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Content:

AD HOC ARBITRATION

LIAMCO v. LIBYA

AWARD OF APRIL 12, 1977

Arbitrator: Dr. Sobhi Mahmassani (Sole Arbitrator)

Parties: Claimant: Libyan American Oil Company (LIAMCO) (USA), Respondent: Government of the Libyan Arab Republic

Published in: Revue de l'Arbitrage, 1980, pp. 132-191 (French translation of the award, original in English), with a commentary (in French) by Prof. Brigitte Stern pp. 3-43, l.c., entitled 'Trois arbitrages, un même problème, trois solutions' (Three arbitrations, same problem, three solutions).

Subject matter:
- nationalization
- jurisdiction of the arbitrator
- choice of law clause
- nature of concession deeds
- breach of contract
- restitutio in integrum (rejected)
- compensation for damages
- general principal of equity applied
- interests

I. FACTS

On December 12, 1955, LIAMCO was granted under the Petroleum Law of Libya of April 1955 Concessions 16, 17 and 20. After some transfers LIAMCO continued to own 25,5%, the other participants in these Concessions being ESSO SIRTE (50%) and GRACEPETECO (24,5%). These Concessions were granted in the form of 'Deeds of Concession'.
representing a bilateral agreement between the Petroleum Commission and LIAMCO and approved by the Minister of Petroleum. All the concession agreements were in the form as prescribed by the Petroleum Law of 1955 in its second Schedule. Each Concession Agreement consisted of thirty clauses. Clause 28 contains the Arbitral Clause (quoted in the extract below); paragraph 7 provides for the rules of law to be applied.

On September 1, 1969, Colonel Khadafi took over from King Idriss and announced the formation of the Libyan Arab Republic. On September 1, 1973, the Libyan Revolutionary Command Council issued Law no. 66 nationalizing 51% of the concession rights of a number of companies amongst others LIAMCO. Article 2 of the said Nationalization Law provides:

'The State shall compensate people concerned for the property, rights and assets that have reverted to it under Article 1. Such compensation shall be assessed by a committee or committees which shall be formed by a decision from the Minister of Petroleum, in the following manner:

(a) One of the Judges of the Courts of Appeal, being Chairman, to be nominated by the Minister of Justice;

(b) A representative of the National Oil Corporation, being a member, to be nominated by the Minister of Petroleum;

(c) A representative of the Ministry of Treasury, being a member, to be nominated by the Minister of Treasury.

'In carrying out this task, the committee may seek assistance of any employee or others whose assistance it considers necessary.'

On November 15, 1973, LIAMCO, by letter addressed to the Respondent, requested arbitration under Clause 28 of the Concession Deeds (see extract below).

On February 11, 1974, the remaining 49% of LIAMCO was nationalized. After this second nationalization LIAMCO pursued its arbitration by letter of July 2, 1974, to the Respondent. As the Libyan Government failed to appoint its arbitrator, LIAMCO requested the President of the International Court of Justice to name a single arbitrator to determine the dispute. On January 27, 1975, the President appointed Dr. Sobhi Mahmassani, Counsellor-at-Law in Beirut as Sole Arbitrator.

The arbitrator held a preliminary meeting in London on June 9, 1975. Only the Claimant appeared. No appearance was made by the Respondent. At the meeting the arbitrator, in accordance with Clause 28, decided inter alia that Geneva was to be the official seat of arbitration with the possibility to hold secondary meetings elsewhere and that the arbitrator 'in his procedure shall be guided as much as possible by the general principles contained in the Draft Convention on Arbitral Procedure elaborated by the International Law Commission of the United Nations in 1958'.

After production of statements and documents by the Claimant the arbitrator held a second meeting in Geneva on November 15, 1976, at which again only the Claimant appeared. After hearing the Claimant the arbitrator fixed the arbitration hearing on 10-12 January 1977 in Geneva where again only the Claimant appeared. Witnesses and experts, introduced by the Claimant, were heard, and oral presentation of LIAMCO's arguments of fact, law and remedies took place. A 'Memorial on the Resolutions of the United Nations General Assembly' was produced concerning the subject matter and an Article by Messrs. Andersen and Coulson on 'The Moslem Rules and Contractual Obligations'. The Award was delivered on April 12, 1977, at the International Conference Center of Geneva and notified, with an Arabic translation, to the Respondent.

