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THE PYRAMIDS OF EGYPT CASE

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Arab Republic of Egypt v. *Southern Pacific Properties Limited* and *Southern Pacific Properties (Middle East) Limited*, Court of Appeal of Paris (first supplementary chamber), judgment of 12 July, 1984[1] is the first French court decision to annul an international arbitration award since the recent reform of French arbitration law was completed by the Decree of 12 May, 1981.[2] The decision raises a number of questions which will undoubtedly be the subject of doctrinal discussion, but this note will be limited to two aspects of the decision which merit comment: (1) the extent to which a party, who challenges the jurisdiction of an ICC arbitral tribunal, may participate in the arbitral proceedings without being deemed thereby to have waived its jurisdictional objection, and (2) the scope of review which the Courts of Appeal may exercise when an international award rendered in France is challenged.

Before referring to the terms of the court's decision on these two points, it is appropriate to summarise briefly the facts as they appear from the decision.

On 23 September, 1979 the Arab Republic of Egypt represented by its Minister of Tourism ("Egypt"), the Egyptian General Organisation for Tourism and Hotels, an Egyptian public commercial establishment ("EGOTH"), and Southern Pacific Properties Limited, a Hong Kong company ("SPP"), entered into "Heads of Agreement" providing, among other things, for the creation of a tourist complex near the site of the pyramids in Egypt. Under the Agreement, Egypt undertook to make available the necessary land whereas EGOTH and SPP undertook to constitute a joint venture company to implement and manage the project. The Heads of Agreement contained no arbitration clause.

About three months later, on 12 December, 1974 EGOTH and SPP signed a "Supplemental Agreement" containing further stipulations as to the joint venture company and providing for certain undertakings by EGOTH in relation to the joint venture, including: to use its best efforts to transfer the use of the land to the joint venture, to refrain from competing with it, and to try to obtain a tax holiday for the venture from the Egyptian authorities. The Supplemental Agreement also contained a clause providing for the arbitration of disputes by the International Chamber of Commerce in Paris. Appended to

[1] An English translation of this decision has been published at (1984) 23 I.L.M. 1048.

[2] Introductory Note by Professor Emmanuel Gaillard to the English translation of the decision, (1984), 23 I.L.M. 1048.

this Agreement was a "Statement" signed by EGOTH and SPP providing that the obligations of EGOTH would be subject to the approval of competent governmental authorities and the results of a feasibility study.

On the last page of the Supplemental Agreement, the signature of the two parties and the date were followed by the words, "approved, agreed and ratified by the Minister of Tourism" which were, in turn, followed by the signature of the Minister and the date, 12 December, 1974.

Thereafter, the joint venture company was formed and performance of the contracts commenced. However, the project gave rise to opposition and to a worldwide campaign to protect the site of the pyramids from this scheme for commercial development. The campaign led, ultimately, to a new series of decisions by the Egyptian government pursuant to which all works were stopped and the entire pyramids' tourist project cancelled.

At this point, SPP and SPP–ME, its Middle East subsidiary, commenced arbitration against Egypt and EGOTH under the ICC rules, as approved for in the Supplemental Agreement, seeking damages for breach of contract. In its initial correspondence in the arbitration and when nominating an arbitrator, Egypt expressly objected to the jurisdiction of an ICC arbitral tribunal, maintaining that it was not a party to the Supplemental Agreement and that it had not signed any agreement containing an ICC arbitral clause.

Nonetheless, an arbitral tribunal was constituted comprising Prof. Giorgio Bernini, Chairman, Mr. Aly H. Elghatit and Mr. Mark Littman Q.C. and, on 3 May 1980, Terms of Reference[3] under the ICC Rules were drawn up and signed by the parties. These specified that the place of arbitration would be Paris and made express reference to Egypt's objections to the jurisdiction of the arbitral tribunal.[4] Arbitration proceedings ensued and, by an award, dated 16 February 1983,[5] the arbitral tribunal rejected Egypt's jurisdictional objections and held Egypt liable to pay SPP–ME U.S.$12,500,000 in damages, together with interest and legal costs. The claims against EGOTH were dismissed.

