INTERNATIONAL CHAMBER OF COMMERCE

Partial award on Jurisdiction and Admissibility in case no. 6474 of 1992

Parties: Claimant: Supplier (European country)
          Defendant: Republic of X

Place of arbitration: Zurich, Switzerland

Published in: Unpublished

Subject matters: - jurisdiction [partly included in the Trans-Lex]
                 - admissibility of claim [not included in the Trans-Lex]
                 - role of transnational public policy with respect to the interests of the international community [not included in the Trans-Lex]
                 - lack of standing [not included in the Trans-Lex]
                 - lack of authority to conclude arbitration agreement [not included in the Trans-Lex]
                 - applicable law to arbitration agreement [not included in the Trans-Lex]
                 - arbitrability of bills of exchange [not included in the Trans-Lex]

Facts

A European supplier entered into several contracts, namely an Agreement of Cooperation and Purchases and a Purchase Contract, to supply agricultural products to the Republic of X (referred to in the award as 'the territory'). The contracts provided that the law applicable to the dispute was Swiss law. A dispute arose between the parties. Following unsuccessful negotiations, the supplier initiated ICC arbitration in Zurich, Switzerland, relying on the arbitration clause in the contracts.
The Republic of X argued that the arbitral tribunal had no jurisdiction over the claim due to overriding transnational public policy interests. This was because international public policy prohibited recognition of the Republic of X which was not recognized as a state by the international community. Thus, international arbitration of commercial dealings with the Republic of X would be a violation of international public policy. The arbitral tribunal found that it had jurisdiction over the dispute holding that a denial of justice would contradict the principle of good faith, one of the most fundamental principles of transnational public policy.

Asserting that the claimed receivables had been transferred from the supplier to the European country, the Republic of X challenged the supplier's standing to sue. After examining the law of the European country with regard to the subrogation of claims within the framework of an export promotion scheme, the arbitral tribunal concluded that the supplier was the owner of the claims. Furthermore, the tribunal questioned the Republic of X's interest in raising an objection concerning the admissibility of the claim.

The Republic of X contended that its representatives did not have the authority to bind it to a contract with financial implications. Applying Art. 177 of the Swiss Code on Private International Law (PILA) and relevant case law, the arbitral tribunal held that the Republic of X could not use its own law to contest capacity to be a party in arbitration.

The Republic of X alleged that the contract was induced by corruption and fraud. The arbitral tribunal held that corruption or fraud could not be determined in the context of a discussion an jurisdiction. Moreover, even if the Republic of X could prove fraud, it would have to prove that the arbitration clause was entered into due to corruption and fraud.

Finally, the Republic of X's objection to the arbitrability of bills of exchange under the law of the European country was dismissed as they were issued in compliance with contracts and arbitration clauses governed by Swiss law.

Excerpt

[...]

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[...]

III. THE FUNDAMENTAL PRINCIPLE OF GOOD FAITH

36 "Such a denial of jurisdiction in the circumstances would be contrary to that clear principle of transnational public policy which is the principle of good faith; it would defeat the legitimate expectations of the parties to the agreements and finally compel the claimant to go before the courts of the territory, as suggested by the defendant — all results which do not seem, to say the least, to be in keeping with the requirements of international public policy and of natural justice.

37 "Nor would such a result be in the interest of the present government of [the area], since they would find it more difficult henceforth to find foreign contracting partners.

38 "The line of defense adopted (and, as its consequence, a decline of jurisdiction) would appear, moreover, to be closely similar to cases of unilateral rescission or withdrawal of the arbitration undertaking, a course of conduct which, whether adopted by states or by private organizations or companies, is generally rejected by the international community as in flat contradiction with the fundamental principle of good faith, as well as with what may be described as the 'jus cogens' of international arbitration.

39 "In its oral argument, lastly, the defendant has rightly emphasized that 'international arbitration is designed to facilitate and bolster the security of international commerce' and that it should not be seen, or allowed to be used, as a 'vehicle' assisting 'activities of sanction busting'.

40 "To sum up, the defendant has totally failed to show, on the one hand, in what way and to what extent the application of the arbitration clause in the present case would constitute assistance to 'activities of sanction busting' and, on the other hand, has been unable to establish, if it attempted at all to do so, how a refusal to apply the arbitration clause and a decline of jurisdiction by this Tribunal would 'facilitate and bolster the security of international commerce'.”
Note General Editor. A virtually identical award was made on the same date in case no. 6476 of 1992, involving a different claimant and the same defendant.

Referring Principles:

I.1.1 - Good faith and fair dealing in international trade