[...]
III. Considerations on Procedure and Applicable Law

2. The Validity of the Arbitral Clause

The arbitrator then considered the validity of the arbitral clause as contained in Art. 28 of the Concession Agreements. This clause reads, apart from its para. 7, which is already quoted under III above, as follows:

'(1) If at any time during or after the currency of this contract any difference or dispute shall arise between the Government and the Company concerning the interpretation or performance of the provisions of this contract, or its annexes, or in connection with the rights and liabilities of either of the contracting parties hereunder, and if the parties should fail to settle

such difference or dispute by agreement, the same shall, failing any agreement to settle it in any other way, be referred to two Arbitrators, one of whom shall be appointed by each party, and an Umpire who shall be appointed by the Arbitrators immediately after their appointment:

'(In the event of the Arbitrators failing to agree upon an Umpire within 60 days from the date of the appointment of the second Arbitrator, either of such parties may request the President or, if the President is a national of Libya or of the country where the Company is incorporated, the Vice-President, of the International Court of Justice to appoint the Umpire.

'(2) The institution of the arbitration proceedings shall take place upon the receipt by one of such parties of a written request for arbitration from the other, which request shall specify the matter in respect of which arbitration is requested and name the Arbitrator appointed by the party requesting arbitration.

'(3) The party receiving the request shall within 90 days of such receipt appoint its Arbitrator and notify this appointment to the other party, failing which that other party may request the President or, in the case referred to in paragraph (1) above, the Vice-President of the International Court of Justice to appoint a Sole Arbitrator, and the award of the Sole Arbitrator so appointed shall be binding upon both parties.

'(4) If the Arbitrators appointed by the two parties fail to agree upon a decision within 6 months of the institution of arbitration proceedings, or either or both Arbitrators become unable or unwilling to perform their functions at any time within such period, the Umpire shall then enter upon the arbitration process. The award of the Arbitrators, or in case of a difference of opinion between them, the award of the Umpire shall be final. If the Umpire or the Sole Arbitrator, as the case may be, is unable or unwilling to enter upon or complete the arbitration process, then, unless the parties otherwise agree, a substitute will be appointed at the request of either of said parties by the President or, in the case referred to in paragraph (1) above, by the Vice-President, of the International Court of Justice.

'(5) The Umpire however appointed or the Sole Arbitrator shall not be either a national of Libya or of the country in which the Company or any Company which directly or indirectly controls it was incorporated, nor shall he be or have been in the employ of either such parties or of the Government of any of the aforesaid countries.
The application of the provisions of this paragraph and the determination of the procedure to be followed in the arbitration shall be decided by the Arbitrators or, in the event they fail to agree within 60 days from the date of appointment of the second Arbitrator, then by the Umpire or, in the event a Sole Arbitrator is appointed, then by the Sole Arbitrator.

In giving the Award the Arbitrators, the Umpire or the Sole Arbitrator, as the case may be, shall give an adequate period of time during which the party against whom the Award is given shall execute that Award, and such party shall not be in default if it has conformed to said Award prior to the expiry of that period.

(6) The seat of arbitration shall be such as may be agreed upon by the two parties. In default of agreement between them within 120 days from the date of the initiation of the arbitration as specified in paragraph (2) above, it shall be determined by the Arbitrators or, in the event the Arbitrators fail to agree within 60 days from the date of appointment of the second Arbitrator, then by the Umpire or, in the event a Sole Arbitrator is appointed, then by the Sole Arbitrator.

(7) (This paragraph recites the proper law applicable to the concession, as above set forth).

(8) The costs of the arbitration shall be borne by the said two parties in such proportion and manner as may be fixed in the Award.

Two questions were to be decided: (a) the capacity of the parties to enter into this arbitration agreement, and (b) the continuation of the arbitration agreement after the nationalization took place.

Ad (a): 'LIAMCO's capacity to arbitrate is supported by the Law of its place of incorporation, namely Delaware, whose Corporation Law of 1967, Section 122 as amended, provides that every corporation created pursuant to Delaware law shall have power "to sue and be sued in all courts and to participate, as a party or otherwise, in any judicial, administrative, arbitrating or other proceedings in its corporate name".

On the other part, the Libyan Government is empowered to arbitrate by an explicit legislative text, namely Article 20 of the Petroleum Laws of 1955 and 1965 as completed and amplified by Clause 28 of Schedule II annexed to those Laws.'

Ad (b): 'It is widely accepted in international law and practice that an arbitration clause survives the unilateral termination by the State of the contract in which it is inserted and continues in force even after that termination. This is a logical consequence of the interpretation of the intention of the contracting parties, and appears to be one of the basic conditions for creating a favorable climate for foreign investment.

This rule was adopted by decisions of the International Court of Justice (ex. in Ambatélias Case in 1952 and 1953), and of many Arbitral Tribunals (ex. in Losinger and Co. v. State of Yugoslavia). Such decisions have confirmed the obligation of the State to arbitrate with a private party according to the terms of the contract despite the protest or default of the State and despite arguments that the agreement containing the arbitration Clause had been terminated or come to an end.

