YURISPRUDENSIYA

HUQUQIY ILMIY-AMALIY JURNALI

2023-yil 5-son

VOLUME 3 / ISSUE 5 / 2023

DOI: 10.51788/tsul.jurisprudence.3.5.

ISSN: 2181-1938

DOI: 10.51788/tsul.jurisprudence

MUNDARIJA

12.00.02 – KONSTITUTSIYAVIY HUQUQ. MA'MURIY HUQUQ. MOLIYA VA BOJXONA HUQUQI

12.00.03 – FUQAROLIK HUQUQI. TADBIRKORLIK HUQUQI. OILA HUQUQI. XALQARO XUSUSIY HUQUQ

12.00.08 – JINOYAT HUQUQI. HUQUQBUZARLIKLARNING OLDINI OLISH. KRIMINOLOGIYA. JINOYAT-IJROIYA HUQUQI.

12.00.09 – JINOYAT PROTSESSI. KRIMINALISTIKA, TEZKOR-QIDIRUV HUQUQ VA SUD EKSPERTIZASI

12.00.10 – XALQARO HUQUQ

DOI: 10.51788/tsul.jurisprudence.3.5./QDGM9333
UDC: 347.918(045)(575.1)

NOT A PARTY, NOT A PROBLEM: THE DILEMMA OF EXTENDING ARBITRATION CLAUSE TO NON-SIGNATORY STATES

Isakulov Abduaziz,
Juris Candidate at Cardozo School of Law
ORCID: 0009-0000-8688-2937
e-mail: aisakulov@law.cardozo.yu.edu

Abstract. *This article will explore the case law regarding the extension of the arbitration clause to non-signatories, in particular, to states via the prism of state enterprises in international commercial arbitration cases. In this paper, the author will also discuss the legal grounds and doctrinal theories utilized in commercial arbitration cases for reaching decisions on extending the arbitration clause to the non-signatory state, and it will try to argue about the caveats and pitfalls that coexist in such disputes. Furthermore, specific cases along with their solutions, such as the Pyramids case and Zeevi Holdings, are presented in order to elaborate on the given concept, namely arbitration and its role on a global scale.*

Keywords*: state, state-owned enterprises, alter ego, state attribution, Pyramids case, Zeevi Holdings v. The Republic of Bulgaria and The Privatization Agency of The Republic of Bulgaria, agency theory, intervention of state.*

TOMON EMAS, MUAMMO EMAS: ARBITRAJ SHARTNOMASINI IMZOLAMAGAN DAVLATLARGA ARBITRAJ BANDINI QO‘LLASH DILEMMASI

Isakulov Abduaziz,
Kardozo huquq maktabi, yuridik fanlar nomzodi

Annotatsiya. *Ushbu maqola xalqaro tijoriy arbitraj ishlari bo‘yicha davlat korxonalari obyektivi orqali arbitraj bandini imzolamaganlarga, xususan, davlatlarga uzaytirish bo‘yicha sud amaliyotini ko‘rib chiqadi. Maqolada, shuningdek, tijorat arbitraji ishlarida qo‘llanadigan huquqiy asoslar va doktrinal nazariyalar, arbitraj bandini imzolamagan davlatga uzaytirish to‘g‘risida qaror qabul qilish uchun zarur huquqiy asoslar ko‘rib chiqilib, bunday nizolarning o‘ziga xos xususiyatlari muhokama qilinadi.*

Kalit so‘zlar: *davlat, davlat korxonalari, alter ego, aybni davlatga yuklash, Zeevi Holdings Bolgariya Respublikasiga qarshi va Bolgariya Respublikasining xususiylashtirish agentligi, agentlik nazariyasi, davlat aralashuvi.*

НЕ СТОРОНА, НЕ ПРОБЛЕМА: ДИЛЕММА РАСПРОСТРАНЕНИЯ АРБИТРАЖНОЙ ОГОВОРКИ НА ГОСУДАРСТВА, НЕ ПОДПИСАВШИЕ АРБИТРАЖНОЕ СОГЛАШЕНИЕ

Исакулов Абдуазиз,
кандидат юридических наук,
Школа права Кардозо

Аннотация. *В данной статье будет рассмотрена судебная практика относительно распространения арбитражной оговорки на не подписавших её сторон, в частности*

на государства, через призму государственных предприятий в делах международного коммерческого арбитража. В статье также будут обсуждаться правовые основания и доктринальные теории, используемые в коммерческих арбитражных делах для принятия решений о распространении арбитражной оговорки на государство, не подписавшее договор, а также будут предприняты попытки рассуждения о предостережениях и подводных камнях, которые существуют в таких спорах.

