporation that is duly and validly incorporated under the law of the place of its incorporation. It stated that "for the sake of law and international transactions security the application of the theory of the effective domicile should remain in exception." Consequently, since EOSC did not intend to be registered in Liberia to evade

3. *See* Foundation X v. Banque Y, ATF 108 II 398 (Semaine Judiciaire 1983 at 337).
4. *See* Société L v. AFC, ATF 110 Ib 213.

substantive mandatory provisions of Swiss corporate law, the court overruled the decision of the lower court.

C. Conclusion

The principal significance of the EOSC case is the confirmation that Swiss civil courts do not intend to open their gates to the intrusion of foreign tax law or practices. Prior Federal Tribunal decisions foreshadowed this trend, and the EOSC case clearly affirmed it.

Swiss civil judges are right to reject such intrusions. They could face enormous difficulties in trying to distinguish between lawful tax saving and illegal tax avoidance, especially when foreign law applies. Adequate means to fight tax avoidance already exist, such as imposing tax liability where business is effectively carried on or piercing the corporate veil.

Finally, the civil judge cannot disregard the realities of modern methods of conducting business. Substantial transactions are concluded daily through Liechtenstein establishments, Panamanian companies, or other foreign entities effectively managed from elsewhere than their statutory head office. The protection of third parties and the security of business transactions require that creditors of such legal entities would not have to face the unjust, unfair, or undesirable consequences of the nonrecognition in Switzerland of their business counterparts.

II. The Marcos Case[5]

At a time when Switzerland's policy on banking secrecy is facing severe but unfair criticism from foreign states, the Marcos case illustrates the Swiss authorities' willingness to combat the image that Swiss financial institutions are a haven for funds of unlawful origin. This misconception of Swiss banking secrecy and the consequent criticism thereof have put considerable pressure on the Swiss authorities lately. To prove their goodwill, they went as far, in the Marcos case, as to freeze the assets of former President Marcos in Switzerland before any request for assistance from the Philippines Government was presented to them. This decision, which was clearly motivated by political considerations to avoid and defeat the criticism encountered, gave rise to conflicting comment in Switzerland, but had the merit of showing a distinct effort on behalf of the Swiss authorities to improve cooperation in the field of international assistance in criminal matters.

5. Arrêts du Tribunal fédéral [Decision of the Federal Tribunal] in Semaine Judiciaire 1987 at 609 (not yet published in Recueil Officiel des Arrêts de Tribunal fédéral).

A. The Facts of the Case

A distinction must be made between the events that took place prior to the request for assistance by the Philippines authorities and the request itself.

1. *Before the Request for Assistance*

On March 24, 1986, the Federal Banking Commission was advised by a Swiss bank that a representative of Mr. Marcos had asked to withdraw a substantial amount of money. The same day, the Federal Council[6] froze the assets of Mr. Marcos and his relatives in six Swiss banks on the basis of article 102 of the Federal Constitution.[7] Two days later, the Federal Banking Commission wrote to all the banks concerned that the irreproachable conduct of business required by the Federal Banking Act,[8] as a condition for issuance of a banking license, would not allow the withdrawal of assets belonging to Mr. Marcos or his relatives before the situation could be clarified through international assistance.

The purpose of such measures was to maintain the status quo while awaiting an imminent request for assistance from the Philippines Government. The commission felt that the reputation of the Swiss financial establishment would have suffered if the withdrawal of the funds had not been prevented at the last minute.

The Federal Banking Commission ruled that even when no formal request for assistance is presented, but appears, nevertheless, to be imminent, the banks may not consent to the withdrawal of substantial funds. According to the duty of diligence set forth in the Federal Banking Act, they must refuse all substantial withdrawals when measures freezing the funds can be anticipated by the Swiss criminal authorities.[9]

One can easily imagine the difficulties that the banks will encounter in applying these prescriptions. What if their decision to block funds is not followed by a request for assistance? Or if the bank fails to anticipate a freezing order in a particular case and the funds are withdrawn?

6. Conseil fédéral, the Swiss Government.

7. Constitution Fédérale [Cst. Fed.] art. 102(8) (Switz.) provides that the Federal Council is in charge of the interests of the Swiss Confederation abroad and supervises the observance of its international relationships.

8. Loi fédérale sur les Banques et les Caisses d'Epargne [Federal Act on Banks and Savings Banks] Nov. 8, 1934, *as amended by* Federal Act of March 11, 1971, Recueil systématique du droit fédéral [RS] 952.0 [hereinafter Federal Banking Act].

