JOC Oil v. Sojuznefteexport

Award in Case No. 109/1980 of 9 July 1984

XVIII Y.B. Comm. Arb. 92 (1993)

[Sojuznefteexport (the "Association" or "SNE") was a foreign trade organization established under the laws of the former Union of Soviet Socialist Republics ("USSR"). In 1976, SNE entered into various agreements to sell quantities of oil to JOC Oil Limited ("JOC"), a Bermuda company. The purchase agreements incorporated SNE's standard conditions, which contained the following arbitration clause:

All disputes or differences which may arise out of this contract or in connection with it are to be settled, without recourse to the general Courts of law, in the Commission of the U.S.S.R. Chamber of Commerce and Industry in Moscow ["FTAC"], in conformity with the rules of procedure of the above Commission.

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JOC took delivery of 33 oil shipments (worth approximately $100 million) without paying for them. Following JOC's non-payment, SNE initiated arbitration under the arbitration clause set forth above. JOC replied by claiming that the purchase agreement had not been executed by two authorized representatives of SNE and accordingly was void under Soviet law. JOC also alleged that, as a consequence, the arbitral tribunal lacked competence to adjudicate the dispute because the arbitration clause was void. SNE claimed that the sales agreement was not void and that, even if it were, the arbitration clause was separable, and the law applicable to that agreement did not require two signatures to be valid.]

1. The FTAC has confirmed the agreement of the parties as to the material law to be applied to the dispute between them. As this law, the parties have agreed upon Soviet law. The Commission has therefore decided the dispute being guided by the corresponding provisions of the Fundamentals of Civil Legislation of the USSR and of the Union Republics of 1961 and the Civil Code of the RSFSR of 1964….

2. According to Article 27 of the Civil Procedural Code of the RSFSR in cases contemplated by law of International Treaty, a dispute arising out of civil legal relationships, by agreement of the parties can be referred for resolution by an arbitration body, the Maritime Arbitration Commission or the FTAC at the Chamber of Commerce and Industry of the USSR. As stated in the statute on the FTAC, confirmed by the Decree of the Presidium of the Supreme Soviet of the USSR of the 16th April 1975, this Commission is a permanently functioning arbitration court and decides disputes arising from contractual and other civil legal relationships, arising between the subjects of law of different countries in relation to the implementation of foreign trade and of other international economic relationships. The FTAC considers disputes where there is a written agreement between the Parties to submit for its decision a dispute which has arisen or which may arise….

The Rules … envisage different types of written agreements of the parties as to the submission of a dispute to the FTAC and do not require that this agreement be expressed in an independent document signed by the parties. The Rules also do not require fulfillment of those requirements which Soviet civil law, in accordance with articles 45 and 565 of the

[Civil Code], require for the conclusion of a foreign trade transaction of which one party is a Soviet Organization. This provision of the Rules does not depart from Art. II(2) of the New York Convention in which it is stated that an agreement, establishing the arbitration procedure for hearing disputes, "shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams."…

All this allows the Commission to recognize the arbitration clause contained in the contract signed in the name of the Association "Sojuznefteexport" by the Chairman of the Association V.E. Merkulow and in the name of the firm "JOC Oil" by John Deuss as a written agreement satisfying the requirements of the law — the Statute on the FTAC and its Rules as to the form of concluding such an agreement.

So far as the dispute is concerned which arose during the proceedings concerning the inter-relationship of the contract which established the rights and duties of the parties arising out of the sale of oil and oil products (the material-legal contract) and the arbitration agreement (the arbitration clause), that is to say as to whether the agreement is independent (autonomous) in relation to the contract independently of the decision as to the question of the validity or invalidity of the contract, the FTAC has come to the following conclusion. In the Rules of the FTAC there are no direct references to the fact that an arbitration agreement (arbitration clause) is autonomous in relation to the contract. But the above analysis of the Statute of the FTAC and page "182" of its Rules which have defined the competence of the Commission, and also the practice of the Commission, allows the conclusion to be drawn that the independence of an arbitration clause is not subject to doubt. Thus, in the ruling of the FTAC on the 29th January 1974, taken on hearing a dispute between a Soviet and an Indian organization, the arbitration agreement is treated as a procedural contract and not as an element (condition) of a material-legal contract (Arbitration Practice of the FTAC, Moscow 1979, part VII, page 68). The subject of an arbitration agreement (clause) is distinguished from the subject of a material-legal contract (of the contract of purchase and sale). The subject of the agreement is the obligation of the parties to submit the examination of a dispute between a plaintiff and defendant to arbitration (the FTAC) at the place where it sits, that is to say in Moscow, having excluded by that very fact the possibility of the resolution of the dispute in a state court.

Predominant in the literature is the recognition of the autonomy of an arbitration agreement, its independence in relation to the contract. Such is the point of view of the overwhelming majority of Soviet authors who have expressed themselves on this subject. The opinion of Soviet scholars are not unanimous but the Arbitration Commission considers as correct the opinion of those scholars, and this opinion is dominant, who recognize the autonomy of an arbitration clause, since this opinion relies upon the propositions of Soviet law cited above, from which there flows its autonomy as an independent procedural agreement….

The principle of the independence of an arbitration clause (in relation to the contract, to which the said clause relates), is now predominant both in doctrine as well as in practice. In a developed form, this principle has received its expression in the Arbitration Rules of UNCITRAL (Art. 21.2)….

