School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law
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Award Name and Date: Active Partners Group Limited v. The Republic of South Sudan (PCA Case No. 2013/4) – Final Award – 27 January 2015

Case Report by: Alyson Joy Akoka**, Editor Diego Luis Alonso Massa***

Summary: On 28 May 2007, the Republic of South Sudan ("Respondent") set up a tender ("May Bid Contract") for the construction of electric power in eight towns, Awil, Bentiu, Bor, Malakal, Rumbek, Tori, Warrap and Yambio. The winner of the tender would receive a Final Letter of Award after which a contract ("Contract", "Technical Contract") would be formally signed. On 7 February 2008, Active Partners Group Ltd ("Claimant") received the Final Letter of Award. Claimant was the successful bidder with costs of USD 197,863,146 for the electrifying project. Before the contract was signed, Claimant asserts that Respondent modified the contract to include only five towns rather than eight. By that time, Claimant had already carried out surveys of the eight towns. The Contract was formalized on 5 October 2008 and the Financial Agreement ("Finance Agreement") was signed on 16 November 2008. The Finance Agreement stipulated the date of the handing over of the site for the construction work to commence and the requirement of a letter of guarantee. However, allegedly the letter of guarantee was not submitted by Respondent to Claimant. As such, Claimant terminated the Contract and proceeded to obtain reparation recourse to arbitration in 2012.

Main issues: Applicable law; Scope of the Agreement; Termination of the Agreement; Lost Profits; Consequential Damages; Liquidated Damages.

Committee: Mr. Phillipe Pinsole (President), Mr. Richard Omwela (Member), Mr. Karel Daele (Member).

Claimants' Counsel: Mungu & Company Advocates, Nairobi, Republic of Kenya; EZC Law, Los Angeles, United States of America; and Aztan Law Firm, Khartom, The Republic of Sudan; Aztan, Sulaf & Associates, Juba, Republic of South Sudan; Dafalla & Alfadil & Partners, Khartoum, Republic of South Sudan.

Respondent's Counsel: Minister of Justice, Juba, South Sudan.

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Digest:

1. Relevant Facts and Procedural Dates

Active Partners Group Limited ("Claimant") sent a Notice of Arbitration on 20 February 2012 to Respondent, Republic of South Sudan, ("Respondent"), following the UNCITRAL rules. The Arbitral Tribunal ("Tribunal") was constituted on 19 October 2012. The president arbitrator, Mr. Pinsolle was appointed by Mr. Omwela and Mr. Daele on 19 October 2012; Mr. Omwela was appointed by Claimant on 12 March 2012 and Mr. Daele was appointed on the 20 September 2012 by the appointing authority of the PCA as Respondent did not forward any comments. On 6 May 2014, the Hearing took place in Mauritius. The Final Award was rendered on 27 January 2015.

2. The Tribunal's Analysis

In its analysis, the Tribunal proceeded to, firstly address the issues regarding the merits of the case (2.1), namely determining the proper applicable law to the Contract (2.1.1), the scope of the Contract with regard to the number of towns to be electrified (2.1.2) and the validity of the termination of the Contract (2.1.3). Secondly, the Tribunal assessed the quantum (2.2) through the evaluation of lost profits (2.2.1), the direct and indirect expenditure and finally the liquidated damages (2.2.3).

2.1. The Tribunal's Analysis on the Merits

2.1.1. Applicable Law

In rendering its award, the Arbitral Tribunal first dealt with the issue of the applicable law to the Contract. While both Parties agreed that English case law would only have persuasive authority per the May Bid Contract and the principles of Sudanese law (§130; §139; §316; §318), they disagreed with the application of the Contract Act 2008 as applicable law.

Active Partners contended that the applicable law to the Contract was the law of Sudan since the Contract was signed before the Contract Act of South Sudan 2008 was enacted. The Contract Act of South Sudan 2008 came into force on 28 November 2008 (§128; §316). The aforementioned Act sections 4(4)-4(3) stipulate that parties who entered into contracts executed prior to the date of entry in force of the Contract Act of South Sudan 2008, would have to modify these contracts for the Contract Act of South Sudan 2008 to apply (§131; §320). Since no such modification occurred, Claimant argued that the applicable laws to the Contract were the Sudanese laws, the Contract Act of Sudan 1974 as well as the Civil Transactions Act 1984 (§316; §320).

However, the Republic of South Sudan disagreed with Claimant by arguing that the proper applicable law to the Contract is the Contract Act of South Sudan 2008. Respondent

explained that the legislative Assembly had already passed the Contract Act of South Sudan 2008 and that the only formality left for the Act to come into force was the signature of the President of South Sudan (§135; §317). Moreover, Respondent pointed out that the modification referred in the Contract Act of South Sudan 2008 was to take place only when an agreement signed before the entry into force of the Contract Act of South Sudan 2008 contravened the law of that Contract (§137; §321).

