AD HOC

Interim award of 9 September 1983

(ORIGINAL IN GERMAN):

Arbitrators: Dr. Lelio Vieli (Switzerland), chairman; Stanislaw Jenger (Poland); Dr. Stefan Kraft (Switzerland)

Parties: Claimant: F.R. German engineering company; Defendant: polish buyer

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Subject matter:

- Act of State as force majeure
- piercing the corporate veil of a state enterprise (Zheorie des Durchgriffs)
- "actual"/"functional" instrumentality (faktische/funktionelle Organschaft) in Swiss law
- applicable law

FACTS

The claimant is an engineering company incorporated in the F.R. Germany, which engages in the planning and delivery of plants and equipment. Being without its own production facilities, it operates as general contractor and enters into subcontracts for delivery with numerous producers. The defendant is an export trading company of the Polish State.

On 26 January 1980 the parties entered into a contract under which claimant was to construct and deliver a plant for the production of fuel gas from coal in the People's Republic of Poland. Contract negotiations had extended over several years. The Polish ministries for chemistry, foreign trade and mining as well as representatives of the Polish State Planning Commission partly participated in the negotiations. The contract was to enter into force upon various conditions, in particular, the obtaining of permission by all competent authorities in the People's Republic of Poland and issuance of the mandatory Polish import licence. After all these conditions had been complied with, the contract entered into force on 24 March 1980. Claimant's obligations included planning of the plant and delivery of technical documentation, delivery of equipment, technical supervision of the construction process and training of personnel. Besides its obligation to pay the price, the defendant, in particular, agreed to provide the take over of deliveries, transport and storage of equipment in Poland, construction work on the construction site and all necessary governmental working and residence permits for claimant's personnel.
With respect to dissolution of the contract due to "force majeure", Art. 19 of the contract contained the following provisions:

Consequences related exclusively thereto, will be considered unforeseen events beyond the control of the contracting parties, which occurred after the making of the contract and which could not be avoided by the contracting parties with the exercise of due diligence, and which render fulfillment of contractual obligations impossible as a whole or in part, e.g., natural disasters, fires, floods, earthquakes, strikes, war, mobilization, military actions of the enemy, requisitions, riot, embargo, governmental order. Unavailability of workers, materials and raw materials will not be recognized as force majeure.

"19.2 Strikes not legalized by the competent trade unions and all lock-outs resulting therefrom will not be considered as force majeure.

"19.3 The contracting party claiming force majeure must notify the other contracting party by telegram or telex of the occurrence and termination of the force majeure not later than two weeks from the date of occurrence. Within a period of an additional 15 days, this contracting party must confirm by registered letter, the circumstances of force majeure confirmed by a competent authority of the State or the Chamber of Industry and Commerce or the Chamber of Foreign Trade respectively, in which the nexus between the force majeure and the impossibility of timely delivery or performance of contractual obligations is determined. In the same manner and within 10 days, the contracting party claiming force majeure must notify the other contracting party of the termination of the state of force majeure.

"19.4 If the above-mentioned notifications and confirmations are not provided for within the stipulated time limits, the contracting party in breach of this obligation may not rely on rights resulting from force majeure.

"19.5 In case of force majeure, and insofar as this will influence time limits for delivery and other contractual time limits, the time limits will be prolonged for the duration of force majeure and the consequences related exclusively thereto.

"19.6 If the contracting party concerned is not able to comply with contractual obligations within 4 months due to force majeure, both contracting parties will immediately consult each other and discuss solutions acceptable to both contracting parties.

"19.7 If an agreement as mentioned in Art. 19.6 should not be reached, the contracting party which has sustained a loss may call upon the arbitral tribunal after two additional months."

According to Art. 20.5 of the contract, Swiss law is applicable to the contract and its interpretation.

By telex of 25/26 January 1982, defendant notified claimant that the Council of Ministers of the People's Republic of Poland on 21 December 1981 has banned all imports of industrial investment goods for the gas production plant . . . and that this created an event of force majeure as defined in Art. 19.1 of the contract. The governmental Order was worded as follows:

"By virtue of the ordered state of war and the decision of the Military Council for the Rescue of the Nation of 19 December 1981 concerning the restriction of industrial investments in progress, based on Art. 11(4) of the Statute of 26 March 1975 - relating to customs law (Reg. Bl. No. 10, Pos. 56) the following is ordered:

§ 1 According to the annex with investment projects listed therein, a ban is ordered on the import of investment
goods for such projects.

§ 2 Permits granted for import of goods as listed in § 1 are void.

§ 3 The Minister of Foreign Trade is in charge of executing this order.

§ 4 The order enters into force as of the date of issuance.

Chairman of the Council of Ministers

Army-Gen. W. Jaruselski.