Taking into account the cited facts and observations as to the nature of an arbitration agreement (clause), the Commission has come to the conclusion that, by virtue of its procedural content and independently of the form of its conclusion, it is autonomous in relation to the material-legal contract. An arbitration clause, included in a contract, means that

there are regulated in it relationships different in legal nature, and that therefore the effect of the arbitration clause is separate from the effect of the remaining provisions of the foreign trade contract.

The requirements laid down for the recognition of the validity of the two contracts, which differ in their legal nature, need not coincide. Different also are the consequences of the recognition of these contracts as invalid. An arbitration agreement can be recognized as invalid only in the case where there are discovered in it defects in will (mistake, fraud and so on), the breach of the requirements of the law relating to the content and the form of an arbitration agreement which has been concluded. Such circumstances leading to the invalidity of an arbitration agreement do not exist and neither one of the parties stated its invalidity referring to such circumstances. [JOC Oil] considers the arbitration agreement as invalid for other reasons asserting that it is a component part of a contract which, in its opinion, as a whole (together with the arbitration clause) is invalid.

From this there follows the incorrectness in the objections relating to the fact that the New York Convention is applicable only to arbitration agreements on the basis of disputes arising out of specific contracts and therefore is inapplicable to contracts recognized as invalid. In article II of the said Convention there is envisaged the enforcement of arbitral awards in relation to disputes which arise and can arise also in connection with other specific legal relationships, the object of which can be the subject of arbitration proceedings. This means, that since in connection with the invalidity of a contract, the applicable law envisages legal consequences, which are page "183" determined by a different non-contractual legal relationship but are connected with the invalid contract, the arbitrators have the right to examine the dispute and to rule upon it.

Proceeding from the above analysis of the Soviet material and procedural legislation applicable to the dispute in question, the Commission has recognized that an arbitration agreement (arbitration clause) is a procedural contract, independent from the material-legal contract and that therefore the question as to the validity or invalidity of this contract does not affect the agreement of the parties about the submission of the existing dispute to the jurisdiction of the FTAC. The Commission has come to the conclusion that the arbitration clause contained in the contract is valid and therefore in accordance with the right assigned to it has recognized itself as competent to hear the dispute as to its essence and to rule upon it.

3. The Commission has examined further the application of the representatives of the firm "JOC Oil" as to recognizing as invalid the contract of 17th November 1976 from which the dispute has arisen and has satisfied this application in view of the failure to observe the procedure for its signing (article 14 of the Fundamentals, article 45 of the [Civil Code]). [The tribunal concluded that the sales agreement was invalid because of failure to respect the two-signature rule for foreign trade organizations.]

4. On the question of the consequences of recognizing the contract of the 17th November 1976 as invalid, the representatives of the parties as pointed out in the deposition of the facts of the case, proceeded from a different approach to the question as to whether the recognition of the contract as invalid had any legal consequences and in the case of a positive answer to this question, as to what these consequences are.

In examining this question, the Commission established that according to article 14 of the Fundamentals (article 48 of the [Civil Code]) under an invalid transaction each of the parties

is obligated to return to the other party everything received under the transaction and if it is impossible to return what has been received in kind, to reimburse its value in money if other consequences of the invalidity of the transaction are not set out in the law, that is to say bilateral (mutual) restitution must be effected.

The Arbitration Commission has confirmed further that, the recognition of the transaction as invalid does not mean that such a transaction does not give rise to any legal consequences, that it is nothing, legally amounting to a nullity, as asserted by the defendant on the main claim. As is evident from the content of article 48 of the [Civil Code], a court or arbitration tribunal in the event of a dispute must discuss the question of the consequences of the invalidity of a transaction and rule upon the same.

The assertion of the representatives of the Firm that the recognition of the contract as invalid must result in the refusal of the Arbitration Tribunal to hear the case on the basis that there has not arisen a legal relationship envisaged by the contract, is mistaken. It contradicts Soviet law applicable in this case, the practice of its application and the very concept of a transaction. In reality, a transaction, being a legal fact, is not always confined only to the expression of the will of the parties, directed to the achievement of a legal result, but gives rise, in the event of the breach of the requirements of the law, in relations to the content and form of the transaction, to other consequences envisaged by the law….

[The tribunal held that, although the underlying sales contract was void, Soviet principles of restitution applied. Under these principles, the tribunal concluded that "unilateral restitution" was required and awarded SNE the value of the oil shipped to page "184" JOC Oil, at prevailing oil prices at the time it was received by JOC Oil. It also awarded SNE all profits realized by JOC Oil from the sale of the oil (in an amount equal to market interest rates). This produced an award of approximately $200 million in SNE's favor. The tribunal did not award SNE another $120 million, which it claimed in lost profits.

The award was made in the then-USSR, and JOC Oil did not seek annulment in the USSR. Thereafter, SNE sought to enforce the award in Bermuda. The first instance court denied recognition on various grounds, including that the tribunal lacked jurisdiction. The court held that "based on the Tribunal's finding that the underlying contract was invalid *ab initio*, then under both Soviet and English law there never was any contract between the parties from the very onset; so that there never was an arbitration clause or agreement which could be submitted to arbitration." Sojuznefteexport v. JOC Oil Co., 2 Mealey's Int'l Arb. Rep. 400, 486 (1987) (S. Ct. Bermuda 1987). This judgment was reversed on appeal in a 2-1 majority decision. 4 Mealey's Int'l Arb. Rep. B1 (1989) (Ct. App. Bermuda 1989). The dissenting judge said, in his opinion, that it was "quite ridiculous to suggest that this arbitration clause which formed part of that 'non-existent' contract would nevertheless, somehow, be deemed to have come into existence."]