Final award in case no. 7639 of 1994

Parties: Claimant: Sponsor (Qatar); Respondent: Contractor (Italy)

Place of arbitration: Paris, France

Subject matters: - termination of sponsorship agreement
- service agency
- ex officio application of consideration of equity

Facts

An Italian Contractor (Contractor) signed a Sponsorship Agreement with a Qatari engineering company (Sponsor) whereby the latter undertook to become the "sponsor" of the Contractor, and undertook to assist the Contractor to do whatever necessary within the laws and regulations of Qatar to enable the Contractor to be registered and to operate in accordance with the requirements of local laws and regulations. Furthermore, the Sponsor was to assist the Contractor in the award of projects for works in Qatar by the Employer. If such contracts were to be awarded, the Contractor would, according to the Obligation Clause, pay the Sponsor a fixed percentage of the original contract value. The Agreement was to remain effective for one year and could be renewed upon one-month written notice. Several weeks before the end of the first year, the Contractor informed the Sponsor that it did not wish to renew the Agreement and the Agreement expired.

The Agreement provided that, notwithstanding its expiry, its provisions would continue to apply to any projects which may have been awarded pursuant to its provisions (Duration Clause). Approximately one and a half years after the expiry of the Agreement, two contracts were awarded by the Employer to the Contractor. A dispute arose between the Sponsor and the Contractor regarding the Sponsor's entitlement to compensation for these contracts. The Sponsor, relying on the Arbitration Clause in the Agreement, referred the matter of its compensation to arbitration on the ground that, despite the expiry of the original Agreement and in light of the Duration Clause, it was entitled to remuneration for the award of the contracts. In the opinion of the Sponsor, both contracts had been awarded as a result of its efforts under the Agreement.

The arbitral tribunal first found on the facts that the award of the contracts was not due to the efforts of the Sponsor. In its legal arguments, the Sponsor relied principally on the Qatari Law of Commercial Agencies (Law No. x/1986) which states in Art. 6 that a commercial agent must be compensated in case his agency is not renewed. The arbitral tribunal rejected the Sponsor's qualification of the relationship as "commercial agency", finding rather that it was a "service agency".
Finally, even when examined in light of considerations of equity, the Sponsor's claim for the fixed percentage of the value of the two contracts was rejected.

Excerpt

[...]

III. THE "EQUITY" CONSIDERATIONS AND COMMENTS

[31] "Neither party raised an argument for claims in 'Equity'. The Tribunal, on the other hand, is bound to decide all issues by relying on the proper law of the Contract between the parties, as a result of the clear wording of the Applicable Law Clause of the Agreement, which is also expressly reflected in the Terms of Reference adopted by the parties. However, and as principles of equity play a vital role in the operation of the Laws of Qatar and as the Agreement between the Contractor and the Sponsor is subject to that law, the Tribunal has decided to consider these principles as part of its Terms of Reference, in its genuine and serious desire to be fair to both parties, by, among other things, considering the general principles of equity, although this aspect has been disregarded by both parties all through the proceedings. The Tribunal is also motivated by a desire to achieve completeness and thoroughness in preparing its Award.

[32] "The claimant limited its claims to the Agreement itself and to the applicable law. It did not seek to be compensated, even partially, on the basis of equitable considerations. The claimant chose not to submit for consideration a subordinate claim for partial compensation. Technically speaking, the Tribunal, like any other arbitral tribunal, must confine its findings to the limits and scope of the claims as submitted by the parties themselves. No arbitral tribunal has authority to consider claims not submitted; nor indeed is it allowed to go beyond the limits of the claims as submitted, and not as they should have been submitted. If a tribunal were to do so, the validity of its award would almost certainly be in doubt. However, and having considered the claims as submitted to it, the Tribunal in its paramount desire to be strictly objective, utterly thorough and completely scrupulous, decided to take it upon itself to consider any principles of equity, which may be relevant to the issues involved in this case.

[33] "The duty to perform the various obligations under the Agreement in a bona fide manner and in good faith, has been considered with particular emphasis by the Tribunal. Art. 49 of the 'Civil and Commercial Law' of Qatar embodies an express 'bona fide' provision that states that,

'a contract shall be performed in accordance with its contents and in a manner consistent with the dictates of good faith. A contract shall not only bind a contracting party to the contents thereof, but it shall also extend to all its requirements in compliance with law, usage and equity, depending on the nature of the obligation.'

[34] "The Tribunal then considered Art. 48 of the same Law. This emphasises that, 'the Contract is the law of the parties' ....

[35] "The Sponsor undertook to use its 'best endeavours', in performing its obligations. It did not guarantee results. In return, the Sponsor accepted to be paid upon achieving successful results i.e. the Contractor being awarded a tender, during the validity of the Agreement. Strictly and legally speaking, and considering that the Contractor never counterclaimed for damages for the Sponsor's failure to produce positive results, it can be safely assumed that the Sponsor did use its best endeavours during the Agreement, to achieve the objectives of the Agreement. Lack of positive results was despite the use of those best endeavours and therefore, the lack of positive results should be attributed to factors unrelated to any lack of activity by the Sponsor. The Tribunal therefore finds that the Sponsor could not be blamed for the Contractor's failure to obtain contracts during the validity of the Agreement.