Pursuant to the law of the seat, namely, the Kenya Arbitration Act 1995, the Arbitral Tribunal had jurisdiction to adjudicate on this dispute. The Arbitral Tribunal found that the meaning of Section 4(3) of the Contract Act of South Sudan 2008 was plain and that the Contract was made prior the enactment of the Contract Act of South Sudan 2008. Had the parties wished to apply the Contract Act 2008, they could have done so by modifying the applicable law to the Contract as specified in Section 4(4) of the Contract Act of South Sudan 2008. Therefore, the Arbitral Tribunal concluded that the Contract was governed by Sudanese law, in essence, the Contract Act of Sudan 1974 as well as the Civil Transactions Act 1984 (§§323-327). Finally, the Tribunal added that English law would be used only as external persuasive authority (§327).

2.1.2. Scope of the Contract

The second issue tackled by the Arbitral Tribunal was regarding the scope of the Contract, namely, whether both parties had agreed to electrifying eight or five towns.

Claimant set forth the argument that both parties had entered into an agreement for the electrification of eight towns (§§154-156; §§328-329). However, Claimant contends that Respondent exerted economic pressure to reduce the scope of the agreement to five towns (§§182-185). Mr. Fagir, one of Claimant's witnesses, stated that Claimant agreed to the electrification of five town under the Contract instead of eight as per the Final letter of Award, in order to avoid incurring further losses (§§328-329). Indeed, Claimant had already made losses with regard to surveying the three towns that were later removed. Mr. Fagir also mentioned that Claimant did not make any reservation of its rights or formally protested about this reduction (§§328-329).

Respondent, on the other hand, contended that Claimant did not demonstrate that Respondent had imposed the reduced contract of five towns onto Claimant. The Republic of South Sudan also underlined that Claimant remained free to turn down the counter offer for five towns (§§192-193; §329).

The Arbitral Tribunal ruled in favour of Respondent by recognizing that the scope of the Contract was for five towns and not eight (§331).

2.1.3. Termination of the Contract

The last issue with respect to the Arbitral Tribunal's consideration on the merits concerned whether the Claimant's termination of the Contract was valid or not.

Claimant made several assertions to demonstrate that Respondent had "consistently failed to meet its obligations" which in turn would allow Claimant to lawfully terminate the Contract and Finance Agreement (§§194-196; §332). Claimant argued *inter alia* that not only had Respondent "failed to issue a payment guarantee as it was required to do under the Financial

Agreement" as well as "significantly delayed the Project" and "rejected the Centuria Capital financing deal" but also Respondent had "unilaterally reduced the scope of the Contract" and "failed to issue the Notice of Commencement of Works" (§332).

Notably, Claimant also asserted that there was significant delay which affected Claimant's logistical planning and obliged Claimant to take measures to maintain the supplies and materials for an extended and uncertain time (§209; §332; §337). Claimant had to undertake these measures to ensure the deadlines were respected and that they would be able to start as soon as they had to (§332; §337). Subsequently, these factors lead Claimant to incurring additional costs (§342). Additionally, Claimant argued that Respondent had failed to secure a bank guarantee and to notify Claimant that Respondent would not meet such obligation (§180; §197-198; §332; §§338-341).

The witness of Respondent, Professor Chol, recognised that the payment guarantee was crucial to the allocation of funds and to the implementation of the work. Respondent agreed but specified that its failure to secure a bank guarantee was due to insufficient funds (§175; §336; §§339-341; §343). Continuing on this line of reasoning, Respondent submitted that while it failed to issue a bank guarantee, this failure constituted a frustration of the Contract not a breach. Indeed, Respondent's unsuccessful issuing of a bank guarantee was out of Respondent's control (§§240-243; §345; §357). Indeed, Respondent explained that because the country was insecure, food crisis developed and oil prices increased, the Republic of South Sudan was unable to issue the required bank guarantee (§346). Respondent relied on section 92(2) of the Contract Act 2008 - though inapplicable as per the Final Award - whereby a contract is frustrated when unforeseen contingencies occur (§347).

The Tribunal decided that that the situation described by Respondent did not meet the criteria imposed by clause 17 of the Contract. Under the Contract, clause 17, unforeseen contingencies and Government's risk were defined as "civil war", "operation of the forces of nature" (§§348-349). Per the Tribunal, there was no justification for the frustration of the contract (§349; §§358-359). The Tribunal further added that, if the contract had been frustrated, the force majeure clause (clause 19 of the Contract which included the circumstances described in clause 17) should have been used by Respondent (§350; §360). However, Respondent failed to do so (§351; §360). Moreover, the Tribunal pointed out that Respondent had the funds to issue the bank guarantee but chose to redirect the funds elsewhere (§210; §§353-355). Hence, the Tribunal concluded that Respondent had consistently failed to abide by its obligations. As such, the Tribunal declared that the termination of the Contract by the Claimant was lawful and that Claimant had rights to recover damages.

2.2. The Tribunal's Analysis on the Quantum

After concluding that Claimant was entitled to damages due to Respondent's inability to meet its obligations, the Arbitral Tribunal proceeded to analyze the Quantum claims.

2.2.1. Lost Profits

While Respondent did not address the issue of lost profits, Claimant contended that it was entitled to recover them. Indeed, Claimant asserted that by winning the tender, the Republic of South Sudan had accepted Claimant's gross profits as it was the most competitive (§§362-

363). Hence, the Claimant asked for USD 197,863,146 in compensation for the gross lost profits.