In the annex to the order, twenty-four industrial projects are listed, among them the gas production plant . . . .

Claimant alleged that no event of force majeure existed. Claimant declared its readiness for timely delivery of the equipment and expressly made an offer to do so. Defendant subsequently did not accept the equipment which was to be delivered according to the delivery schedule.

Before the arbitral tribunal, claimant primarily sought a declaratory award stating that the order of the Council of Ministers of 21 December 1981 does not create an event of force majeure as defined in Art. 19 of the contract and, furthermore, sought payment of DM 76,530,259 plus interest.

The arbitral tribunal rendered by majority vote an interim award on the issue whether a case of force majeure existed.

EXTRACT

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IV. BASIC LEGAL CONSIDERATIONS

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D. Application of the Doctrine of Piercing the Corporate Veil (Durchgriff) and Factual Instrumentality (faktische Organschaft) to State Enterprises

"The question arises as to what extent the concept of piercing the corporate veil and factual instrumentality applies to State enterprises in Socialist States. The distinction between abuse of right and the basic question whether a Socialist State enterprise may invoke a State Act as force majeure cannot be applied in the sense proposed by the parties. Insofar as the wording and interpretation of Art. 19.1 of the contract permit reliance on force majeure, the question remains, whether the State enterprise should, nevertheless, be disallowed such reliance. Such a decision can only be based on Art. 2 of the Swiss Civil Code, the principle of good faith and the prohibition of abuse of rights.

(. . . .)

"Guidance for a solution under Swiss law must be, 'that the State party may neither be privileged nor discriminated as compared to private parties.' (Böckstiegel, 'Besondere Probleme der Schiedsgerichtsbarkeit zwischen Privatunternehmen und ausländischen Staaten oder Staatsunternehmen', in: Neue Juristische Wochenschrift 1977, p. 1581).

"It must be recognized as a principle that the State enterprise by virtue of its particular legal status, as opposed to the
contracting private party, should not have specific advantages nor specific disadvantages. The relation of Socialist State enterprises to the State must therefore be seen as one comparable to the trust-relation (Treuhand) in Western States or the relation between the single shareholder and the company controlled by him.

"This results also from the considerations which will follow on the relation of the defendant to the Polish state (see infra IV.B).

"This relationship by no means excludes that such 'trustee' (Treugeber) or 'single shareholder', i.e., the State, may perform acts, which in relation to the company may be considered as acts of an outsider, or that completely external influences would apply.

"Therefore, criteria must be determined, when such external acts exist, and when the relationship enterprise/State is decisive.

"As regards the issue of piercing the corporate veil and factual instrumentality (faktische Organschaft), the test whether the enterprise concerned had the

opportunity or has used the opportunity to influence the national authorities that have issued the order, is unsuitable. Piercing of the corporate veil cannot be justified with the argument that the State acts as an organ dependent of the State enterprise. If there is a close relationship by means of instructions, this goes in the opposite direction: the directives emanate from the State authorities, thereby interfering with the decision making process in the enterprise. By virtue of this power to give instructions and to determine the fundamental terms of business, a functional role of an organ may be acquired by the State authorities. By arguing that the State can never be an organ of its enterprise, the defendant overlooks that the issue here is not in respect of an organ in the executing sense but in the sense of participating in the decision making process. However, since also in case of most intensive use of instructions, even in day to day business, the enterprise in view of its internal structure must not necessarily be unable to have essential influence on these decisions, the criterion of the opportunity to have influence is irrelevant for the functional piercing of the corporate veil as well as for the question of abuse of rights regarding when the lack of formal instrumentality (formelle Organfunktion) is invoked.

"However, if it could be shown that a State enterprise has used its influence in order to obtain a State order or was in a position without difficulty to prevent a State order which interferes with a contract, the issue of piercing the corporate veil does not arise at all. In these cases it results already from contract interpretation that force majeure does not exist. With regard to such an order it is namely impossible to say that, having taken all care, it could not have been prevented by the party to the contract.

"The same considerations would apply in case of a privately organized enterprise to the majority shareholder or trustee . . .

"Where a State authority has the power to impose plan instructions on an enterprise, and this authority then imposes another instruction contradicting previous planning acts or does not permit execution of contracts entered into, it does not merely act by virtue of its function as a State organ, but also as an organ of the State enterprise having decision making and directive powers. Also when the enterprise with its formal organs did not have influence on the State decision, in such cases it is precluded from invoking the State order as force majeure on the basis of Art. 2 Swiss Civil Code.

"Therefore, it is the character of the State Act and the intended objectives which are decisive. It is irrelevant whether the same State organ, which is also authorized to give instructions to the enterprise, issues the interfering order or, e.g., a superior or equal-ranking authority. Unilateral and specific interference of the State with contracts already entered into, by which the contracting parties are discharged of their contractual obligations is unacceptable under the principle of good faith according to Art. 2 Swiss Civil Code.

