Title:
Government of the USA v. Government of the UK and Northern Ireland, Ad Hoc Award of 30 November 1992, YCA XIX (1994), at 33 et seq.

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AD HOC Award of 30 November 1992

Arbitrators: Prof. Isi Foighel, President (Denmark); Fred F. Fielding, Esq. (US); Jeremy Lever, QC (UK)

Parties: Claimant: Government of the United States of America; Respondent: Government of the United Kingdom of Great Britain and Northern Ireland

Place of Arbitration: The Hague, The Netherlands

Published in: Unpublished

Subject matters:
- interpretation of "best efforts" provision
- obligation of result
- obligation of conduct

Facts

On 23 July 1977, the Government of the United Kingdom of Great Britain and Northern Ireland (Her Majesty's Government or HMG) and the Government of the United States (USG) signed in Bermuda an Agreement concerning Air Services (Bermuda 2). This Agreement replaced the Final Act of the Civil Aviation Conference held at Bermuda from 15 January to 11 February 1946 and the annexed agreement between HMG and USG (Bermuda 1).

Prior to 1987, the British Airports Authority, which owned and operated seven international airports in England and Scotland, was wholly owned by HMG as was BAA plc, successor to British Airports Authority. Immediately before BAA succeeded to the British Airports Authority, the Authority was restructured. Airport assets and liabilities were transferred to seven subsidiary airport companies, one of which was Heathrow Airport Limited. In July 1987, the entire share capital of BAA plc was sold to the public.

In November 1979, BAA had announced very large increases in user charges for the charging year 1980/81. These increases had the effect of raising charges to the US carriers at Heathrow, namely PanAm and TWA, by 60 to 70 percent. During the course of 1980, 18 international airlines, including TWA, commenced court proceedings in London against the Secretary of State for Trade and BAA, PanAm, with which TWA subsequently joined, commenced parallel court proceedings. On 22 February 1983, a settlement was reached as embodied in a Memorandum of Understanding and Settlement Agreement between the Secretary of State for Trade and BAA, on the one hand, and the international airlines...
on the other hand. Differences persisted, however, between the USG and HMG regarding the user charges. A number of
diplomatic demarches followed in an attempt to reach a negotiated solution. Nevertheless, on 16 December 1988, the
USG requested arbitration pursuant to Art. 17 of Bermuda 2 with respect to "the continuing dispute ... concerning the user
charges imposed by the British Airports Authority and subsequently by BAA plc on US airlines and the conduct of the
British Government in relation thereto."

After rejecting HMG's preliminary plea of non-exhaustion of local remedies, the arbitral tribunal (J. Lever dissenting)
found, inter alia, that in a number of respects HMG failed to fulfill its obligations under Art. 10 of Bermuda 2. A portion of
Chapter 5 of the award considering the interpretation of Art. 10(1)-(3) of the Bermuda 2 Agreement in which each
Contracting Party agreed to use its "best efforts" to ensure that the user charges are "just and reasonable" is reproduced
below.

Excerpt

(...)

I. QUESTIONS OF INTERPRETATION

[...]

[...]

B. "Best Efforts"

(...)

[2] "It is clear to the Tribunal that the 'best efforts' obligation incumbent on HMG under Art. 10(1) of Bermuda 2 cannot be
regarded as a promise or guarantee on HMG's part that user charges will in fact be 'just and reasonable'. Had that been
the intention, the words 'use its best efforts to' would simply have been superfluous.

[3] "On the other hand, the Tribunal cannot subscribe to HMG's view that the 'best efforts' obligation is satisfied solely by
the existence of a statutory power to take steps to regulate charges and of machinery to prompt the taking of such steps.
Such an interpretation, with its overtones of passivity, would not be consistent with the continuous duty to take active
steps which the Tribunal sees as flowing from the words 'use' and 'ensure'. Nor is the Tribunal persuaded by HMG's
contention, advanced in the context of the 'threshold issue', that HMG's obligation to exercise its 'best efforts' arose only
in the event of receipt of a complaint and did not arise even if complaints had been made but, as HMG claims, those
complaints had been formulated in an unsustainable manner. In the view of the Tribunal, there is nothing in the actual text
of Art. 10(1) to support HMG's contention to that effect.