In ordering for damages, the Tribunal aimed to restore Claimant's position to what it would have been had the Contract been performed (§364). The Tribunal concluded that Claimant was entitled to "lost profits" net of tax. Moreover, though Claimant had argued for a 35% profit margin, the Tribunal recognised that electrifying five towns in the region of South Sudan bore unusually high risks. The Tribunal opted to apply in its evaluation a lower rate of return of 25%. To sum up, the Tribunal entitled Claimant to USD 23,152,026.25 for net loss of profits.

2.2.2. Direct and Indirect Expenditures

Claimant argued that it was not only entitled to out of pocket expenses since the Contract stipulated as such but also, the Claimant's incurred expenses were in view of completing the work (§375).

However, Respondent contested this claim because allegedly Claimant failed to show proof of any activities undertook by Claimant with respect to the performance of the contract. The Republic of South Sudan also advanced the position that Claimant did not have the right to commence preparatory works before receiving the Notice of Commencement (§§188-189; §229-231; §374) and that Claimant had agreed to survey the eight towns at its own costs (§374).

The Tribunal found that Claimant had extensively shown evidence of the sums incurred in expectation of the Contract's performance and that Respondent was aware of their activities. The Tribunal recognized that if Claimant had made its 35% margin, Claimant would not have obtained the reimbursement of its expenses. While the Tribunal explained that it did not support recovering its reliance damages, the Tribunal noted that the Contract provided otherwise. As such, the Tribunal ordered Respondent to pay USD 12,419,505 for direct damages and USD 198,712.08 for indirect costs amounting to a total of USD 12,618,217,08 (§§376-384).

2.2.3. Liquidated Damages

Due to the delay, Claimant demanded reparation for liquidated damages at 0.1% rate per delayed day and relied on Clause 8.7 of the May Bid Contract (§385-391).

The Tribunal was not persuaded by Claimant's argument because the May Bid Contract's 0.1% rate had no direct connection to the Contract. Indeed, only part of the May Bid Contract Clause 8 was reproduced in the Contract, leaving out the 0.1% rate. Moreover, the May Bid Contract only mentioned delays by the Contractor (Active Partners in this case) and not by the Employer, the Republic of South Sudan. Claimant claimed that Respondent would qualify as the non-complying party (Contractor) in relation to clause the delay clause of the Contract. However, the delay clause contained in the Contract originated from the May Bid Contract. As a result, the Tribunal disagreed with Claimant's theory. The Tribunal thus concluded that there was no sufficiently clear basis for Claimant to recover liquidated damages. This claim was dismissed. (§§392-395).

2.2.3.1. Consequential Damages

As to the consequential damages, Claimant claimed that Respondent's failure to provide a payment guarantee caused Claimant's financier to withdraw from the South Sudan market. As a result, Claimant lost a potential contract with Hyundai, where they were expected to make USD 120 million profit (§396).

Respondent defended itself by arguing that Claimant had shown no proof that they were the cause for the Hyundai's lost project (§397).

After recalling witness testimonies, the Tribunal held that Respondent was not the only reason for which Claimant lost the Hyundai project. Indeed, Claimant's financier withdrew from the market because it had lost confidence in this region as a market due to various factors such as the geopolitical risks and credit ratings, not solely because of Respondent's failure to respect the contractual agreement. The Tribunal added that the project had not been concluded with any other partner. These arguments lead the Tribunal to dismiss the consequential damages claim (§398-405).

2.2.3.2. Interests

Regarding the interest, while Respondent remained silent on this issue, Claimant asserted that a 3.75% interest rate should apply in connection to Claimant's lost profits, out of pocket expenses, liquidated damages, consequential damages and legal costs (§406-408).

The Tribunal held that the interest rate of 3.75% compounded monthly on Claimant's lost profits and costs from the Notice of Arbitration date to the date of payment in full would be allowed. The purpose of Claimant allowing the application of interest rates was to restore Claimant to the position that it should have been in had the Contract been performed (§409).

2.2.3.3. Costs

Claimant requested that the Tribunal orders Respondent to pay for the arbitration costs (USD 197,757) plus interest and all of Claimants legal fees (totaling USD 6,368,104) plus interest.

While Respondent dismissed Claimant's arguments concerning the costs due to lack of cause of action and failure to prove its case, the Tribunal ordered Respondent to pay for expenses linked to travel and other expenses of the Tribunal and witnesses, cost of experts or other assistance needed by the Tribunal, the legal fees incurred by Claimant and the fees of the arbitral institution, the Permanent Court of Arbitration (§§410-417).

3. The Tribunal's Decision

The Tribunal held that the Republic of South Sudan had breached its obligation under the Technical Contract and Financial Agreement. As a result of this breach, Claimant was entitled to terminate the Contract and to damages in the amount of USD 35,770,243.33 plus USD 4,127,541.83 in interest. The Respondent also bore the legal costs of Claimant (legal fees and arbitration costs) as well as its own. All other claims (such as liquidated damages and consequential damages) were dismissed (§418).