"When an enterprise is integrated in the State economic planning and enters into contracts within the objectives of the State economic planning, then modifications of the plan interfering with contracts entered into cannot be invoked as force majeure by the enterprise. Where, on the other hand, a Socialist State for other reasons issues a general order, which would affect a privately organized company in the same way as a State enterprise, and where the consequences of this order are not related to the specific nature of the
State enterprise as a dependant enterprise, nothing would preclude reliance on force majeure.

"With this distinction, based on Swiss law, between economic planning acts and legislative acts of a general nature, the solution in Swiss law comes close to the one proposed by Böckstiegel in the publications cited above. Furthermore, it comes close to the comments of the Presidents of CMEA Arbitration Courts at the Third Conference (cited supra) and those awards of Socialist arbitration tribunals, which have denied the possibility of invoking economic planning acts as force majeure. There would be a privileged position of the Socialist enterprise as well as of the Socialist State if the State, in case it or a State enterprise under its control is no longer interested in performance of a contract entered into, could 'provide' the enterprise with a suitable case of force majeure by promulgating an appropriate Act of State and through that serve its own interests; for western private enterprises which do not have an equally close relationship to the State where they are situated such a possibility does not exist.

"In accordance with Art. 8 Swiss Civil Code, when a party submits evidence about the nature of an act it suffices that, on the basis of the submitted facts, a natural presumption in favour of or against a planning act is created. To produce a stricter evidence as to the motives of the legislator will often not be possible. Only in rare cases the private party will be able to offer conclusive proof that a certain executive or legislative act of the State was issued because of the State's interest in its legal entity. As also is the case in other fields of business law the difficulty of proof should be overcome by dividing the burden of proof in order to obtain foreseeable risks as is required in business relations. (For the division of proof in respect of State orders see Böckstiegel, ibid. p. 108/109.) For these reasons it is primarily the wording of the order which should be consulted.

"Under Swiss law the following principles apply when evaluating the impact of State orders:

- Reliance on force majeure cannot be taken into consideration insofar as the State Act is an economic planning act. This is particularly true when the order is an individual one, which affects a specific contract or specific contracts. The foregoing is subject to the possibility to show that the State Act itself is based on circumstances which constitute an event of force majeure within the meaning of the contract in question and for which there exists an appropriate causal link with the impossibility of performance.

- This applies regardless of whether it can be proven that the formal organs of the enterprise gave their approval to the State order.

- Where the statute is of a general nature and is based on general considerations, which would affect private enterprises in the same manner, the State party may rely on force majeure.

- If the private enterprise is able to prove (e. g., by means of parliamentary protocols or government notes) that in the statute concerned, the particular interest of the State in the affected legal entity or a purely economic or financial interest has played a role, reliance on force majeure is excluded.

"Before examining in this way the imputation of an order, and leaving aside the question of the connection between the State enterprise and the State, it must of course be determined under Swiss law as well whether force majeure within the meaning of the contract exists at all. This is above all a question of contract interpretation. In this respect, the following points must for instance be considered:

- Where a State enterprise has effected a State order, there is no external event which the State enterprise, exercising due diligence, could not have avoided.

- If a State enterprise has not used all available means in order to prevent the State Act, due diligence was not observed in order to prevent the specific event, and the order must be imputed to the State enterprise.

- Where the State enterprise guaranteed certain State Acts it is responsible for these acts under the contract. This may be the case where the enterprise guaranteed the issuance of an export or import licence. Whether such guarantee exists, is a question of contract interpretation. (In the cited English case, the Court of Appeal and the House of Lords denied such a guarantee on the basis of contract interpretation.)
- If certain events were dealt with in the contract specifically, or where it was stipulated that such events have certain legal consequences or that they shall not be considered as force majeure, it follows from the contract itself that these events do not constitute force majeure. An example in this respect is the wording in Art. 19.2 of the present contract, according to which strikes, not legalized by the competent trade unions and lock-outs resulting therefrom, shall not be considered as force majeure.

- If the contract includes a stipulation that force majeure can only be invoked within certain time limits subsequent to its occurrence, the defence of force majeure is excluded after the expiration of such time limits. When the time limit starts to run is a matter of interpretation. Also in the absence of a stipulation of a certain time limit, an obligation to notify in due time may exist according to the principle of good faith. In the absence of a specific contract stipulation, late notification may make reliance on force majeure an abuse of right or at least, the contracting party relying on force majeure may have to bear the costs of the other party, which have arisen due to the delay.

"In the following, these criteria must be applied to the Order of 21 December 1981 and the relationship of the defendant to the Polish State as well as the involvement of the Polish State in contract negotiations and contract performance."

[...]