It has been contended by the Libyan Government, in its Circular letter of 8 December 1973, addressed to all oil companies and referred to above, that it rejects arbitration as contrary to the heart of its sovereignty. Such argument cannot be retained against said international practice, which was also confirmed in many international
conventions and resolutions. For instance, the Convention of 1966 on the Settlement of Investment Disputes between States and Nationals of other States provides, in its Article 25, that whenever the parties have agreed to arbitrate no party may withdraw its consent unilaterally. More generally, Resolution No. 1803 (XVII) of the United Nations General Assembly, dated 21 December 1952, while proclaiming the permanent sovereignty of peoples and nations over their natural resources, confirms the obligation of the State to respect arbitration agreements (Section I, para. 1 and 4).

'Therefore, a State may always validly waive its so-called sovereign rights by signing an arbitration agreement and then by staying bound by it.

'Moreover, that ruling is in harmony with Islamic law and practice, which is officially adopted by Libya. This is evidenced by many historical precedents. For instance, Prophet Muhammad was appointed as an arbitrator before Islam by the Meccans, and after Islam by the Treaty of Medina. He was confirmed by the Holy Koran (S IV, 65) as the natural arbitrator in all disputes relating to Muslims. He himself resorted to arbitration in his conflict with the Tribe of Banu Qurayza. Muslim rulers followed this practice in many instances, the most famous of which was the arbitration agreement concluded in the year 657 A.D. (37 H.) between Caliph'Ali and Mu'awiya after the battle of Siffin (V. our lectures on International law, op. cit., p. 272-273, and Arabic text p. 160-163).'

ON THE MERITS

IV. LAWFULNESS OF THE LIBYAN NATIONALIZATION MEASURES

3. Sanctity of Contracts

'The right to conclude contracts is one of the primordial civil rights acknowledged since olden times. It was the essence of "commercium" or "jus commercii" of the Roman "jus civile" whose scope was enlarged and extended by "jus gentium". Then it was always and constantly considered as security for economic transactions, and was even extended to the field of international relations.

'This fundamental right is protected and characterized by two important propositions couched respectively in the expression that "the contract is the law of the parties", and in the Latin maxim that "Pacta sunt servanda" (pacts are to be observed).

'The first proposition means that the contracting parties are free to arrange their contractual relationship as they mutually intend. The second means that a freely and validly concluded contract is binding upon the parties in their mutual relationship.

'In fact, the principle of the sanctity of contracts, in its two characteristic propositions, has always constituted an integral part of most legal systems. These include those systems that are based on Roman law, the Napoleonic Code (e.g. Article 1134) and other European civil codes, as well as Anglo-Saxon Common Law and Islamic Jurisprudence (Shari'a).

'Libya adopted and incorporated this legal principle in its Article 147 of the Civil Code (Same in Article 147 of the Egyptian code, Article 146 of the Iraki and Kuweiti codes, Article 148 of the Syrian code, and Article 221 of the Lebanese Code of Obligations and Contracts), whose paragraph 1 reads as follows:

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"The contract is the law of the parties. It cannot be cancelled or amended except by their mutual consent or for reasons admitted by the law".

'The binding force of the contract is expressed in Article 148, para. 1, of the same Code:

"A contract shall be performed according to its contents and in the manner which accords with good faith".

'Moreover, Islamic law, which as we have seen forms a complementary part of the law of Libya (Article 1 of its Civil Code) underscores the binding nature of contractual relations and of all terms and conditions of a contract that are not contrary to a text of law. This is expressed in the legal maxim:

"A stipulation is to be complied with as far as possible" (Article 83 of the Ottoman Majallah Code).

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'This maxim is corroborated by the various sources of Islamic law. For instance, a Koranic Verse ordains:

"Oh, you who believe, perform the contracts" (S V, 1).

...

'In the same sense, a Tradition of the Prophet reads

"Muslims are bound by their stipulations" (Al-Jami'As-Sagheer, II, No. 9213).

...

'Muslim commentators and jurists expounded this binding force of contracts in detail. In particular, the Learned Ibn Al-Kayyem elaborated this principle in his great treatise "I'lâm Al-Muwaq'een", (Cairo, Vol. I p. 299, and Vol. III p. 337-340).

'Further, and as a corollary to the binding force of the contract, its repeal or alteration requires a contrary mutual consent (contrarius consensus) of the contracting parties. This is well underscored in said paragraph 1 of Article 147 of the Libyan Civil Code, as well as in most legal systems mentioned above. 'Consequently, one of the parties cannot unilaterally cancel or modify the contents of the agreement, unless it is so authorized by the law, by a special provision of the agreement, or by its nature which implies such presumed intention of the parties.

