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Part Three. Judicial decisions on questions relating to the United Nations and related intergovernmental organizations

Chapter VII. Decisions and advisory opinions of international tribunals

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Chapter VII

DECISIONS AND ADVISORY OPINIONS OF INTERNATIONAL TRIBUNALS

International Chamber of Commerce Court of Arbitration

Food and Agriculture Organization of the United Nations v. BEVAC Company: Arbitral award (Case No. 5003/JJA) of 29 July 1986

Dispute arose in connection with a purchase contract—Conditions governing the sale as stipulated in the "Request for bids and purchase orders, general conditions"—Settlement of disputes arising in connection with the contract—Rules of Conciliation and Arbitration of the International Chamber of Commerce—Law applicable in the case

On 3 August 1978, by means of a purchase order ("FAO (United Nations) purchase order") the Organization ordered electric equipment from BEVAC Company, Switzerland, which was to be sent to the Resident Representative of the United Nations Development Programme at Delhi. The conditions governing the sale had been stipulated in the attached form headed "Request for bids and purchase orders, general conditions" (hereinafter referred to as "the General Conditions"). The cases containing the consignment arrived in India damaged and the equipment could not be used. Part of the equipment sent by the Organization back to Switzerland to be repaired suffered further damage.

FAO submitted its request for arbitration on 16 May 1984 in accordance with article VII of the General Conditions, which provided arbitration by the International Chamber of Commerce. The ICC Court of Arbitration, at its session on 21 August 1984, appointed as sole arbitrator Mr. Serge Lazareff, Legal Counsel, and notified each of the parties of the appointment.

Before dealing with the merits, the Arbitral Tribunal had to decide on the terms of reference, including the law applicable in the case. In connection with that, the Tribunal referred to paragraphs VII and VIII of the General Conditions, which stipulated as follows:

> "VII. ARBITRATION CLAUSE: All disputes arising in connection with the present contract shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the Rules.
>
> "If the present contract is performed in the United States, all disputes arising in connection therewith shall be finally settled by arbitration conducted in accordance with the rules of the American Arbitration Association.
>
> "VIII. Nothing contained in this agreement shall be deemed a waiver, express or implied, of any privilege or immunity which the Food and Agriculture Organization may enjoy, whether pursuant to the Conven-

tion on Privileges and Immunities of the Specialized Agencies or any other convention or agreement, law, order or decree of an international or national character or otherwise."

The Tribunal held that it appeared, when the two paragraphs were taken together, that the Organization agreed to be bound by the ICC Rules of Conciliation and Arbitration but at the same time refused to renounce any privilege or immunity to which it had been entitled. Since no specific law was referred to in either the contract or the General Conditions, the Arbitral Tribunal took into consideration article 5 of the Oslo resolution (1977) of the Institute of International Law (although the text was not binding on the parties), which provided that:

> "If not expressly indicated in the contract, the proper law shall, where necessary and unless otherwise agreed by the parties at a later stage, be determined by the body entrusted with the settlement of the dispute, which shall try to ascertain the parties' tacit intention or, failing this, apply objective criteria."[1]

No national law was unquestionably applicable in the case before the Tribunal. However, since the drills had been manufactured in Switzerland, sold by a company constituted under Swiss law and shipped from Switzerland under the seller's responsibility, and since the currency of payment had been the Swiss franc, it appeared to the Tribunal, following an objective criterion, that Swiss law should be chosen as the proper law of the contract. The Organization, however, in a telex of 21 March, contended that it was not customary for an intergovernmental agency of the United Nations system to submit the interpretation of its contracts to a national law and therefore proposed that the basis of arbitration be the "general principles of law". In a telex of 17 May 1985 after the terms of reference had been drafted at a meeting of the parties on 13 May, the Organization wrote to the Arbitral Tribunal expressing a preference for the following formulation: "The sole arbitrator shall refer to the generally recognized general principles of law and shall draw upon Swiss law if necessary. He will take the closest account of the provisions of the contract and the relevant trade usages . . ." That was the wording opted for in the terms of reference, since the Organization's special nature as a specialized agency of the United Nations in fact made it difficult to apply a national law directly, particularly in view of paragraph VIII of the General Conditions concerning immunity from suit. Moreover, the Organization's proposal did not seem to be contrary to the spirit of article 13.5 of the ICC Arbitration Rules. Furthermore, not only did BEVAC raise no objection but, in telex of 2 August 1985, it approved the text of the terms of reference, which included that clause.

Having established the facts and the law applicable as outlined above, the Tribunal had to determine responsibility for the damage to the equipment. The Tribunal indicated that both the general principles of law and the specific provisions of the Swiss Civil Code, particularly article 2, obliged a party to fulfil its obligations in good faith. It was clear in the case under consideration that insufficient precautions had been taken when the drills were dispatched to India, and that they had been returned in a manner at least equally careless. If the drills returned to Switzerland had been damaged solely in the course of their transport from India to Switzerland, responsibility for the damage would obviously have to be attributed to the Organization. But the cause, in the legal sense of the term,

of the return of the drills to Switzerland was precisely because they had arrived damaged and could not be used. Although BEVAC maintained during the part of the proceedings in which it participated that it had suffered harm because of the increased damage to the drills, BEVAC had not submitted to the Tribunal a quantified claim for compensation in that regard.

The Tribunal observed that it was clear from all the foregoing that BEVAC acknowledged that it had been negligent as regards the dispatch of the drills and accused the Organization of having been somewhat careless as regards the return of the drills to Switzerland.

The Court noted that those two complaints did not seem to be contradictory, especially since neither party had been able to disprove the allegations of the other. It also noted that neither party had sought to evaluate the other's degree of responsibility for the total damage.

Having stressed that the arbitrator could only take a decision on the basis of the factual evidence available to him, in particular in the relatively voluminous correspondence transmitted to him by the Organization, the authenticity or veracity of which had at no time been called in question by BEVAC, the Tribunal felt that it seemed equitable to hold BEVAC responsible for 80 percent of the damage to the drills and to hold the Organization responsible for 20 per cent, on account of the careless way in which the drills had been returned. The Organization must, moreover, pay the cost of sending the drills back from India to Switzerland, since they had not been shipped with proper care; although the origin of the damage could be ascribed to BEVAC, it was nevertheless true that the latter had suffered harm as a result of the failure of the representatives of the Organization to take proper precautions. The damage could not be evaluated directly; however, since the parties agreed that the drills were and would remain unusable, the Tribunal held that the total damage could only be equivalent or very close to their purchase price.

For the above reasons, the Arbitral Tribunal in its award rendered on 25 July 1986 decided that:

—BEVAC should pay the Organization the sum representing 80 per cent of the total purchase price of the drills, which was paid before they were shipped, while the cost of returning the drills from India to Switzerland, should remain payable by the Organization;

—There was no need to rule on interest, since no claim for interest had been submitted to the Tribunal;

—BEVAC should pay the Organization as damages a total sum of US$ 10,000;

—BEVAC should pay all the expenses incurred by the Organization as well as all the costs and expenses relating to the proceedings.

NOTE

[1] Cited in J. F. Lalive, "Contrats entre états ou entreprises étatiques et personnes privées" (course given at the Hague Academy of International Law, 1984), p. 55.