*Texaco Overseas Petroleum Company, California Asiatic Oil Company v The Government of the Libyan Arab Republic, Award, 19 January 1977*The case has been settled in the meantime. The parties have agreed that Libya shall provide the companies with US $ 152 million of Libyan crude oil over the next 15 months, and that the companies shall terminate the arbitration proceedings (New York Times and Wall Street Journal of September 26, 1977). (Source: Introductory Note in 17 International Legal Materials p. 2 (1978)).*
Yearbook Commercial Arbitration 1979 - Volume IV (Sanders (ed.); Jan 1979)

[Excerpts]

I. Facts

1. The arbitration originates from fourteen Deeds of Concession concluded between 1955 and 1968 between Libya and two United States companies, Texaco Overseas Petroleum Company and California Asiatic Oil Company (hereafter called the Companies). The majority of the Deeds of Concession were modified by consent of all parties in 1963, 1966, 1970 and 1971. The purpose of the modifications was to bring the Concessions into line with the amended Libyan Petroleum Laws (originally 1955, amended by Royal 177Decrees in 1961, 1963 and 1965; in 1966 a consolidated version of the previous texts was made: Petroleum Law of August 1, 1966). The Concessions were a reproduction of a model contract which was provided in an annex to the text of the Petroleum Law 1955.

The Royal Decree of November 9, 1961, modifying some of the provisions of the Petroleum Law of 1955, gave a more precise wording to clause 16 of the model contract which reads:

'The Libyan Government, the (Petroleum) Commission and the competent authorities in the Provinces shall take all the steps that are necessary to ensure that the Company enjoys all the rights conferred upon it by this concession, and the contractual rights expressly provided for in this concession may not be infringed except by agreement of both parties.

This concession shall be interpreted during the period of its effectiveness in accordance with the provisions of the Petroleum Law and the Regulations issued thereunder at the time of the grant of the concession, and any amendments to or cancellations of these Regulations shall not apply to the contractual rights of the Company except with its consent'.

Clause 28 of the Deeds of Concession contained an extensive arbitral clause, the relevant parts of which will be referred to below.

In 1973, 51% of the properties, rights and assets relating to the Deeds of Concession of the Companies, as well as of seven other oil companies was nationalized by a Decree. In the following year, on September 1, 1974, a Decree was issued, directed only to the Companies. By this Decree the entirety of all the properties, rights and assets relating to the fourteen Deeds of Concession, of which the Companies were holders, was nationalized. Under both Decrees the Companies concerned were at the same time declared solely responsible and liable for all the liabilities and debts or obligations arising from their activities. Both Decrees also provided for a committee to be appointed to determine the amount of compensation to be paid. It did not appear from any document submitted to the arbitration that this committee had functioned or that its members had been nominated.

By the Decree of 1973, Amoseas, a company governed by foreign law, which was formed jointly by the Companies to be their operating entity in Libya, was to continue to carry out its activities for the account of the Companies to the extent of 49%, and for the account of the Libyan National Oil Company (N.O.C.), to the extent of 51%. The Decree of 1974 effected a fundamental change in Amoseas: it was converted into a non-profit company, the assets of

which were completely owned by N.O.C. Amoseas lost its name and was renamed the 'Om el Jawabi Company'.

The Companies thereupon notified the Libyan Government that recourse would be taken to arbitration by virtue of clause 28 of the Deeds of Concession. In accordance with clause 28 they designated their arbitrator. When the Libyan government abstained from designating its arbitrator, the Companies requested, as provided for in this situation by the same clause, the President of the International Court of Justice to designate a sole arbitrator. On December 18, 1974, the President of the I.C.J. appointed the French Law Professor René-Jean Dupuy as sole arbitrator.

