Title:
Ad Hoc-Award of January 14, 1982, Elf Aquitaine Iran (France) v. National Iranian Oil Company, YCA 1986, at 97, 102 et seq.

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AD HOC

Preliminary Award of 14 January 1982

Sole arbitrator: Prof. Dr. jur. Bernhard Gomard

Parties: Claimant: Elf Aquitaine Iran (France); Defendant: National Iranian Oil Company (Iran)


Subject matters:
- competence-competence
- law applicable to arbitration
- law applicable to substance
- international law
- autonomy (separability) of the arbitration clause
- State corporation
- exhaustion of local remedies

FACTS

On 27 August 1966, the National Iranian Oil Company ("NIOC") signed in Tehran an exploration and production contracting agreement with the Entreprise de Recherches et d'Activités Pétrolières ("ERAP"), a French State agency, and the French company Société Française de Pétroles d'Iran (Sofiran). The agreement contained in Art. 41 a comprehensive arbitration clause.

Sofiran was to explore for oil within certain designated areas of Iran, and to supply the technical services to exploit the oil fields discovered. ERAP was to contribute the initial funds for financing the exploration operations and, if oil fields were discovered, carry out the exploitation, until the cash flow, accruing to NIOC as a result of the operations, would enable NIOC to provide the financing. NIOC was liable for the repayment of the funds advanced by ERAP, but only if oil fields were discovered and commercial production of oil (regular export of at least 100,000 cubic metres of oil) had commenced. NIOC also undertook to sell to ERAP a certain percentage of the crude oil extracted from the discovered fields, at a preferential price.

Under the agreement, ERAP had the right to associate its affiliate, Société Nationale des Pétroles de Aquitaine ("SNPA"), with its activities, and ERAP and SNPA had a right to transfer their interests in the rights acquired and the obligations undertaken by them under the agreement to companies controlled by either ERAP or SNPA. During the period from 1967 to 1977 ERAP assigned all its interests to its subsidiary, Elf Iran; SNPA assigned all its interests in the agreement to Aquitaine Iran. Thereafter, Elf Iran and Aquitaine Iran merged into Elf Aquitaine Iran ("ELF"), which, therefore, became a
party to the agreement. ELF is the claimant in the present arbitration.

Two oil fields were discovered, and their commercial exploitation commenced in the month of December 1978. Notwithstanding its contractual obligations, NIOC did not refund the exploration and development loans received from ERAP, and refused to sell oil at the preferential price provided for in the agreement.

On 8 January 1980, the Islamic Republic Revolution Council of Iran passed an Act establishing a Special Committee to review oil agreements (the "Single Article Act"). The text of the Single Article Act reads:

"All the Oil Agreements, which at the discretion of the Special Committee to be convened by the Ministry of Oil, may be found to be at variance with the provisions of the Act on Nationalization of the Oil Industry of Iran, shall be declared null and void, and all the claims arising from entering into and performance of such agreements, shall be settled according to the resolution of such Committee. Such Committee shall be held with participation of the Representative of the Ministry of Foreign Affairs."

By a Letter of 11 August 1980, ELF was informed by NIOC that the Special Committee had declared null and void the agreement of 27 August 1966. Thereupon, ELF resorted to arbitration according to the arbitration clause in the 1966 agreement. According to this clause, each party was to appoint an arbitrator, and the two arbitrators were to appoint an umpire. If the parties did not appoint their arbitrator, or the arbitrators failed to agree on an umpire, the President of the Danish Supreme Court was to appoint a sole arbitrator in the first case, or an umpire in the second.

When NIOC refused to appoint its arbitrator, the President of the Danish Supreme Court appointed, at ELF’s request, a sole arbitrator, Prof. Bernhard Gomard. As the parties had not reached an agreement as to the place and procedure for the arbitration, the arbitrator decided to hold the arbitration in Copenhagen and to apply Danish procedural law. NIOC objected on various grounds to the sole arbitrator’s competence. In a preliminary award, reported below, the arbitrator rejected NIOC’s objections and declared to have competence.

EXTRACT

[...]

The questions regarding the arbitrator’s competence

2. At the outset, the arbitrator identified the questions which had arisen in connection with his competence as follows:

[...]

"(B) Does an arbitral clause form an integrated part of the contract in which it is inserted with the consequence that the clause is subject to all exceptions raised against the contract; or does an arbitral clause enjoy the autonomy (or independence or separability) that it can form the basis of an arbitration between the parties even after objections against the validity of the contract have been raised by one of the parties?"

[...]

Ad question (B) Autonomy of the arbitration clause

15. NIOC emphasized that its agreement that the arbitrator is competent to decide on his competence did not in any way imply a recognition by NIOC that the arbitrator could decide on the merits of ELF’s claims, because the Agreement had been declared null and void *ab initio* by the Special Committee in accordance with the Single Article Act of 1980.

16. The arbitrator noted that the Agreement had been ratified by the Iranian Majlis and had received the Royal Assent in 1966. It was in 1980 that the Special Committee had declared the Agreement null and void *ab initio* as being at variance
with the Iranian Nationalization Act of 1951.

17. The arbitrator considered:

"In this Preliminary Award the Sole Arbitrator cannot and has not attempted to reach a decision on the merits of the objection made by NIOC that the Agreement, as a consequence of the decision made by the Special Committee, is null and void ab initio. This Preliminary Award, however, must determine whether the arbitration clause contained in Art. 41 of the Agreement enjoys an autonomy or independence in the sense that the nullity of the Agreement alleged by one of the parties, in casu NIOC, cannot affect the validity of the arbitration clause, or whether the arbitration clause as part of the Agreement is of no force and effect if the Agreement is to be regarded as a nullity.

18. "It is a generally recognized principle of the law of international arbitration that arbitration clauses continue to be operative, even though an objection is raised by one of the parties that the contract containing the arbitration clause is null and void. The jurisdiction of an arbitrator or arbitration board designated in accordance with an arbitration clause is unimpaired, even though the contract containing the arbitration clause is alleged to be null and void.

19. "The rational strength of this principle is apparent. In the absence of access to international courts, arbitration under an international rule of law presents a workable and qualified system for the settlement of disputes independent of both parties involved. This is evidenced inter alia by the wide acceptance of the various international conventions an arbitration. Arbitration offers the parties the possibility of adjusting in their agreement the general law of arbitration in a way that makes their submission to arbitration acceptable from the point of view of their different nationalities.

organisations and in treaties. Also, in many countries the principle forms part of national arbitration law."9

21. The arbitrator concluded: "The Sole Arbitrator has, by the weight of the authority cited and of the rationale of the principle of the autonomy of arbitration clauses, been led to the conclusion, that the arbitration clause binds the parties and is operative unimpaired by the allegation by NIOC that the Agreement as a whole is null and void ab initio. This conclusion does not in any way prejudice the outcome of a later decision as to whether the Agreement is null and void as alleged by NIOC. NIOC is completely free if they so wish to develop further in their pleadings at a later stage the justifications for the allegation of nullity and the consequences of the nullity of the Agreement, if established, for the claims raised by ELF."

[...]


Referring Principles:
XIII.2.4 - Principle of separability of the arbitration clause