Title:
Framatome-Award, YCA 1983, at 94, 101 et seq.

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AWARD OF APRIL, 1982 (ORIGINAL IN FRENCH)

Arbitrators: Prof. Pierre Lalive (President), Prof. Berthold Goldman, Prof. Jacques Robert

Parties: Claimant: Company Z and others (Republic of Xanadu); Defendant: State Organization ABC (Republic of Utopia)

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- competence of arbitrators
- validity of contract
- validity of arbitral clause
- national sovereignty of State
- arbitrability of dispute

FACTS

Within the framework of agreements between the Governments of the Republic of Xanadu and the Republic of Utopia on the exploitation of natural resources, a Contract was concluded between, on the one hand, Company Z and others, of Xanadu, and, on the other hand, ABC, a State Organization of Utopia. The Contract contained an arbitral clause providing for ad hoc arbitration, and it was submitted to Utopian law.

After several months during which the Contract was being performed by both parties, a dispute arose, and ABC terminated the Contract. Company Z thereupon initiated arbitration, appointing an arbitrator. Although ABC did contest the validity of the arbitration clause, it equally appointed an arbitrator, but it reserved its rights at the same time.

In the arbitration ABC alleged that the Contract was not valid: it had not been approved by ABC's Council or Committee, nor had one of the documents preliminary to the Contract been approved by Utopia's Parliament. ABC furthermore brought forward that its Council was never established, and that its Committee met only occasionally. Failing the necessary authorization, ABC's President did not have the power to sign the Contract, and, even if he did, had in any case not possessed the power to delegate this to a representative, as he had done.

ABC also relied on a decision, by the Utopian Government, to renounce the exploitation of the kind of natural resources, which was the object of the Contract. It claimed that, since the said decision concerned directly the national sovereignty of the State of Utopia, the dispute could not be submitted to international arbitration. Accordingly, the Tribunal had to decide on its own jurisdiction.

Note Gen. Ed.
This award is published without mentioning the names of the parties and their nationality. Articles of the Charter and Statutes of the State Organization are referred to with fictitious numbers, and so are the articles of the applicable law of Utopia and its Constitution.

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It remains to decide the legal consequences of this state of affairs and to resolve in particular the following two questions:

(1). Is ABC entitled to assert the said irregularity against the claimants and to conclude that the Contract is null as a result?

(2). If the answer to this first question is in the affirmative, is ABC entitled, in view of the events subsequent to the signature of the Contract and, in particular, the partial performance of the Contract by both parties, to claim that it is absolutely null and void and not covered by subsequent ratification?

Ad (1). On the first question, the Arbitral Tribunal is of the following opinion: judging today upon the sole basis of the applicable texts, one can and must regret, on the one hand, that the co-contractor of Xanadu, in a contract of such importance, did not take additional precautions (for example requesting a "Legal Opinion" attached to the Contract attesting to the powers of the Utopian signatories) in order to ensure the complete regularity of the operations according to the applicable Utopian texts and, on the other hand, regret that ABC itself, its various organs and officers, did not respect the Same texts better. This finding must however be completed and modified by the following observations:

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Basing itself on the Charter which established ABC and was annexed to the Contract, ABC has stressed that "the claimant companies cannot claim ... that they did not have the obligation to satisfy themselves that the provisions were respected when the contract was signed".

While in principle such a duty was incumbent on a foreign co-contractor, it was at least equally incumbent upon the Utopian party itself and upon its organs, and the extent of its exercise (or the consequences of a possible failure to exercise it) must be appreciated, not in abstracto but in the context of the concrete circumstances at the time for both parties.

In this context, it is appropriate to note at the outset that, contrary to certain allegations made by the defendant, there is no question, according to the applicable Utopian texts, of any incapacity to contract on the part of ABC itself, and the claimants were all the more justified to accept this capacity as existing since it was exercised in this case with the full approval and on the instructions of the Utopian Government. The only thing that can be discussed here is the claimants' attitude: not in the face of a lack of capacity on the part of ABC, and still less in the face of a lack of power to conclude on the part of the President of the organization (since these powers indisputably existed in principle), but in relation to the conditions in which these powers were exercised and delegated.

It is not necessary to examine here whether the applicable Utopian law should be adjusted in international contractual relations, with regard to a foreign co-contractor, or whether, in the present circumstances, the claimants could base themselves on the appearances and on the general attitude of the Organization and its supervising authorities, which confirmed the full authority of the President to engage ABC, despite a stricter interpretation of the texts which was chosen by the Arbitral Tribunal from among various possible interpretations, as seen above. Indeed, ABC cannot in any case, as
a legal entity party to the present arbitration proceedings on jurisdiction, assert and take advantage of irregularities, infringements of Statutes and violations of Utopian law which were committed by its own organs by omission or commission.