Thereafter, Egypt commenced proceedings before the Paris Court of Appeal to have the award annulled on the basis of Articles 1504 and 1502(1) and (5) of the New Code of Civil Procedure. Articles 1504 and 1502, when read together, provide that an arbitration award rendered in France in an international arbitration may be the subject of an annulment proceeding in the cases specified in Article 1502. Article 1502(1) and (5) specify two of the cases for annulment, as follows (translation):

[3] Under Article 13 of the ICC Rules, before proceeding with a case, the arbitrators are bound to draw up a document defining their terms of reference, which must include specified particulars about the case. The "Terms of Reference" (as this document is called) must be signed by the arbitrators and, ordinarily, all parties.

[4] The court's decision does not specify the law which the arbitrators applied to the substance of the dispute. However, the text of the arbitral award (see note 5 below) shows it to have been Egyptian law including general principles of international law.

[5] The text of the award, which is in the English language, has been published at (1983) 22 I.L.M. 753. The award was rendered by a majority, Mr. Elghatit of Egypt dissenting. He refused to sign the award.

> "(4) If the arbitrator has decided in the absence of an arbitration agreement or on the basis of an agreement which is void or has expired;"
>
> "(5) If the recognition or the enforcement is contrary to international public policy."

The arbitral award was made by a two-to-one majority, the majority including an English lawyer (Mark Littman, Q.C.). In the award, substantial weight was apparently given to the oral testimony of an SPP executive, Mr. Gilmour. Under English (and American) practice, the fact that a witness is an employee of a party does not necessarily detract from the weight to be given to his evidence.

However, the Paris Court of Appeal made it clear that (though it presumably had never seen Mr. Gilmour) it would not give the same weight to his testimony (translation):

> "WHEREAS, Mr. Gilmour's position with the companies concerned precludes giving any degree of credibility to his testimony sufficient to convince this court, although it was accepted by the arbitral tribunal."

This is consistent with French court practice according to which little or no weight is given to the oral testimony of an interested party.

Thus, this decision makes clear that when reviewing an international arbitral award in an annulment proceeding, the French courts may not only undertake an independent review of the facts relevant to the ground for annulment but may apply their own (that is, French) evidentiary standards to the evaluation of those facts, notwithstanding that such standards differ from those applied by the arbitral tribunal itself. Parties who engage in an international arbitration in France may wish to bear this point in mind.

Egypt contended, among other things, that it had never waived its immunity from jurisdiction and that the arbitral tribunal had decided in the absence of an arbitration agreement inasmuch as Egypt had, so it contended, never subscribed to such an agreement. The Court of Appeal agreed and annulled the award on the basis of Article 1502(1). The Minister of Tourism's signature on the Statement appended to the Supplemental Agreement, which contained the arbitral clause, was held not to constitute a contractual commitment of the Egyptian State, but merely to concern approval of various administrative authorisations within the Minister's competence. In view of the court's holding, it was unnecessary for it to consider Egypt's second ground for annulment based on Article 1502(5).

The reasoning of the court in disposing of two of the arguments in defence made by SPP and SPP–ME is particularly interesting. The first argument advanced by SPP and SPP–ME was that in signing the Terms of Reference and in arguing the case on the merits Egypt had manifested its intention to have the dispute resolved by an ICC arbitral tribunal and, consequently, should be deemed to have waived its objection to such a tribunal's jurisdiction. SPP and SPP–ME argued that the Terms of Reference constituted, in effect, an arbitration agreement (*compromis*) signed by Egypt,

notwithstanding its jurisdictional objections mentioned therein.[6] The Court of Appeal disagreed, stating (translation):

