Final award of 29 January 2000, case no. 142/1999 ad hoc

Arbitrators: Three Egyptian Arbitrators

Parties:
- Claimant: An African enterprises company
- Respondent: The Ministry of Defence of an African state

Place: CRCICA

Subject: Administrative contract of construction

Applicable Law: Egyptian law

Language of Arbitration: Arabic

Held

The "exceptio non adiinpleti contractus" cannot be raised against a legal duty of delivery of public properties to a relevant authority to conduct and continue a public utility.

Facts

In 1977 the parties entered into a contract upon which the Claimant was obliged to buy and install a plant for the production of "W. Panel units", which can produce annually a quarter million metres square of buildings, to be purchased from a North American company.

By the same contract the Claimant had to train the technicians of the Respondent in the design and installation of these units, to bring raw materials and the spare parts for regular commissioning for a period of 10 years, after which the Claimant shall return the factory to the Respondent in good condition. The Respondent undertook to entrust to the Claimant an annual quantum of works of 100,000 m² that was built on a site granted by the Respondent for ten years, with free water and electricity.
The Claimant undertook to insure the plant. The contract contained an arbitration clause:

> any dispute arising between parties shall be settled by an arbitration tribunal assisted by experts so long as is possible.

Claimant's demands are:

1. To dismiss all demands of the Respondent because they are contrary to the facts and the law;
2. To order the Respondent to pay the value of losses sustained by the Claimant according to the reports of the central auditing agency, from 1985 to 1990 and from 1991 till 1999, the date of delivery of the plant;
3. To order the Respondent to settle the remaining value after the amortisation of the plant;
4. To order the Respondent to pay the wages and salaries of 105 workers, technicians and employees until the date of delivery of the plant;
5. To order the Respondent to pay the expenses of bank finance for production, which is composed of three elements:

> the remaining value of amortisation, the stored production, and the losses.

6. To award the Claimant the right to have the loss sustained and the profit lost;
7. To award the Claimant the right to have the expenses of maintenance, guards and insurance until the effective date of delivery.

The Respondent's demands are:

1. To dismiss all demands of the Claimant because they are contrary to the facts and to the law;
2. To dismiss the claim for losses, if any, because it resulted from the failure of the Claimant to distribute its products and if we review the contract we do not find any monopoly of production by the armed forces, especially if we read the Article saying that the Claimant has the right to invest the rest of the production (if any) in establishing buildings for third parties;
3. Claims 3, 4 and 5 are refuted because the Claimant retained the land and the plant after the defined period, while the contract provides that at the time of dispute and referral to arbitration, delivery must take place. The period before delivery is the responsibility of the Claimant;
4. To order the Claimant to pay the counter-value for the usufruct of land and constructions and equipment installed upon it, as well as the legal interest;
5. To order the Claimant to pay for the construction and equipment, which became unfit for use for the purposes agreed upon, as is evidenced by the minutes of delivery;
6. To dismiss all demands of the Claimant related to the loss sustained and to the profit lost, because they resulted from the Claimant's acts, and because the Claimant made an amendment to the activity of the plant to manufacture wood products.

The Claimant substantiated its demands saying that the production in the plant began in 1980, but the Respondent did not fulfil its obligation to buy 100,000 m² of the production and did not buy, except 21% of the minimum of its obligation. The marketing of the rest was impossible because there was no demand upon this kind of production used by the armed forces. The Claimant asked the Respondent each year to aid it in avoiding these losses. The Claimant said also that the expenses of bank finance was 15% and it could have avoided the loss if the Respondent bought the quantities agreed upon.

The Claimant added that it did not abstain from delivering the land and the plant, but expressed its wish to deliver after ascertaining that the damages it claims shall be negotiated.

The Claimant said that the contract with the Respondent is not an administrative contract because it does not relate to a public utility, and the government regulations of procurement were not applied thereto and there are no exceptional clauses in it for which the use of public law methods is required. Accordingly the contract is a civil one.

As to the amortisation of machinery and equipment, it said that amortisation did not exceed 28% and the plant was in
good condition by 72%.

The Respondent replied that the quota to be bought by the armed forces is for encouraging the Claimant to continue in the market, as the rest of its production is about 150% of the quota of the armed forces. The Claimant made the first feasibility studies and pretended that it would be able to make the marketing. The Respondent gave the land with utilities free, paid the value of buildings of the plant brought to it, taxes and custom duties exemption over the period of contracting, and paid much to raise the capacity of the plant.

The Respondent refused to accept that the contract was a civil one and upheld that it is administrative and, if so, it has the right to reduce the quantities needed for the armed public utilities.

The Respondent submitted copies of hundreds of documents and papers of the Claimant as evidence of the volume of profit it realised from different activities it practiced, such as dealing in metal, glass and wood products.

The Claimant objected that the Respondent took over its papers and said that its possession of such papers was illegal.

**Award**

[...]

In synallagmatique contracts, if the juxtaposing obligations are due, each of the two parties may abstain from executing its obligation, if the other party did not execute its obligation.

This *exceptio non adimpleti contractus* cannot be raised against a public authority in the matters of public utilities because the jurisprudence and the doctrine are unanimous upon the rule of continuance of public utility without any interruption. Accordingly, the Tribunal calculated the rent of the land during the period of delay in delivery and awarded it to the Respondent.

As to the amortisation and the value of the plant the Tribunal said that it agreed to the amortisation of 28% and divided the 72% between the parties, and so the Respondent shall pay 36% to the Claimant.

[...]

**Referring Principles:**

| V.1.4 - Principle of simultaneous performance; right to withhold performance |