Interim Award of 1985 in case no. 4650

Arbitrators:
Dr. Robert Briner (Switz.) chairman; Rend Merkt (Switz.); Thomas R. A. Morison, QC (UK)

Parties:
Claimant: American architect; Respondent: Saudi Arabian company

Published in: Unpublished

Subject matters:
- law applicable to substance

ters:

FACTS

In 1976 the parties concluded two agreements (Service Phase I and Service Phase II) which basically involved the preparation by claimant of drawings and other related construction documents as well as an involvement in connection with negotiations with potential contractors regarding a building project in Jeddah, Saudi Arabia. The parties agreed on ICC arbitration to take place in Geneva. No choice of law was expressed in the agreements.

When a dispute arose about the amount of the fee, claimant commenced arbitration. Defendant made a counterclaim for alleged overpayment. By a final award rendered in 1986, the arbitrators dismissed both the claim and the counterclaim.

The interim award was rendered in 1985. It dealt with the question of which law was applicable to the substance.

The claimant contended that this law should be the law of the State of Georgia, USA, as all significant work provided under the agreements was carried out there. Claimant submitted in the alternative that Swiss substantive law, being the lex fori, or, possibly, the lex mercatoria should apply. Finally, claimant relied on "analogous international rules regarding the provision of engineering services which suggest that the law of the place of domicile of the engineer rather than of the employer will govern the legal relations between the parties, in the absence of any express agreement to the contrary".

Defendant submitted that Saudi Arabian law should be applied because claimant's obligations were partly performed in Georgia and partly in Saudi Arabia, whilst defendant's obligations were to be wholly performed in Saudi Arabia. Moreover, under the Service Phase II Agreement, claimant's obligations were all to be performed in Saudi Arabia. With regard to trade usages, defendant contended that there exist no such usages which have any direct bearing on the provision of architectural services by an American architect for a project in Saudi Arabia. Finally, defendant submitted that neither Swiss substantive law nor the lex mercatoria should be applied.

The arbitrators held that the law of the State of Georgia applied for the reasons reproduced below.
1. "It is not disputed that the parties did not make an express choice of law in their agreement.

2. "Based on the evidence presented to the arbitral tribunal the question of the governing law did not appear to have been discussed between the parties and it would seem obvious that no tacit agreement or understanding had been reached. In the absence of any evidence regarding an actual agreement or concurrent intentions of the parties, the arbitral tribunal is of the opinion that one cannot consider that the parties had chosen Swiss substantive law or the lex mercatoria. It would seem to the arbitral tribunal that the choice of such a law would require an agreement between the parties which in the present case was not reached.

3. "Based on the evidence produced by the parties regarding the services which claimant was to render under the agreement there can be no doubt that the work needed to render such services was predominantly performed in Georgia. Occasional visits for fact finding and liaison purposes by representatives of the claimant to Saudi Arabia do not shift the centre of the characteristic work from Georgia to Saudi Arabia. The bulk and characteristic part of the work of the claimant, for which an amount of 5,135,997 Saudi Rials was paid, was, the tribunal finds, carried out and performed in Georgia, USA.

4. "The arbitral tribunal does not deem it necessary in this case to decide on a specific rule of conflict to designate the proper law of the contract in view of the fact that most major rules in some form or other point to the place of the characteristic or dominant work and that in the opinion of the arbitral tribunal there can be no doubt that the dominant or characteristic work performed under the agreement was performed in Georgia, USA.

[...]

Referring Principles:

- XIV.2 - Law applicable to international contracts