Final award of 6 January 1988

Arbitrators: Donald Zubrod (US, chairman); Jack Berg (US); David J. Sharpe (US)

Parties: Claimant: Maritime International Nominees Establishment (Liechtenstein); Respondent: The Republic of Guinea

Place of arbitration: New York, USA

Published in: 3 International Arbitration Report (January 1988, no.1) pp. A2-44

Subject matters:
- breach of contract
- bad faith
- compensation of damages
- exclusive jurisdiction ICSID for provisional measures
- damages: lost profits
- damages: costs of related court proceedings

Facts

On 19 August 1971, the Socialist Republic of Guinea and MINE entered into a "Convention" for ocean transportation of bauxite (CBG bauxite). The Convention was intended for the establishment, for thirty years, of a mixed-economy company, called "La Société Guinéenne de Transports Maritimes" ("SOTRAMAR" ). The company's purpose would be to carry out the transportation of 50 % of the Guinean bauxite (CBG bauxite) that had been sold to several western companies (the "Bauxite Receivers") and which, according to Art. 9 of a contract of 1961 with the first buyer ("Harvey Contract"), could be carried by ships flying the Guinean flag.

The Convention contained an arbitration clause providing that if conciliation failed, the dispute was to be settled through arbitration for which the tribunal was to be appointed by the President of ICSID.

SOTRAMAR was capitalized at US$ 20 per share, 49,000 for Guinea and 51,000 for MINE. At shareholders meetings, they were to have equal voting rights. MINE was to deposit US$ 1,020,000 to SOTRAMAR's credit in the Bank. Guinea was to contribute half of the freight rights, stable tax and customs rules and two vessels.

Profits were expected to come from the use of ships on two different types of round voyages, one (the one from Kamsar to Europe and back) to be made at competitive freight rates, the other being extra-profitable.
Because they could not get dry bulk cargoes to carry back from Europe to Kamsar, the parties decided to have the ships go from Europe to Kamsar, be filled with bauxite for North America and return with grain. This extra profit for SOTRAMAR was to be divided between the parties.

MINE made several calculations and recommendations to start long-term contracts, but Guinea did not react to any of the proposals.

On 29 August 1972, the parties agreed to an amendment of the Convention ("Codicil 2") by which Guinea withdrew its contribution of cargo-carrying rights and the two ships.

In November 1972, Guinea asked MINE to negotiate short-term contracts. The parties established the SOTRAMAR Shipping Committee to continue negotiations with the Bauxite Receivers. In the meantime costs and freight rates had increased and the proposed contracts were rejected by the Bauxite Receivers.

In July 1972, the parties held an "arbitration" meeting with the Bauxite Receivers, which resulted in the acceptance by the latter of freight rates which, according to MINE, would be profitable to SOTRAMAR. However, SOTRAMAR, according to MINE, had still not received authority from Guinea to conclude contracts of affreightment.

On 5 September 1973, MINE wrote a letter to Guinea complaining that Guinea had failed to send its members to the Shipping Committee of so TRAMAR and that the purpose of SOTRAMAR was frustrated. MINE called for a meeting in Washington, DC to discuss the expansion of the Shipping Committee and the authority to conclude contracts of affreightment.

At the meeting held on 9 September 1973, MINE made clear that because SOTRAMAR did not have the authority to contract, it could not proceed on the basis of the "arbitrated" rates of July.

On 11 September 1973, MINE sent a letter to Guinea again mentioning SOTRAMAR's need for authority and saying that the failure to give this was in contradiction with the Convention.

The Bauxite Receivers started the transportation of the CBG bauxite from Kamsar under their own arrangements for transportation in October 1973.

In February 1974, MINE became aware that Guinea was negotiating about the Art. 9 freight rights with a third Party. MINE informed the Minister of Mining and Geology of Guinea of the existence of disputes under the Convention.

On 12 April 1974, parties held a "conciliation" meeting and MINE asked Guinea about this rumor. Guinea did not give a clear answer. However, on 16 March 1974, Guinea had entered into an agreement with a consortium of Danish and Spanish shipping companies ("AFROBULK"), under which AFROBULK was to pay Guinea 50 Cents per ton for the Art. 9 freight rights.

On 4 July 1974, at a meeting in Zurich, this was acknowledged to MINE by Guineas Minister of Mining and Geology, but it was Said that this was a temporary matter, until SOTRAMAR would be in Operation. In August 1974, Guinea presented the agreement with AFROBULK to MINE, which did not regard it as a temporary agreement, but as a unilateral Substitution of the rights of SOTRAMAR.

