Title:
ICC Award No. 9797, ASA Bull. 2000, at 514 et seq.

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Summary of the proceedings

The Andersen Worldwide Organization (AWO) is comprised of a Swiss entity, Andersen Worldwide Société Coopérative (AWSC), acting as an "umbrella" for the AWO member firms. Every member firm and its Practice Partners enter into a Member Firm Interfirm Agreement (MFIFA) with AWSC, substantially in the form of a standard version approved by the AWSC partners pursuant to which the member firm and/or its Practice Partners agree to adhere to professional standards and principles coordinated by AWSC, subject to compliance with applicable laws and professional regulations, to adapt appropriate and compatible policies and to carry out certain other responsibilities.

The MFIFAs also contained an arbitration agreement. Before 1991, the MFIFAs stipulated that disputes were to be resolved by a sole arbitrator in Geneva provided that the parties did not agree on another place of arbitration. If taking place in Switzerland, the proceedings were to be governed by the Swiss Concordat for Arbitration (applicable to domestic arbitration). If outside Switzerland, the arbitration was to be governed by the ICC Rules. The standard text was modified in 1991. The parties were still given the possibility to agree on a place of arbitration other than Geneva, but reference to the
Concordat was deleted. Any arbitration was henceforth to be subject to the ICC Rules with one notable exception: if the proceedings took place in Switzerland, the competent Swiss court was designated as appointing authority. In 1994, the arbitration agreement to be included in the standard MFIFAs underwent a further revision. Geneva was to be the exclusive place of arbitration with the ICC Rules applicable to all proceedings. The ICC was to act as the appointing authority in all cases.

As AWO developed through the years, various difficulties began to strain the relationship between the partners practicing in the Accounting and Audit and Tax divisions on one side, and those practicing in the consulting and management division on the other. The earnings disparity between the practices, the need for new governance framework in light of the firm's internationalization, the desire of each division to run its own business and the regulatory issues stemming from the auditors' independence requirements caused discomfort among the consulting partners. In 1989, the AWSC Board of Partners decided that the firm's practice was to be conducted through two business units: ARTHUR ANDERSEN for audit/attest, tax and other financial and specialty advisory services, and ANDERSEN CONSULTING for strategic services, systems integration, and information technology consulting. In spite of several subsequent attempts by AWSC to define the respective scope of practice of the two business units, none of the suggested definitions turned out to be satisfactory.

In December 1997, Andersen Consulting Business Unit Member Firms (ACBU) initiated arbitration against Arthur Andersen Business Unit Member Firms (AABU) and AWSC based on the arbitration agreement in the MFIFAs. In essence, ACBU asserted that the MFIFAs were terminated for breach of contract by AWSC. According to ACBU, AABU member firms had breached their material obligations under their MFIFAs by competing with ACBU member firms, causing marketplace confusion and misappropriating the Andersen Consulting name. ACBU reproached AWSC for having breached the MFIFAs by failing to coordinate and ensure compatibility between the practices of the member firms.

AWSC made counterclaims against ACBU arguing among others that ACBU had breached contractual and fiduciary obligations under their MFIFAs by planning to separate from the AWO, by filing the arbitration in bad faith and without complying with the contractual notice provisions, by disparaging AABU and AWO in the press, and by disrupting the Respondents' business.

AABU and AWSC raised jurisdictional objections. They argued that the exclusive ICC arbitration agreement as it was inserted in the standard MFIFAs from 1994 onwards was not applicable to member firms who had signed an MFIFA containing a prior version of the arbitration agreement.

In an Interim Award rendered on 29 April 1999, the Sole Arbitrator decided that all member firms were bound by the new 1994 arbitration clause and that the UNIDROIT Principles of International Commercial Contracts were applicable to the merits of the dispute.

AABU and AWSC challenged the Interim Award before the Swiss Federal Tribunal without success. The Tribunal's decision on the AABU appeal is published in this Bulletin ASA 3/2000 (see below, p. 546).

In his final award, excerpts of which are published below, the Sole Arbitrator found, in summary, that AWSC had failed to coordinate the business of its member firms, that this failure amounted to a substantial breach of their MFIFAs, which entitled the ACBU member firms to terminate the latter. The ACBU member firms were ordered to abandon the name "Andersen" by 31 December 2000.

Extracts of the award:

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In his final award, excerpts of which are published below, the Sole Arbitrator found, in summary, that AWSC had failed to coordinate the business of its member firms, that this failure amounted to a substantial breach of their MFIFAs, which entitled the ACBU member firms to terminate the latter. The ACBU member firms were ordered to abandon the name "Andersen" by 31 December 2000.
V. Considerations

[...]

G. Whether Claimants are entitled to be excused from further obligations to AWSC and the AABU member firms under the MFIFAs

While AWSC breached its obligations to the ACBU member firms under Claimants' MFIFAs and was responsible for a fundamental non-performance thereunder, Claimants did not engage in inequitable conduct or breach their contractual or fiduciary obligations.

It is a well established rule of law that a fundamental breach of a contract gives the aggrieved party the right to terminate the contractual relationship. This general rule is reflected in the MFIFAs which provide that the effect of a material breach thereto entitles the wronged party to terminate its MFIFA (Paragraph 14.2 (F) of the MFIFAs).

Under the UNIDROIT Principles of International Commercial Contracts, a party may terminate a contract when the failure of the other party to perform an obligation under the contract amounts to a fundamental non-performance. The consequence of termination is to release the parties from their obligation to effect and to receive further performance. (UNIDROIT Principles of International Commercial Contracts, Articles 7.3.1 (1) and 7.3.5 (1)).

On account of AWSC's fundamental non-performance, the ACBU member firms' MFIFAs are terminated. Consequently, Claimants are released from all their obligations to AWSC and the AABU member firms under the MFIFAs as of the date the present award is notified to the parties.

[...]


Referring Principles:

VI.1 - Termination of contract in case of fundamental non-performance