Final award in case no. 5485 of 18 August 1987

Arbitrators: M. de Haas (France, chairman); B. Cremades (Spain); D.L. Lopez Sanchez (Spain)

Parties: Claimant: Bermudian Company

Place of Arbitration: Paris, France

Subject matters: - validity arbitration clause under Spanish law [not included in the TransLex]

Facts

On 7 October 1972, parties entered into a “Basic Agreement” for the formation of a new Spanish joint venture (“X”), the initial object of which was to construct and operate facilities in Spain for the manufacture and sale of petrochemical products. The corporation was to be owned fifty percent by claimant and fifty percent by defendant.

According to the Basic Agreement, the directors of either shareholder had the right to veto a proposition to expand the business of X beyond the production and sale of its products or to invest in additional facilities for their production beyond the facilities initially approved. The payment of dividends, however, was not subject to unilateral veto of either shareholder. The Basic Agreement, in Art. 4(9), provided that, unless otherwise agreed by the annual meeting of shareholders, the shareholders would be paid each year the maximum dividend consistent with maintaining mandatory legal reserves.

Art. 5(13) of the Basic Agreement contained the clause that shareholders were obliged to "so cast their votes at general meetings of shareholders of [X] and otherwise expend their efforts to assure that [X] will be managed and operated in a manner ... consistent with the provisions of the Basic Agreement".

On 24 June 1985, the annual report, balance sheet and profit-and-loss statement for the fiscal year 1984 were unanimously approved by the shareholders. The report indicated that approximately 359 million pesetas were available for distribution to the shareholders. After approval of the annual report, claimant proposed distribution of this sum as dividend. Defendant opposed this, taking the view that the amount should be assigned to a freely disposable reserve until the financing schedule for a proposed increase in X's production capacity was established. Prior to the shareholders meeting, this proposal to increase the production capacity of X's facilities had been presented to the Board of Directors,
but had been voted down by the directors of claimant.

Claimant stated that, consequently, defendant was obliged to vote for the distribution of a dividend in accordance with Art. 4(9), and that defendant, in accordance with Art. 5(13) was obligated to vote to assure that the Basic Agreement was accomplished. Defendant, however, maintained that the amount was necessary for the proposed expansion of X's production.

On 5 September 1985, at another shareholders meeting, claimant again proposed that the dividend would be paid and informed defendant, which once again refused its approval, that it was in violation of the Basic Agreement.

Claimant requested for arbitration at the Court of Arbitration of the ICC on 27 November 1985, claiming that defendant, by refusing to approve the distribution of the dividend, was in breach of the Basic Agreement; that claimant was entitled to receive its share of the dividend; and that it had been damaged in an amount equal to fifty percent of the dividend to be distributed. On 15 August 1986, claimant sent a supplemental request for arbitration to include the problem of the distribution of dividends for the fiscal year 1985 (1055 million pesetas).

Defendant contended that the Arbitral Tribunal lacked jurisdiction, because the arbitral agreement was null and void under Spanish law.

**Excerpt**

**A. Jurisdiction**

1 "Whereas the defendant has alleged that the Tribunal lacks jurisdiction because the arbitration clause in the Basic Agreement (Art. 17(2)) ... is void at law since it is contrary to Art. 57 of the Spanish law for Civil Procedure ('Ley de Enjuiciamiento Civil', LEC) and, more precisely, that said Art. 17(2) of the Basic Agreement is contrary to the prohibition against submitting to alternative fora, established in Art. 57 LEC, such prohibition being Spanish public policy, which is to say, in short, that the arbitration clause is in conflict with the Spanish law which governs the contract (Art. 17(1) of the Basic Agreement). The Tribunal should, in first instance, resolve the question of its own jurisdiction since whether or not to consider the substance of the dispute between the parties depends on the resolution of this previous question."

[...]

9 The arbitrators then considered the separability of the arbitration clause and concluded that separability is recognized both in international commercial arbitration and under Spanish law:

10 "Whereas the separability (autonomy) of the arbitration clause has long been recognized as a general principle of international commercial arbitration, from the point of view of conflicts (the law applicable to the arbitration clause can be different from the law applicable to the contract, see, for example, Art. V(1)/(a) of the Convention for the Recognition and Enforcement of Foreign Arbitral Awards signed in New York on 10 June 1958 - hereinafter, the New York Convention - , Art. VI(2)/(a) of the Geneva Convention, the award handed down in ICC case number 4131 of 1982, or the interim ICC arbitral award handed down on 23 September 1982 in the Dow Chemical/Isover-Saint Gobain case), as well as from the point of view of substance (the nullity of the contract does not necessarily imply the nullity of the arbitration clause, see, for example, Art. V(3) of the Geneva Convention and Art. 8(4) of the ICC Rules of Arbitration, as well as the ICC arbitral awards handed down in cases nos. 1526 of 1968 or 2476 of 1976)."
B. Merits

36 The arbitrators did not agree with defendant's view, that Art. 4(9) of the Basic Agreement was contrary to Spanish law:

37 "Whereas the defendant argues that Art. 4(9) of the Basic Agreement, which states 'unless otherwise agreed to at the annual general meeting of the shareholders, the dividend policy of [X] will be to pay its shareholders each year the maximum dividend consistent with maintaining mandatory legal reserves, using maximum depreciation rates, repayment of shareholder loans, and providing for future cash requirements of [X]', is in some respect contrary to Spanish law because said Art. 4(9) lacks two of the three requirements imposed by Art. 1261 CC ... (consent, object and cause); more precisely, the defendant claims that Art. 4(9) of the Basic Agreement lacks object (or determined object) and cause.

