School of International Arbitration, Queen Mary, University of London
International Arbitration Case Law
*Academic Directors: Ignacio Torterola, Loukas Mistelis**

Award Name and Date: Atlantic Ventures – Sociedade de Desenvolvimento e Gestão Portuária S.A. v. 1. Republic of Angola (Angola), 2. President of the Republic of Angola (Angola), 3. Ministry of Transport, 4. Port of Luanda E.P. (Angola), 5. Ministry of Construction and Public Works (Angola) (*ad hoc* arbitration NN 511/JPA) – Final Award – 10 July 2020

Case Report by: Inaê Siqueira de Oliveira**, Editor Diego Luis Alonso Massa***

Summary: Claimant requested arbitration based on drafts of a Port Concession Agreement and of a Surface Agreement. Respondents objected to the jurisdiction of the *ad hoc* arbitral tribunal alleging, *inter alia*, lack of a binding arbitration agreement. The arbitral tribunal, relying on the criteria used by the Swiss Federal Tribunal in the 2016 decision 4A_84/2015, decided it did not have jurisdiction over the dispute because the parties had not agreed to arbitrate during the exchange of drafts.

Main Issue: whether there is a binding arbitration agreement regardless of the conclusion of the underlying contract.

Tribunal: Jan Kleinheisterkamp (President), Lino Torgal (Co-Arbitrator, Claimant's appointee) and Vasco António Grandão Ramos (Co-Arbitrator, Respondents' appointee)

Claimant's Counsel: Ms. Pacôme Ziegler and Ms. Mariana Carvalho (Delaloa, Lisbon)

Respondent's Counsel: Mr. Correia Bartolomeu, Ms. Arlete Amaral Maia and Mr. Riveraldo Adolfo (CBAM Advogados, Luanda)

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Digest:

1. Relevant Facts

The dispute has arisen out of negotiations for a port construction project at Barra do Dande. The arbitration was conducted in Portuguese. The seat of arbitration was Luanda and the applicable law was Angolan law (¶4.1-4.3).

Atlantic Ventures ('Claimant') is a company incorporated on 9 June 2017 under the laws of the Republic of Angola. Its shareholder structure was unclear to the Arbitral Tribunal (¶7.9). Respondents are the Republic of Angola, the President of the Republic of Angola, the Ministry of Transport, the Port of Luanda E.P. and the Ministry of Construction and Public Works ('Respondents').

The Angolan government has long shown interest in developing a port at Barra do Dande (¶7.2). On 2 July 2015, the then Angolan Secretary of Transport, Mr. Mario Domingues, sent to Urbinvest S.A. – a company owned by Ms. Isabel dos Santos – an MoU draft to be agreed between the Ministry of Transport and two different companies, Atlântico Copperbelt (Angola-based) and Boreal Investments (Hong Kong-based), regarding the Port of Dande project (¶7.3).

The first draft of the Port Concession Agreement was made in 2016, had 21 pages and an ICC arbitration clause (¶7.10). Following exchange of e-mails, a second draft with 86 pages and another arbitration clause was presented (¶7.16). A third draft, allegedly of April 2017, had a different ICC arbitration clause (¶7.20). The first draft of the Surface Agreement was made in June 2017 and had an ICC arbitration clause (¶7.21).

In June 2017, Claimant sent drafts of the Concession and Surface Agreements to the Ministry of Transport, alongside other documents – namely, a Presidential Decree draft. It reinforced its intention to participate in the "development, construction, operation and finance of the Port of Dande" and proposed the conclusion of the attached Concession Contract (¶7.23).

On 20 September 2017, the President of the Republic of Angola issued the Presidential Decree 207/17, based on the draft suggested by Claimant, approving the Barra do Dande Port Project (¶7.25).

On 26 September 2017, the new President of Angola, elected in August 2017, took office (¶7.29). On November 2017, a Memorandum was sent to Claimant, listing concerns on how severely unbalanced the draft proposal for the Concession Agreement was (¶7.32). Negotiations stalled.

On 28 June 2018, two presidential decisions were published. The first one (Decree 157/18) revoked Presidential Decree 207/17 "for not having fulfilled the legal requirements of Public Procurement established on Law 9/16 of 16 June" (¶7.47). The second one (Dispatch 76/18) opened a new public procurement process for the Barra do Dande Port Project (¶7.48).

2. Procedural History

On 24 August 2018, Claimant filed a Request for Arbitration at the ICC and sent a Notice of *ad hoc* Arbitration to Respondents (¶5.1). It initially appointed Prof. Marçal Justen Filho as co-arbitrator. In September 2018, Respondents replied, alleging lack of arbitration agreement and non-arbitrability of the Presidential Decrees (¶5.3).

On 9 November 2018, the ICC Court discontinued the ICC arbitration (Case 23980/JPA), because it understood there was not a valid ICC arbitration clause between the parties. In view of that, Claimant decided to proceed with the *ad hoc* arbitration and requested ICC to be the appointing authority (¶5.6). Respondents opposed (¶5.10), but the ICC deemed it was possible to act as appointing authority (¶5.27).

In May 2019, as the co-arbitrators had not agreed on the third arbitrator, the ICC appointed Prof. Matthieu de Boisséson, which accepted but soon afterwards resigned (¶5.27). On 6 September 2019, after consultation to the parties, the ICC appointed Prof. Jan Kleinheisterkamp as presiding arbitrator (¶5.29).

On Procedural Order 1, the Arbitral Tribunal ordered the bifurcation of proceedings, so that Parties should first present their arguments regarding the existence, validity and legal effects of the arbitration agreement (¶5.48).