9. Federal Banking Act art. 3, ¶ 2(c).

2. The Request for Assistance from the Philippines Government

In February 1986, immediately after the fall of the Marcos regime, the President of the Philippines Republic, Corazon Aquino, instituted the Presidential Commission on good government. This Commission was to help the new President in recovering the fortune that Marcos and his relatives may have acquired in an illicit manner in their official capacity. Within the framework of these investigations, the Embassy of the Philippines sent a request for international assistance to the Swiss authorities on April 25, 1986. The Embassy informed the authorities in question that the preliminary investigations of the Commission were aimed at indicting Marcos and others before the Sandiganbayan, a special court with jurisdiction over criminal matters relating to corruption, dishonest transactions, and other punishable acts committed by public officers in their official capacity.

Marcos and his relatives reportedly appropriated some U.S. $5 billion of state funds, and transferred a substantial part to Swiss accounts. The request for assistance called for inquiries to determine the assets placed in Switzerland, information relating to these assets, and adoption by the Swiss authorities of conservation measures and, eventually, the return of the seized assets to the Philippines.

Marcos *et al.* applied to the Geneva Chamber of Accusation to have the request for judicial assistance rejected, and upon dismissal of their applications, appealed to the Federal Tribunal of Switzerland.[10]

B. The Decision

Since there is no treaty on international judicial assistance between the Swiss Confederation and the Philippines Republic, Swiss law was applicable to the Marcos case, that is to say the Federal Act on International Assistance in Criminal Matters[11] and its implementing Regulation.[12]

According to its article 1, the Federal Act on Assistance is concerned with all procedures relating to international cooperation in criminal matters, and in particular with assistance in foreign criminal procedures. Within the meaning of article 63 of the Act, assistance includes the transmission of information and records of proceedings available in Switzerland such as minutes of hearings of witnesses, search records, files or docu-

10. The Federal Tribunal is the Swiss Supreme Court. Cst. Fed. arts. 106–114bis.

11. Loi fédérale sur l'Entraide Internationale en Matière Pénale [Federal Act on International Assistance in Criminal Matters], March 20, 1981, RS 351.1 [hereinafter Federal Act on Assistance].

12. Ordonnance d'Application, Implementing Regulation of Feb. 24, 1982.

ments, or even effecting a seizure, insofar as that may help the procedure abroad.

Marcos *et al.* maintained that the federal law had been transgressed in that their application to the Geneva Chamber of Accusation had not been granted suspensive effect. Such an argument could, of course, not hold water in the sense that if an application against safety measures undertaken by the required state were automatically granted suspensive effect, the safety measures would come too late by the time the question of their legitimacy was resolved.

Marcos *et al.* also complained that the authorities of the Canton of Geneva had entertained the request for assistance and ordered provisional measures while no criminal proceedings were as yet pending against them in the applicant state. On this point, the Federal Tribunal ruled that, for Switzerland to collaborate within the meaning of article 1 of the Federal Act on Assistance, it is not necessary that proceedings at law be already instituted against the affected parties in the applicant state. It is sufficient that preparatory investigations be opened, to the extent that they are the compulsory preliminary step to bring the case before the national court competent under the law of the applicant state.

The Federal Tribunal rendered a similar decision a few years ago in which it held that the investigations of the Securities and Exchange Commission of the United States could be likened to preparatory investigations for which assistance shall be granted within the meaning of article 1 of the Swiss-U.S. Treaty concerning assistance in criminal matters.[13]

In the Marcos case, the Federal Tribunal stated that procedures under the Federal Act on Assistance could be directed not only against persons who were the object of a criminal prosecution abroad, but that the term "prosecuted persons" also extended to persons simply under suspicion. This is quite a daring step since a simple suspicion does not necessarily lead to an indictment. The Federal Tribunal is on a slippery path, and it is to be hoped that future cases will lay down more reliable guidelines. The Federal Tribunal admitted that no criminal proceedings had yet been instituted against Marcos *et al.* in the Philippines. The Government of the Philippines Republic, however, had unequivocally expressed in the declarations to the Swiss authorities its intention to institute criminal proceedings against Marcos before the Sandiganbayan. The official documents presented with the request clearly exposed the unlawful aspect of the facts stated by the applicant state. For this reason, the Federal Tribunal held that the authorities of the Canton of Geneva had not transgressed the law

13. Mutual Assistance in Criminal Matters, May 25, 1973, United States-Switzerland, 27 U.S.T. 2019, T.I.A.S. No. 8302.