[4] "Thus, in the judgment of the Tribunal, Art. 10(1) and (3) of Bermuda 2 imposes an obligation on the Parties that goes
further than requiring them to use their best efforts to have user charges revoked if and to the extent that they are unjust and unreasonable to the
designated airlines of the other Party; even more so, it goes further than merely requiring them to ensure that well-
founded complaints to that effect are duly remedied: Art. 10(1) and (3), on its plain words, creates an obligation that
operates even prior to such a situation arising in that it requires the Parties to use their best efforts to ensure that such a
situation shall not arise.

[5] "The Tribunal thus largely agrees with USG's view that Art. 10(1) places the Parties under a continuous duty to do their
best to ensure that the goals of that provision are attained. That is, however, not an absolute duty, since a Party may be
able to point to good reasons that explain why, if the charges imposed on the designated airlines of the other Party were
not just and reasonable, that was not due to any lack of required effort on its part."
“One such reason would be that, an account of constitutional or other legal constraints, the Party did not possess and could not obtain the necessary statutory powers. However, the fact that a Party possessed all necessary legal powers would not have the consequence that a best efforts obligation would lose its character as an obligation of conduct and would necessarily be an obligation of result (as to which, see further paragraphs [7]-[9] below). On the other hand, if HMG had all necessary legal powers, that fact may require to be taken into consideration in determining whether the obligation of conduct has been complied with.

With regard to the conduct required by the obligation, in the view of the Tribunal a Party is entitled to recognise the normal margin of appreciation enjoyed by charging authorities in relation to the complex economic situation that is relevant to the establishment of charges. But, subject thereto, the Party is obliged to use as much effort as it would if it had an unconditional interest of its own in ensuring that relevant user charges did not exceed what was just and reasonable (e.g. because the Party itself was going to have to meet the cost of the charges): if a Party uses less effort than it would then have used, it cannot claim to have used its best efforts.

A corollary of the foregoing is that the 'best efforts' obligation does not require the taking of steps which a reasonable government in the position of the Party would reasonably have believed to be unnecessary in order to ensure that the user charges imposed on the designated airlines of the other Party did not exceed just and reasonable charges. So, for example, HMG could not justifiably be reproached for having failed to use its best efforts to ensure that user charges at Heathrow were just and reasonable, if and to the extent that any unreasonableness of the charges was dependent on facts which a person with a personal financial interest could not reasonably have been expected to know or to find out.

Similarly, the nature of airport operation is such that the review and modification of user charges may take time. Accordingly, the expression ‘best efforts’ must be read as allowing a Party a reasonable amount of time in which to bring into effect any necessary corrections or adjustments to user charges.

On the other hand, a Party could not excuse a failure on its part to use its best efforts as required by Art. 10 of Bermuda 2 on the ground that it was inexpedient to take the required steps or that normal political considerations made it inadvisable for it to do so. In this sense, Bermuda 2 constitutes a significant relinquishment by the two Parties of their right to exercise their normal sovereign powers within their own territory, without reference to the other, so far as the relevant conduct of operators of relevant airports is concerned.

It is also to be observed that if a Party misinterprets Art. 10(1)-(3) of Bermuda 2 and for that reason deploys its efforts to a wrong end, then no matter the fact that it acted in the best of faith and no matter that it acted with the greatest energy, it will have failed to discharge its obligations under Art. 10(1)-(3) because its best efforts will not have been deployed to the ends laid down by Art. 10(1)-(3) on their proper interpretation. The degree of effort required to constitute 'best efforts' must in the last resort be a question for determination by an arbitral tribunal established under Art. 17 of Bermuda 2 and cannot be left for determination by the Party itself or by a national body of that Party, no matter that the Party believed in good faith that no more was required of it. A Party's 'best efforts' may therefore be morally irreproachable but legally defective or insufficient.

It is also to be observed that if a Party misinterprets Art. 10(1)-(3) of Bermuda 2 and for that reason deploys its efforts to a wrong end, then no matter the fact that it acted in the best of faith and no matter that it acted with the greatest energy, it will have failed to discharge its obligations under Art. 10(1)-(3) because its best efforts will not have been deployed to the ends laid down by Art. 10(1)-(3) on their proper interpretation. The degree of effort required to constitute 'best efforts' must in the last resort be a question for determination by an arbitral tribunal established under Art. 17 of Bermuda 2 and cannot be left for determination by the Party itself or by a national body of that Party, no matter that the Party believed in good faith that no more was required of it. A Party's 'best efforts' may therefore be morally irreproachable but legally defective or insufficient.

[...]

British Airports Authority and its successor BAA plc are generally both referred to without distinction in the Award as "BAA".

Referring Principles:

IV.6.5 - Best efforts undertakings