[36] "The Tribunal also considered whether it was fair and reasonable to stipulate that the duration of the Agreement was restricted to one year; or whether it was fair and reasonable to deprive the Sponsor of payment, unless the award was
proved to have been made during the one year specified. The third point considered by the Tribunal ... was whether there was a duty in equity on either party to renew the Agreement.

[37] "The Tribunal after careful deliberations found that there was no violation of any 'bona fide' principles in respect of each one of the above three issues. The specified duration of the Agreement was freely entered into. Both parties must have felt the said duration was reasonable for their expectations under the circumstances prevailing at the time the Agreement was signed. Providing for payment to the Sponsor, but only if the award was achieved within a certain time, is also reasonable and not contrary to equitable principles. It is found in fact that this is a common provision in Sponsorship as well as in other Agency contracts of this type. Art. 49 quoted above seems to allow expanding the scope of interpretation of an obligation so as to comply with 'usage and equity', depending on the nature of the obligation. This specific aspect of usage in performance of contracts is common, not only in Qatar, but also in all civilised legal systems of the world. It is in fact a common trade practice internationally to make payment to sponsor dependent on positive results, such as an award of a tender. This trade usage provides certainty in the substance as well as in the duration of an agreement. The contractual practice which seems to prevail in the area, in the opinion of the Tribunal, does not conflict with the principles of good faith, as construed in the Agreement under consideration.

[38] "The Tribunal might have taken a different view if the Sponsor had, by one month notice, proposed to renew the Agreement ... and the Contractor had refused to extend the Agreement despite such a proposal notice. The Tribunal finds that none of these conditions were met in the present case.

[39] "The third and last issue to be faced is whether the 'bona fide' concept implied a 'duty to renew' the Agreement, as the claimant' Counsel seemed to imply. The Tribunal finds there is no such duty upon either party. The arguments on both sides were discussed above. The Sponsor still had time to sponsor the Project with other contractors when the Agreement came to an end. The Sponsor, on the other hand, did not request the renewal of the Agreement. The Contractor was under no obligations to divulge in advance or at all its intentions in respect of renewing the Agreement or otherwise. It has been therefore impossible for the Tribunal to find that both parties or either of them were bound by any 'bona fide' requirements to renew the Agreement.

[40] "What about the 'bona fide' duty in relation to the 'nature' of the obligation, as indicated by Art. 49 of the Civil and Commercial Law? The Tribunal exhaustively considered the concept in relation to the specific 'nature' of the Agreement between the parties. If it is a 'Commercial Agency', an Agent who has procured 'promotion of products' and/or an 'increase of customers', deserves fair compensation for this activity when the Principal 'does not agree to renew the agency without strong justification': these are all concepts used in Art. 6 of Law 4/1986 of Qatar. This Article is particularly severe as it constitutes a 'mandatory' provision under Qatari law, which is allowed to overrun any provision to the contrary agreed by the parties. The intention of the legislator is clear. It wanted to extend mandatory protection to Commercial Agents, to allow them to withstand unfair practices by more powerful exporting Principals. All this is not in line with the nature of Service Agency. A Service Agent is not appointed to sell and/or distribute the Principal's goods in the market. A Service Agent is appointed to procure a service which he holds himself out as expert in procuring, through special knowledge or contact, especially with regard to Authorities, Employers and public bodies. This explains why there is no provision similar to Art. 6 in the law governing Service Agency. Similarly, this also indicates why there is no restriction whatsoever for a Service Agency in regards to limitations on duration from which the parties may not derogate.

[41] "Art. 54 of the Qatari 'Civil and Commercial Law', extends the interpretation and meaning of words and expressions, beyond the usual or strict construction and their appropriate circumstances. This, like many other provisions, are taken from Egyptian law, which had general influence on Qatari law. It contains the same principle in Art. 150 of its Civil Code. It says that, 'should the expressions in a contract be vague or unclear ... it is essential to disclose the mutual intention of the contracting parties and disregard the subjective intention of each party'. This again leads to the requirement to interpret the Agreement in a 'bona fide' manner, to avoid any inequity. The Obligations Clause and the Duration Clause mentioned earlier, are not vague or uncertain or incapable of precise meaning. They reveal the intention of the parties clearly and without any ambiguity. The reference to 'one year' and the duty to pay the Sponsor if an award was achieved within this period and all other expressions used in the relevant Clauses of the Agreement, do not lend themselves to uncertainty or
ambiguity, of a nature that would throw some doubt on the genuine intentions of the parties.

[42] "The above-mentioned Clauses of the Agreement are the outcome of the free will of both parties and their use is in compliance with the specific trade usage in this field and with equity accepted in Qatari Sponsorship contracts. The Tribunal, even on consideration of equity, cannot find that the claimant's claims are well founded. The Tribunal has found no violation of justice or equity in the behaviour of the Contractor towards the Sponsor."

[...]

**Referring Principles:**

- IV.6.5 - Best efforts undertakings