> "WHEREAS, in this case, the arbitration agreement can only consist of the arbitration clause inserted in the contract of December 12, 1979, by virtue of which the Court of Arbitration of the ICC was seized by SPP and SPP–ME and the arbitrators appointed in accordance with the ICC Rules; furthermore, the Rules distinguish very clearly between the arbitration agreement, referred to in Articles 7 and 8, and the Terms of Reference, the main purpose of which is to define the issues in dispute and the mission of the arbitrator;
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> WHEREAS, in any event it would not be possible to explain how Terms of Reference, in which Egypt claims immunity from jurisdiction and maintains, before any defence on the merits, that there was no arbitration agreement, could replace such an agreement;
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> WHEREAS, the fact of defending a case on the merits before a tribunal whose jurisdiction one has previously taken the care to contest, can not be deemed a waiver of the right to contest such jurisdiction;
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> *WHEREAS, the Egyptian State had legitimate reasons to defend itself even before arbitrators it considered to lack jurisdiction, in order to attempt to mitigate the damage which could result from an award holding it liable;*
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> *WHEREAS, it is also important to note that as the Court of Arbitration is the judge of its own jurisdiction, Egypt was in fact obliged to appear before it to make known its opposition to the claim of its adversaries, which once again underlines the distinction between Terms of Reference signed by a party desirous not to default and an arbitration agreement characterised by the freely-expressed will of the parties to grant jurisdiction to arbitrators;*" (emphasis added).

The last two paragraphs are particularly noteworthy. The ICC Rules expressly provide that where a party contests the existence or validity of an agreement to arbitrate, the ICC Court of Arbitration determines whether such agreement exists, prima facie, and, if it determines that it does exist, then any decision as to the arbitrators' jurisdiction is to be taken by the arbitrators themselves.[7] This decision seems to be saying that it follows necessarily from the fact that the arbitrators have the power to decide on their own jurisdiction that a party who contests their jurisdiction should be able to appear in the arbitration not merely to argue his jurisdictional objection but to sign Terms of Reference addressing the merits and to defend the case on the merits without being held, by having done so, to have waived his jurisdictional objection. So long as he has made clear, in the Terms of Reference (it is indicated), that he continues to challenge the arbitrators' jurisdiction, his jurisdictional objection will be regarded, at least by French courts, as having been fully preserved.[8]

[6] As Terms of Reference (see note 3 above) are signed by the parties, as well as the arbitrators, they may, in effect, constitute an arbitration agreement or (in French) *compromis*. Indeed, under those municipal laws (e.g. of Brazil) where an arbitration clause does not create an enforceable obligation to arbitrate, Terms of Reference (or a similar agreement) may be essential to compel arbitration. See de Hancock, "The ICC Court of Arbitration: The Institution and its Procedures" (1984) 1 J.Int.Arb. 21, 34.

But, as the court's decision indicates, this does not mean that the signature of Terms of Reference *necessarily* implies a waiver of jurisdictional objections, especially when such objections are expressed in the document.

[7] ICC Rules, Art. 8(3).

[8] The Court of Appeal appears to have assumed in its decision that Egypt had to sign the Terms of Reference in order to be able to participate in the arbitral proceedings. In fact, this should not ordinarily be essential in the case of a defendant who is contesting the jurisdiction of an ICC tribunal. The ICC Guide to

Second, SPP and SPP–ME had contended that the arbitrators' finding of fact that Egypt had intended to be bound by the Supplementary Agreement (containing the arbitration clause), by virtue of the Minister of Tourism's signature thereon, was not reviewable by the Court of Appeal. The Court disagreed, stating (translation):

> "WHEREAS, *it is erroneous to claim* that this (Arbitral) Tribunal had the power to determine the validity of its own jurisdiction without being subject to review and *that the Court of Appeal must adopt the Tribunal's interpretation of the intention of the parties, as deduced by it from the evidence before it;* whereas although arbitrators, whose jurisdiction is contested, have the power to decide on the existence or the validity of the arbitration agreement, it is no less certain that their decision is subject to review by the judge having jurisdiction over the annulment procedure provided for by article 1504 of the New Code of Civil Procedure, it being noted that this procedure is available 'if the arbitrator has decided in the absence of an arbitration agreement or on the basis of an agreement which is void or has expired' (Article 1502(1);
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> WHEREAS, if it were followed, the reasoning contended for by the defendant companies would have the parodoxical effect of eliminating completely a power recognized as belonging to the court without restriction and which is no more than the counterpart of the competence granted to arbitrators to decide on their own jurisdiction" (emphasis added).

Arbitration, which was published in October 1983, states: "A refusal by a party to sign the Terms of Reference does not affect the validity of the proceedings, nor does it prevent that party from taking part in the hearings of the case. The party concerned must in all respects be treated as if he had signed." p.41.