38 Nevertheless, the Tribunal observes that: (1) Art. 1261 CC is included in Book IV ('Obligations and contracts'), ...; (2) Art. 1285 CC, Chapter IV of said Book IV, Title II ('Interpretation of contracts') states: 'Each article of a contract should be interpreted in view of the content of the others, attributing the sense extracted from the articles taken as a whole, to those whose meaning is not clear'; and (3) Art. 1255 cc, Chapter I of said Book IV, Title II ('General provisions') states: 'The contracting parties may establish such agreements, articles and conditions as they deem convenient, provided that such are not contrary to the laws, morals or public policy'; and there is no Spanish norm in which consent, object and cause are set out as requirements for each article of a contract (nor has the defendant argued the contrary).

39 "The Tribunal can infer from the above that under Spanish law (1) the three conditions of Art. 1261 CC are required for the existence of any contract as a whole, but not for the existence of each article of that contract; (2) the articles of a contract are not independent of one another, but are always interdependent; and (3) Spanish law recognizes the validity of the articles of a contract insofar as they do not oppose laws, morals and public policy.

40 "It is the judgment of the Tribunal that Art. 4(9) of the Basic Agreement is not contrary to Art. 1256 CC since there is nothing in said Art. 4(9) in conflict with the laws, morals or public policy (nor has the defendant proved otherwise). The defendant's argument is rejected."

According to the arbitrators, Art. 4(9) of the Basic Agreement was clear and had to be applied literally:

41 "Whereas the rule pacta sunt servanda implies that the contract is the law of the parties, agreed to by them for the regulation of their legal relationship, and generates not only the obligation of each party to a contract to fulfill its promises, but also the obligation to perform them in good faith, to compensate for the damage caused to the other party by their non-fulfillment and to not terminate the contract unilaterally except as provided for in the contract. These principles are also part of Spanish law: [See Arts. 1101, 1124, 1257 and 1258 CC]."
refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that: (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; ....

6 Art. VI(2)(a) of the European Convention of 1961 provides: "2. In taking a decision concerning the existence or the validity of an arbitration agreement, courts of Contracting States shall examine the validity of such agreement with reference to the capacity of the parties, under the law applicable to them, and with reference to other questions (a) under the law to which the parties have subjected their arbitration agreement; ...."


8 Supra, note 2. [Art. V(3) of the Geneva Convention of 1961 provides: "3. Subject to any subsequent judicial control provided for under the lex fori, the arbitrator whose jurisdiction is called in question shall be entitled to proceed with the arbitration, to rule on his own jurisdiction and to decide upon the existence or the validity of the arbitration agreement or the contract of which the agreement forms part."]

9 Art. 8(4) of the 1975 ICC Rules provides: "Unless otherwise provided, the arbitrator shall not cease to have jurisdiction by reason of any claim that the contract is null and void or allegation that it is inexistent provided that he upholds the validity of the agreement to arbitrate. He shall continue to have jurisdiction, even though the contract itself may be inexistent or null and void, to determine the respective rights of the parties and to adjudicate upon their claims and pleas."

21 Art. 1101 of the Spanish Civil Code provides: "Those persons who, whilst complying with their obligations commit fraud, are negligent or delay payment, and those who in any way go against the spirit of their obligations, shall be liable to indemnify the damages caused." Art. 1124 of the Spanish Civil Code provides: "In bilateral obligations, it is understood that an implied right exists to cancel the obligation should one of the parties fail to fulfil his obligations." Art. 1257 of the Spanish Civil Code provides: "Contracts are only effective between the contracting parties and their heirs; except, with regard to the latter, in cases where the rights and obligations deriving from the contract are not transferable, either by their nature, or by agreement, or according to the provisions of the law. Should the contract contain any provision in favour of a third party, the latter may demand its execution, if he already has communicated his acceptance to the person under the obligation and prior to its cancellation." Art. 1258 of the Spanish Civil Code provides: "Contracts become enforceable by mere consent and from then on not only oblige compliance with the express provisions of the contract, but also that all consequences resulting therefrom, according to their nature, be in keeping with good faith, common practice or the law."

**Referring Principles:**

- IV.1.2 - Sanctity of contracts
- XIII.2.4 - Principle of separability of the arbitration clause