Given the Covid-19 pandemic, the hearing scheduled to be held in Luanda on 25 and 26 May 2020 (¶5.74) was replaced by an additional round of written submissions (¶5.90).

3. Claimant's position

Claimant sustained the Arbitral Tribunal had jurisdiction over the dispute based on the arbitration clauses of the Concession Agreement and Surface Agreement drafts.

3.1. The arbitration agreement is binding regardless of the underlying contract existence and validity

According to Claimant, it follows from the principle of autonomy established on Article 4(2) of the Angolan Arbitration Law, interpreted according to the rules of transnational commercial arbitration that the arbitration agreement is binding regardless of the underlying contract. There would be "a total split between these two contracts" (¶8.5).

Claimant sustained that even though parties had not concluded the underlying agreements, they had agreed on arbitration. Earlier drafts containing an arbitration clause were not modified by Respondents (¶8.6)

3.2 In any case, both Concession and Surface Agreement were concluded and are binding

Claimant also alleged that Angola had accepted its contractual offer by issuing Presidential Decree 207/17. Therefore, both Concession and Surface Agreements had been concluded, regardless of their non-formalization (lack of signature). Both contracts were in full force and effect, including their respective arbitration agreements (¶8.10).

3.3 As a secondary argument, the Arbitral Tribunal had jurisdiction based Angola's national law

Claimant alleged that even if the contracts had not been concluded, the Arbitral Tribunal would have jurisdiction based on the General Rules of Port Concession and General Rules of Use Concession ("Concessão Dominial", in Portuguese). In its view, these rules are applicable to all disputes related to *concessions*, a word whose meaning encompasses not only concession contracts, but also the *act of concession* in itself (¶8.13).

4. Respondents' position

Respondents objected to jurisdiction based on the lack of an arbitration agreement and on the non-arbitrability of the Presidential Decrees.

4.1 Lack of an arbitration agreement

Respondents alleged the draft contracts, to which they replied in a Memorandum, had numerous pending issues that should be addressed before other clauses, such as the ones providing for arbitration, could be analysed (¶8.18). The parties had neither agreed on a draft contract, as all versions were unilaterally prepared by Claimant (¶8.21), neither on an arbitration agreement through a different instrument (¶8.23).

4.2 Non-arbitrability of the Presidential Decrees

Respondents sustained the Presidential Decrees are administrative acts, not subject to arbitration pursuant to Article 1(3) of the Angolan Arbitration Law.

4.3 Angola's General Rules of Port Concession and Use are non-applicable

Respondents argued that the General Rules invoked by Claimant were applicable only to contractual performance. Since the Concession and Surface Agreements had not been concluded in the first place, the rules were not applicable to the dispute (¶8.25).

5. Tribunal's analysis

The Arbitral Tribunal concluded that it lacked jurisdiction over the dispute. In its reasoning, it focused on the issue of whether the arbitration agreements in the draft contracts were binding.

5.1. Non-existence of the underlying contracts

As starting point, the Arbitral Tribunal considered that the existence of the Port Concession Agreement and the Surface Agreement had not been proved (¶9.10). As Claimant had argued that the arbitration agreements were autonomous and binding regardless of the existence of the underlying contracts, the Arbitral Tribunal turned to this issue under Angolan Arbitration Law.

5.2. Meaning of "autonomy of the arbitration agreement"

The Arbitral Tribunal reasoned that Article 4(2) of the Angolan Arbitration Law referred to the autonomy of the arbitration agreement regarding contract invalidity (nullity), which implies a concluded contract, even if with serious irregularities (¶9.12). It described the controversial

issue as "whether the arbitration agreement may exist if the underlying contract has not been formally agreed." (¶9.13).

5.3. In exceptional circumstances, there may be a binding arbitration agreement in the absence of a concluded contract

The Arbitral Tribunal relied on the Swiss Federal Tribunal decision of 18 November 2016 (Case 4A_84/2015) as guidance to assess the controversial issue (¶9.15). It accepted that, as a general rule, exchange of drafts is not sufficient to bind the parties to a particular clause of a future contract (¶9.16). "Additional special circumstances", related to the drafts and the negotiation, are needed (¶9.17). These circumstances must show the parties' will to be bound to arbitration even if the underlying contract under negotiation is not concluded. An exchange of drafts where the arbitration clause remains unaltered may be an example of that special circumstance, but it is not, in and of itself, sufficient evidence. The assessment depends on the specific facts of each case (¶9.18).

Applying that test to the case at hand, the Arbitral Tribunal did not find evidence of parties' intention to arbitrate regardless of the conclusion of the underlying contracts (¶9.22). Final and definitive consent regarding the agreement to arbitrate, whatever the result of negotiations, should have been shown (¶9.24).

5.4. Meaning of "concession"

The Arbitral Tribunal rejected Claimant's argument of jurisdiction based on the General Rules of Port Concession and Use. It found the interpretation of 'concession' as encompassing any 'act of concession' unpersuasive. It sided with Respondents' view, according to which the General Rules are applicable once there is a concluded contract (¶9.26).

The Arbitral Tribunal deemed unnecessary to decide other issues raised by Respondents, such as the non-arbitrability of the dispute (¶9.28).

6. Costs

Applying the costs-follow-the-event rule, the Arbitral Tribunal ordered Claimant to bear all costs in connection with the arbitration proceedings (¶10.1) and to reimburse Respondents its legal costs and expenses (¶10.16).