It is not contested and is incontestable that ABC today is the same legal person as that created by the Charter; the identity and the continuity of the legal entity forbid it to repudiate or to attribute to somebody else the consequences of the faults of its organs, faults which must therefore be imputed to it, and by which it cannot profit at the expense of the claimants. The general principles of law and particularly that of good faith, applicable in international relations, both inter-State and between "private" persons, necessarily lead to the exclusion of the argument drawn by ABC from the infringements and irregularities committed which, by the very nature of things, the parties of the Republic of Xanadu could hardly oppose or criticize.

The defendant has laid stress, particularly in its oral pleadings, on the conditions reigning at the time of the negotiation of the Contract in the Republic of Utopia and has clearly indicated that, in its opinion, it was not only a problem of "a clear infringement in the Statutes of ABC", but also and in a larger sense of "abnormal" proceedings in various respects, concerning the negotiations, the powers and the required approval for signature of the Contract and the amendments to the Letter of intention which authorized the commencement of the work before signature. The defendant says that it is

now confronted with the consequences of a "de facto situation" which arose at a time when decisions were made by the "President for life" of the State of Utopia without being concerned with legal or statutory prescriptions. ABC, considering itself "obliged to return to legal orthodoxy" and wishing to "situate itself strictly within the procedure provided for", has explained the reasons for which, after the claimants filed the Request for Arbitration, it had come to challenge the validity of the Contract and, consequently, to raise an objection to jurisdiction.

The understanding that an arbitral tribunal may have of factual circumstances obviously does not dispense it of its duty to uphold legal orthodoxy, which obliges it to consider as decisive the single question posed above (ad 1): whether the irregularities found could be invoked by ABC as a source of nullity of the Contract (together with the question of the arbitration clause, which will be examined below).

To restrict oneself to the explanations given by the defendant regarding the situation existing in the Republic of Utopia at the time when the Contract was negotiated and the practice, described as "habitual", according to which the will of the "President for life" overruled the legal prescriptions theoretically in force (as it overruled a fortiori the text of the Statutes of ABC), to consider the facts exposed by the defendant as to the effective position of President P., who had no choice other than to acquiesce to the orders of the "President for life", the Arbitral Tribunal can only come to the following conclusion: the defendant wishes and requests a return to Utopian law, as it should have been, but was not, applied at the time. It may be asked whether this desire to "return to legal orthodoxy" does not imply a sort of "retroactive" application of Utopian law. It may be also asked what is meant by "Utopian law" applicable to the relations between the parties: is it the totality of all existing legal texts at the time (although, "habitually" according to the defendant, they were not respected) or is it, rather than texts, the effective practice, i.e., all conduct then considered as obligatory in the State regime at the time?

It is not necessary to pronounce upon such questions to arrive at the conclusion, already indicated above, that ABC cannot assert here conditions which existed in the past in the Republic of Utopia against the claimants. If, according to its own declarations before the Arbitral Tribunal, ABC itself, as it was then organized and managed, was not able to resist "an habitual practice" of violation of the law, it is evident that the foreign co-contractor could not do so either. It is not without interest to note that the present Government has never declared - or at least no such allegation has been made before the Tribunal - that it wished to repudiate the previous obligations of the Utopian State and to contest the principle of the continuity of the State in international law; what is more, nor has the legal identity and continuity of ABC been contested by the latter, from which it, results that ABC is bound by its acts both past and present.

The situation might be different if it was established that the conclusion of the Contract was obtained by fraud or misrepresentation, for example by the President and/or the General Manager of the organization, a possibility which has clearly been alluded to by the defendant. The attention of the Arbitral Tribunal has been drawn to the criminal proceedings introduced in Utopia against Mr. P., former President, and against Mr. X., former General Manager, arrested and imprisoned. According to the defendant, this double criminal procedure "is presently being investigated, covered by the secrecy of criminal investigation and in these conditions, the Arbitral Tribunal does not have the
possibility to set aside the objection relating to the capacity of Mr. X. to sign such a contract, while the Tribunal seized of the infringements committed by Mr. X. has not pronounced final judgement". The defendant further maintains that this is a ground for suspension as a matter of public policy (ordre public).

This theory is unacceptable. The defendant expressly admits that it has "no proof at the moment" of the possible fraud or corruption by the two former officers of ABC, and it has not even put forward any circumstantial or initial proofs of a character rendering such allegations credible. Also, the defendant relies on the "secrecy of the investigation", but this does not dispense it from the requirement to discharge the burden of proof incumbent upon it as counterclaimant on the objection to jurisdiction.

