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Partial award of 23 June 2000, case no. 120/1998

Arbitrators:
Chairman of Lebanese nationality, two members of Egyptian and Syrian nationalities

Parties:
Claimant: An African furniture company (seller); Respondent: An Asian company (buyer)

Place: CRCICA

Subject Matter:
lack of jurisdiction, applicable law, alter ego doctrine

Applicable Law:
The law of the Asian Party

Language of Arbitration:
English

Held

US American courts when confronted with the problem under consideration have used the after ego doctrine or the doctrine of piercing the corporate veil. According to this doctrine "the corporation and those who have controlled it without regard to its separate entity are treated as but one entity, and at least in the area of contracts, the acts of one are the acts of all".

[...]

C. The parties to the dispute

[...]

The Tribunal's position

Considering that, the question at issue is whether the chairman of the Respondent's Board of Directors may become a
proper party in this arbitration?

Considering that, the jurisdictional objection raised by the Respondent as to the personal liability of its chairman gives rise to the issue of the scope and effects of the relevant arbitration clauses. Therefore, the sources of law appropriate to the determination of said scope and said effects should be defined.

Considering, however, that in referring to the African country arbitration rules, that is, UNCITRAL Rules, the parties incorporated its provisions concerning the Arbitral Tribunal's authority to decide as to its own jurisdiction, which provisions do not refer to the application of any national law.

Considering that, the sources of law applicable to determine the scope and the effects of an arbitration clause providing for international arbitration do not necessarily coincide with the law applicable to the merits of a dispute submitted to such arbitration. Although this law or these rules of law may in certain cases concern the merits of the dispute as well as the arbitration agreement, it is perfectly possible that in other cases, the latter, because of its autonomy, is governed, not only as to its scope, but also as to its effects, by its own specific sources of law, distinct from those that govern the merits of the dispute.

Considering that, this is particularly the case, unless the parties have expressly agreed otherwise, with respect to an arbitration clause referring to the UNCITRAL Rules.

Considering that, the provisions of the UNCITRAL Rules establish in particular, the principle of the complete autonomy of the arbitration clause (Article 21(2)) and confer on the arbitrator the power to take any decision as to its own jurisdiction (Article 21(1)) without obliging him to apply any national law.

The Arbitral Tribunal reaches its decision regarding jurisdiction, by reference to the common intent of the parties to these proceedings, such as it appears from the circumstances that surround the conclusion and characterise the performance of the contracts in which they appear. In doing so, the Tribunal should also take into account usages conforming to the needs of international commerce.

Considering that, in conformity with the preceding it is appropriate, in order to determine the scope and the effects of the arbitration clauses relied upon, to examine successively the circumstances under which the negotiation, the performance of the contracts in which these claims appear took place, and to explore thereafter if, in this context, the chairman could be a party to this arbitration.

Considering that, it is not disputed that Mr. ... is the chairman of the Respondent company and by his own statement he is also the chairman of a bank and he owns 72% of its shares, as it appears from his letter sent to the Claimant.

Considering that, in his letter dated ... sent to the Claimant, Mr. ... admits that he negotiated and treated with the Claimant by stating that "I regret that I cooperated with you regarding the exhibition in 1996 and spent too much money... and my time". Thus it appears that Mr. ... was the one who negotiated the contract and was aware of the arbitration clause contained in the contract, especially that he is the chairman of the Respondent's Board of Directors.

Considering that two months after the signature of the contract dated ..., an addendum to the said contract regarding the rescheduling of the Respondent's due payment was signed between the Claimant and the Respondent on ... and Mr. ... was the signatory of this addendum acting prima facie on behalf of the Respondent.

Considering that, the correspondence related to the settlement of the debt owed to the Claimant was all addressed to Mr. ... and that the latter was the one replying to these letters. Thus, Mr. ... appears as the main contact in the Respondent company.

Mr. ..., therefore played an essential role in the negotiation, which led to signing of the contract and its addendum, as well as the execution of the contract.

Considering that, in his letter dated ... Mr. ... maintains a confusion between himself and the Respondent, by the use
sometimes of the first pronoun "I" and sometimes the plural pronoun "we":

"the question regarding transfer of the dues of the Exhibition goods is deciding really (sic)."

and

"I inform you that recently I bought 72% of the shares of the acting commercial joint-stock Bank and I am the chairman of its Board of Directors and it will remove many problems of the debts."

In the same letter, he further states using the plural

"we are carrying on negotiations with the Bank in plan of conversion of the sums into USD"

and

"the present we have the buyer of four-floors building, proceeds of sales will be remittance for payment of the exhibitions goods (sic)."