'Likewise, the same rule is recognized in Islamic law, in which cancellation of a contract is not valid except by mutual consent (al-ikâlah) (V. Articles 163 and 190 of the Ottoman Majallah Code, and our book "The General Theory", op. cit., Vol. II p. 486).

'Furthermore, some contracts explicitly emphasize the above mentioned principles and corollaries in a special provision, as in Clause 16 of LIAMCO's Concession Agreements, wherein it is provided that the "contractual rights expressly created by this Concession shall not be altered except by mutual consent of the parties".

'The said Libyan law, whether in the text of the civil code or in the complementary Islamic Jurisprudence appears clearly consistent with international law in this connection, as exemplified by international statutes and custom.
'In the first place, it is relevant to recall here what has been provided in the above mentioned United Nations Resolutions in relation to the subject matter.

'Resolution No. 626 of 21 December 1952, while asserting the right of States to exploit freely their natural wealth and resources stresses "the need for maintaining the flow of capital in conditions of security, mutual confidence and economic co-operation among nations".

'Resolution No. 1803 of 14 December 1962 declares in Paragraph I, 8, that:

"Agreements relative to foreign investments freely concluded by sovereign States or between such States shall be respected in good faith."

'Resolution No. 3281 of 12 December 1974, called the Charter of Economic Rights and Duties of States, recites among the fundamentals of international relations: the fulfilment in good faith of international obligations and the respect for human rights and fundamental freedoms (Chap. I, j and k).

International custom and case-law had always sustained the proposition of "Pacta sunt servanda". It has been upheld in many arbitration awards, such as Aramco-Saudi Arabia Arbitration of 1958, and Sapphire International Petroleum Ltd. v. National Iranian Oil of 1963.

'This principle is also upheld by most international publicists, who maintain that the sovereign right of nationalization is limited by the respect due for contractual rights (V. Wehberg, Article "Pacta sunt servanda", in American Journal of International Law 1959 p. 786; and Friedman, op. cit., p. 220-221). Professor Lapradelle, as rapporteur of the 1950 meeting of the "Institut de droit international", recorded that: "Nationalization, as a unilateral act of sovereignty, shall respect validly concluded agreements, whether by treaty or contract." (Annuaire de l'Institut, 1950, I, 67).

'The principle of the respect for agreements is thus applicable to ordinary contracts and concession agreements. It is binding on individuals as well as governments. The same is admitted in Islamic law, as is evidenced by many historical precedents. For instance, no less than the Great Caliphs Omar Ibn Al-Khattab and Imam 'Ali accepted to abide by their agreements and to appear before the Cadis (Judges) as ordinary litigants without feeling that this conduct was against their sovereign dignity (V. our Article on "The Judiciary and Al-Mawerdi", in Arabic, Al-Mawerdi Millenium, Cairo, Nov., 1975).


'The same principle is likewise applicable to treaties validly concluded between States. The subject of treaties and their binding nature according to international law has been confirmed and regulated by the recent Convention of Vienna on the Law of Treaties of 23 May 1969.

'It is also of relevance in this dispute to refer to Islamic law, as part of Libyan law, concerning treaties. That law, as was previously stated, considers the rules of international relations (Law of Siyar) as an integral part of the common positive law. Treaties partake of the nature of contracts, and as such have the same contractual binding force. This is based on several Verses of the Holy Koran, particularly on the following:

- "And fulfil the covenant (of God) if you have covenanted and do not violate the oaths after their confirmation" (S XVI, 91).

...  

- "And fulfil the covenant, for the covenant entails responsibility" (S XVII, 34).
(V. our Lectures on Islamic International Law, op. cit., p. 268, and our Arabic book on International Law and Relations, op. cit., p. 139).

"Under international law, the principle of the binding force of treaties is sometimes restricted by the proposition of "Rebus sic stantibus". This means that the binding force is subject to the continuance of circumstances under which a treaty was concluded. If such circumstances change substantially, then its modification or cancellation may be claimed and resorted to.

This limitation is akin to the "doctrine of unforeseen events" (théorie de l'imprévision), which is known in civil and administrative laws in some countries. The Libyan Civil Code, as well as other Arab civil codes, referred to such restrictive phenomena, and provided in paragraph 2 of said Article 147 as follows:

"2. However, if exceptional general circumstances arise which were not capable of being foreseen and for which the performance of the contract, although did not become impossible, but has become so onerous to the debtor that it threatens him with heavy loss, (then) the Judge, according to the circumstances and after weighing the reciprocal in-

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