Finally and most importantly, even if the principle invoked was one of internal public policy and in the relations between the State's criminal and civil jurisdictions, the Tribunal considers that it cannot be applied to international relations such as those disputed here. If an arbitral tribunal had to suspend decisions upon the commencement of criminal proceedings, it would obviously be sufficient for the party wishing to paralyze the international arbitration to commence such proceedings or cause them to be commenced.

This being so, the Tribunal can only note the lack of any initial proofs in support of these allegations, which are in any case extremely vague, made by the defendant in relation to the fraud or unauthorized acts of the officers of ABC in order to strengthen its theory of irregularities committed and of the invalidity of the Contract.

Ad (2). Apart from the above considerations, there is a decisive and independent reason which prevents the defendant from now contesting the validity of the Contract: this Contract was partially performed by both parties and for several months, until the occurrence of the facts at the basis of the dispute. This ratification is not denied by ABC which writes in its reply as follows:

"It is indeed undisputable that there was a ratification of this contract subsequent to its signature"

but stresses that this does not necessarily concern the arbitration clause itself, but only the Contract as a whole.

This recognizes that the irregularities which tainted the signature of the Contract are not of such a nature that they must result, in Utopian law, in absolute and irremediable nullity. Such a theory could only be advanced with difficulty, as it does not concern a lack of capacity on the part of ABC, as has been said above, nor even a lack of powers on the part of the President of the Organization, but irregularities in the exercise of the powers of the President. Even if these irregularities could have provided a basis for the defendant's theory the day after the signature of the Contract, it remains to be shown that they were not covered by the subsequent ratification, the existence of which is indeed "undisputable". The defendant, in this respect, has limited itself to a vague allusion to the idea that the ratification "did not necessarily" take place "in conditions conforming to Utopian law", and to contesting the arguments put forward by the claimants in relation to the "Credit Agreement" between ABC and a consortium of banks of the Republic of Xanadu.

The defendant has not indicated how this ratification, the existence of which it does not contest, does not conform to the conditions of Utopian law, nor is there an indication of which conditions it refers to. It is true that the Credit Agreement should not be confused or "amalgamated" with the Contract in dispute - which is forbidden by the argument that the Xanadu co-contractor of ABC, in these two agreements, is not the same. Nevertheless, the Credit Agreement had obvious and close links with the project, to which it refers at several points and particularly in the definitions; thus elementary realism and general principles of interpretation permit and even oblige an arbitral tribunal, where necessary, to draw upon the elements contained in the Credit Agreement. The same applies, by analogy, to the "governmental context" in which the disputed Contract and the Credit Agreement must be placed in order to be understood, that of the agreements between the Utopian Government and the Government of Xanadu.

It is significant in this respect that, according to an uncontested allegation made by the claimants, the Credit Agreement which in several places mentions the Contract presently in dispute, is considered as valid by the Utopian party, which has performed and continues to perform it.

Be that as it may, it is even more important to note that, particularly in proceeding or causing the necessary work to be carried out on the site set aside for the performance of the Contract, ABC necessarily ratified the Contract. It cannot be claimed that the legal and material performance of the Contract over several months by the Utopian party has no
consequence and does not change the “technical and administrative” regularity or irregularity of the decision to conclude the Contract. Whether or not it established all the organs provided for by the Charter and its Statutes, or whether it held meetings of these organs, and whether or not they formally made decisions as provided for in the texts, the fact remains that ABC, a legal person in Utopian public law, existed and functioned as such, that it had organs. This Organization, closely linked to the Utopian State, did not at any time, up to the moment when the claimant lodged the Request for Arbitration, express to the latter any doubts whatsoever concerning the full validity of the Contract being performed. It must be admitted that ABC, like the governmental authorities upon which it depended, considered the Contract perfectly valid and binding on both parties, at least until the occurrence of the dispute. If ABC was not of this opinion, however, the principle of good faith would have imposed upon it a duty to make its view known to the co-contractor of the Republic of Xanadu.

Finally, it seems extremely doubtful whether a public law Organization such as ABC may still be permitted to allege the initial invalidity of a contract after such a period of performance when the Utopian State itself, by its highest authorities, has constantly manifested in various ways its belief in the full validity of the said contract, in particular by undertaking international obligations in respect of the Republic of Xanadu. This question need not be further examined as, for the reasons given above, the Arbitral Tribunal has arrived at the conclusion that the initial irregularities cannot be asserted against the Xanadu parties, principally in view of the ratification of the Contract by performance.

This conclusion obviously does not suffice to decide the question of the Tribunal's jurisdiction since the defendant raises the nullity of the arbitration agreement as such.

[...]

**Referring Principles:**

- I.1.2 - Prohibition of inconsistent behavior
- IV.2.3 - No repudiation of contractual consent by state party