He also added that

"we delivered to Russia a big consignment, the supposed returns from its realization will be also remittance for the payment of the Exhibition goods [this is the type of English used by the Respondent]."

Considering that, it is not clear whether Mr. ... is talking on his own behalf or on behalf of the company, thus creating a confusion between him and the company.

Furthermore, this finding is asserted by further letters of Mr. ..., indeed, in his letter dated ..., he stated that "I take all measures to repay the debt", "I have money", "I put in to a real estate", "I receive profits ..." And in the same letter added "we have controlling block of shares", "no question about the debts we will settle".

Considering that the above documentation shows that Mr. ... is confusing the management of the Respondent and the bank and using at his own initiative the money of one company to cover the debts of another.

In his letter dated ..., Mr. ... stated that:

"I inform you, that I take all measures to repay the debt for the goods from the Exhibition together with the payment of banking interests for the delay. I have money in the national currency, however at the present for the commercial banks there are difficulties on its conversion. Therefore the incomes are returning on the banking operations I put into a real estate. I receive profits from transactions with Russian partners, which also will go on with the payment of our debt. In the stage of consideration is a question of receipt by bank, in which, as we informed you, we have the controlling block of shares (72%) license on the foreign economic activity."

Considering that the two companies, thus, appear to be controlled by Mr. ... who declares using his own money as well as the income of his bank to pay the debt of the Claimant to such a degree that the companies and Mr. ... appear as if they have no separate mind, will or existence of their own.

Such control goes beyond a mere stock ownership, or even identity of directors, to the point that Mr. ... dominated the
finance, policy and business practice of the two companies, it can be said that the companies seem to be a mere screen for his own personal activities.

Considering, in particular, that the arbitration clause expressly accepted by a company should bind the controller of the group which, by virtue of its role in the conclusion, performance or termination of the contracts containing said clauses, and in accordance with the mutual intention of all parties to the proceedings, appear to have been the real parties to these contracts.

Considering that, the award of ICC case n. 5721, 1990 rendered in Geneva describes international arbitral jurisprudence in this respect (see P. Fouchard, E. Gaillard. B. Goldman, traité de l'arbitrage commercial international, Ed. Litec, 1996. p. 301 ). In this case the Arbitral Tribunal pointed out that:

"En résumé, l'appartenance de deux sociétés à un même groupe où la domination d'un actionnaire ne sont jamais, à elles seules, des raisons suffisantes justifiant de plein droit la levée du voile sociale. Cependant, lorsqu'une société ou une personne individuelle apparaît comme étant le pivot des rapports contractuels intervenus dans une affaire particulière, il convient d'examiner avec soin si l'indépendance juridique des parties ne doit pas, exceptionnellement, être écartée au profit d'un jugement global. On acceptera une telle exception lorsque apparait une confusion entretenue par le groupe ou l'actionnaire majoritaire.

Considering that, these Awards are ratified by state courts:

La clause d'arbitrage insérée dans un contrat international a une validité et une efficacité propre qui commandent d'en déduire les effets aux parties directement impliquées dans l'exécution du contrat, dès lors que leur situation et leurs activités font présumer qu'elles avaient connaissance de l'existence et de la portée de cette clause, stipulée conformément aux usages du commerce international (Cour d'Appel de Paris, Rev. arb. 1989, 691 note P.y. Tschanz, see also aff. 1434 : JDI 1975, p. 978; 2375 : JDI 1945, p. 973-4131 : Thl 1983, p. 899).

Considering that, the US American courts when confronted with the problem under consideration have used the alter ego doctrine or the doctrine of piercing the corporate veil. According to this doctrine:

the corporation and those who have controlled it without regard to its separate entity are treated as but one entity, and at least in the area of contracts, the acts of one are the acts of all (see US District Court, SD:Y, 23 January 1992, Yearbook, 1993.506; US Court of Appeals, dr., 19 August 1993, carte Blanche v.

In conclusion, it is appropriate for the Tribunal to assume jurisdiction over the claim brought against Mr. ... (the chairman of Respondent).

In so doing, the Tribunal contradicts no principle nor any rule of ‘international public policy1’ in particular, that of the Egyptian legal system (the seat of arbitration). The latter is not based on any principle that would prohibit giving to an arbitration clause implicating companies and physical persons that are legally distinct, the scope attributed to it by the present award. On the contrary, in reaching this result, the Tribunal takes into account the needs of international
commerce to which the rules of international arbitration should be responsive.

[...]

Referring Principles:

X.2 - Piercing the corporate veil