MINE maintained that it was willing to continue the Convention if Guinea would terminate the agreement with AFROBULK, but Guinea did not affirm this.

In 1975, AFROBULK started to use the Art. 9 freight rights, SOTRAMAR being past resuscitation.

On 20 January 1978, MINE filed a Petition to the US District Court of Columbia to compel arbitration before the American Arbitration Association (AAA). At the hearing on the Petition, on 15 June 1978, at which Guinea did not appear, MINE contended that Guinea refused to participate in the ICSID arbitration. The Petition was granted and arbitration before the AAA was ordered by the District Court.
On 9 June 1980, the arbitrators appointed by the AAA rendered an award against Guinea, which had not attended the hearings, in excess of $27 million.

MINE then returned to the US District Court, filing on 22 August 1980 a motion to confirm and enter judgment on the arbitral award under Sect. 9 of the Federal Arbitration Act. At this point, Guinea entered the proceedings for the first time, filing a motion to dismiss for lack of jurisdiction. Guinea's motion to dismiss was denied by the Court and the AAA award was confirmed in MINE's favour.

Guinea filed an appeal to the US Court of Appeals (Columbia Circuit). On 12 November 1982, the Court of Appeal reversed, ruling that the District Court lacked jurisdiction of the subject matter under the Foreign Sovereign Immunities Act.

On 7 May 1984, MINE filed its Claim with ICSID. The parties waived the ICSID procedures for composition of the tribunal. One arbitrator was appointed by MINE, one by Guinea. The President was chosen by both Parties. On 9 October, after several hearings, it was agreed that the tribunal would receive an extension of the time for presentation of the award through 31 December 1987.

In the meantime, MINE had initiated attachments proceedings in Europe. On

Page: 85

25 June 1985, Guinea requested on order from the Tribunal, in an “Emergency Request for Relief from Attachment of Its Assets by MINE”, to dissolve all pending attachments of its bank account and assets in Europe. The Reply from MINE held that the European actions were meant to seek enforcement of the AAA award and that they were not prejudgment attachments within the ICSID arbitration.

On 3 July 1985, the Tribunal denied Guinea's Request as premature, because it had not yet defended itself in the attachment proceedings. Also a Request for Reconsideration by Guinea on 8 August 1985, did not lead to action by the Tribunal.

On 4 December 1985, the Tribunal ruled, in a Provisional Measure, that MINE's litigation actions in Europe constituted an "other remedy" under Art. 26 of the ICSID Convention and that this breached its submission of the dispute with Guinea to ICSID. It further recommended, in accordance with Art. 47 of the ICSID Convention, that MINE immediately withdraw and discontinue all pending litigation, and that it dissolve all attachments and not seek any new remedy in national courts. MINE did as was recommended by the Tribunal.

In the arbitration award, the ICSID Tribunal decided as follows on the liability of the parties as to the failure to make SOTRAMAR function:

Excerpt

[...]

Page: 90

D. Quantification of damages

[21] "The Tribunal finds that MINE's loss of profits may be measured adequately by the AFROBULK agreement: the 50 cents per ton which Guinea received from AFROBULK for the right to carry bauxite under Art. 9 during a two-year period rightfully belongs to SOTRAMAR. In addition, it seems fair to conclude that such an arrangement could have been extended, or negotiated with others, to a total period of 10 years. While the Convention was to last 30 years, the Bauxite Receivers under the Harvey Agreement were bound to CBG for only 20 years, and 10 years appears to be a reasonable period considering that the Convention contained provisions for early termination.

[22] "The quantity of bauxite carried during the 10-year period under such an arrangement is 38,437,127 tons; and this tonnage, multiplied by 50 cents per ton, produces the total due SOTRAMAR of US$ 19,218,563. Under Art. 9(B) of the Convention, SOTRAMAR's net profits were to be taxed 30 % by Guinea, and the remaining 70 % was to be divided equally between MINE and Guinea. Therefore MINE is entitled to 35 % of the total, producing the principal sum of US$
6,726,497.

[23] "The Tribunal also awards simple interest on each year's estimated lost profits from 1975 through 1987, calculated at the average United States prime interest rate for each year that is published by the Chase Manhattan Bank, a total of US$ 5,457,986, until the date of this award.

[24] "The Tribunal also awards MINE costs toward its fees and expenses in the ICSID arbitration in the amount of US$ 275,000."

[...]


Referring Principles:

- VII.6 - Duty to pay interest