The arbitrator fixed Geneva as the place of the arbitral tribunal (where the award also was signed). Although the arbitrator had repeatedly notified the Libyan Government, and allowed extension of time to submit an answering memorial to the claims of the Companies, the Libyan Government did not participate in the arbitral proceedings. It should be noted that the arbitrator kept the Libyan Government informed of all stages of the proceedings, and each time transmitted to it all relevant documents. Moreover, throughout the preliminary award and the award on the merits, the arbitrator paid due attention to a Memorandum of the Libyan Government which was submitted to the President of the I.C.J. on July 26, 1974, setting forth the reasons for which, in its opinion, no arbitration should take place in the present case.178

II. Preliminary Award

(on the jurisdiction of the arbitrator)

1. Competence-Competence

At the outset the arbitrator had to determine whether he had the competence to decide on his jurisdiction. The arbitrator held that he did have such competence by virtue of a traditional rule followed by international case law (1)and unanimously recognized by the writings of legal scholars. (2) The arbitrator noted also that this rule had been adopted in a great number of international instruments. (3)

The arbitrator added that this solution is in harmony with both the jurisdictional aspect and the contractual aspect of arbitration. As far as the contractual aspect is concerned the arbitrator cited from clause 28 of the Deeds of Concession '. . . the sole arbitrator, shall determine the applicability of this clause and the procedure to be followed in the arbitration'. The arbitrator inferred from this wording that the parties had agreed that the arbitrator alone could determine the question whether he has jurisdiction.

2. Separability of the Arbitral Clause

The next question which the arbitrator had to face was whether, assuming that the nationalization had the effect of voiding the Deeds of Concession, this effect could be extended to the arbitral clause (clause 28) contained in the Deeds of Concession. The arbitrator held that the hypothetical termination of the Deeds of Concession did not affect the the arbitral clause itself.

In this connection the arbitrator referred to the principle of the autonomy or independence of the arbitral clause from the contract in which it is contained. This principle has been upheld by several decisions of international case law. (4)It is equally supported by municipal case law, (5) and various legal scholars, inter alia, from Uruguay, Italy, France and Switzerland.

In addition, the arbitrator considered that the parties had expressly agreed that whatever the fate of the Deeds of Concession, recourse must be available to arbitration. The relevant part of clause 28 reads in this respect: 'If at any time during or after the currency of this Concession any difference or dispute shall arise. . .'.

3. Preliminary Requirement Fulfilled?

Clause 28 provided: '. . . and if such 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 (arbitration). . .'. In the Memorandum of July 26, 1974, mentioned above, the Libyan Government contended that no attempt had been made to bring about friendly settlement, and that therefore a preliminary requirement for recourse to arbitration had not been fulfilled.

The arbitrator rejected this contention. He reasoned that first of all the wording was too vague to have a meaning so precise and restrictive: it referred to the simple eventuality and possibility of amiable settlement, but placed no obligation upon the parties to do so. Moreover, the initiation of arbitration did not prevent the parties from reaching a settlement during the arbitral proceedings. Furthermore, it appeared that the representatives of the two Companies and the Libyan Government had had many negotiations with a view toward reaching a settlement between May and August 1973.

4. Other Objections of Libya

The Libyan Government further asserted in its Memorandum to the President of the I.C.J. that the arbitration was initiated against 'the Libyan Arab Republic', while the Deeds of Concession were concluded by the 'Ministry of Petroleum', and that, consequently, the Libyan Arab Republic was not a party to the contract. The arbitrator 179held that this objection clashed with the principle of 'unity of the State'. An act concluded by the Ministry of Petroleum as a duly qualified organ of the Libyan Government was binding upon the Libyan Arab Republic or, if one prefers, the State of Libya.

Another objection of the Libyan Government was that there was no place for arbitration in the present case because there was no dispute or difference. The arbitrator also rejected this objection by stating that the parties objectively were in 'fundamental disagreement. .. with respect to the rights and obligations which were created, for both parties, by the Deeds of Concession'.

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References

1) Reference was made, inter alia, to the Nottebohm -case, (1953) I.C.J. 111 et seq., especially at p. 119.
2) Reference was made to David, R., L'arbitrage commercial international en droit comparé, Cours de Doctorat 1968-1969 at p. 313.
3) Reference was made, inter alia, to the Statute of the International Court of Justice, Art. 36, para. 4; Washington Convention of 1965 (ICSID) Art. 41, para. 1; European Convention of 1961. Art. 5, para. 2, and ICC Rules (1975) Art. 8, para. 3.
4) Reference was made to the Lena-Goldfields -case, 5 Annual Digest of International Law Cases, Nos. 1 and 258 (1929), at p. 38 and 426, and to the Losinger -case (1936) P.C.I.J., Ser. C. No. 78 at p. 105.
5) Reference was made to French court decisions, especially Cour de Cassation (Supreme Court), May 7, 1963, Gosset, Revue de l'arbitrage p. 60 (1963).