Ключевые слова: *государство, государственные предприятия, альтер эго, атрибуция вины государству, Zeevi Holdings против Республики Болгария и Агентства по приватизации Республики Болгария, агентская теория, вмешательство государства.*

Introduction

Like consummated romance, arbitration rests on consent. An agreement of some sort waives each side's right to invoke the jurisdiction of otherwise competent courts. Nevertheless, arbitrators do hear cases involving entities and individuals that never signed an arbitration clause.

Continental scholars refer to "extending" the arbitration clause, while lawyers in Anglo-American traditions tend to speak of "joining" non-signatories [1, 2]. Bringing an additional party into the proceedings often justifies itself on grounds such as apparent agency, veil-piercing, alter ego, and estoppel [3], and can be sought by either signatories or non-signatories.

Reaching for the financial resources of a large shareholder, claimants sometimes file arbitrations against a parent company. For arbitrators, motions to join non-signatories create a tension between two principles: maintaining arbitration's consensual nature and maximizing an award's practical effectiveness by binding related persons. Pushed to the limit of their logic, each goal points in the opposite direction.

Whether the scope of an arbitration clause extends not only to signatories of the arbitration agreement or underlying contract but also to non-signatories has become a classic problem in international arbitration. This is attributable to the increasing volume and complexity of commercial transactions, the proliferation of national and international groups of companies, and the fact that for financial, tax, or other commercial reasons, there is not always symmetry between the individuals or companies that sign an agreement and those that perform it [4].

Materials and methods

The methodology to be utilized involves detailing the research plan, where the research approach is explained. This approach encompasses a mix of legal scrutiny, case examinations, and comparative research.

Additionally, the methodology covers the procedures for gathering and analyzing data, outlining how pertinent information and materials such as records of arbitration cases and legal documents are collected. It also defines the criteria and techniques for scrutinizing the collected data, including the analysis of legal precedents and the identification of trends.

Furthermore, the methodology includes specifying the criteria for selecting particular investment arbitration cases for in-depth study, as well as describing the process of reviewing these cases to extract pertinent insights, along with an analysis of the relevant legal framework.

Research results

The issue arises not only in relation to individuals and groups of companies but also in relation to states, in particular when a state entity is a signatory to an agreement. In this respect, there has been some debate as to whether the issues of extension to a state, on the one hand, and to a company, on the other, arise in the same terms. According

to Fouchard, Gaillard, and Goldman, the answer is in the affirmative, notwithstanding that in relation to states, the issue may raise additional problems such as immunity from jurisdiction [5]. They submit that in both cases, it is the intention of the parties that is the main criterion in determining the scope *rationae personae* of an arbitration clause [6].

If we look at history, state enterprises have been up and running on the face of earth since the early days of civilization, from the age of the Egyptian Old Kingdom, where the pharaoh was the master of all and everything the sun went around, to modern economic systems driven by state entrepreneurship.

However, in today's world, particularly in countries with greater protection of personal property and corporate nature of ownership, we rarely see the cases associated with state-owned entities and the cases related to other commercial disputes invoking state liability.

By contrast, planned economies brought state enterprises far beyond economics and deep into politics. Until recent times, countries like Russia or China trumpeted state enterprises as drivers of their political programs. In the former USSR, private property over the production of goods and services was virtually non-existent for nearly one century [7].

From a purposive analysis, state enterprises are often engaged in activities considered strategic by states, like, for example, natural resource extraction or military defense. Indeed, certain sectors and markets are too crucial or too sensible to be left to the marketplace [8].

Such corporations would be the specific vehicle for capturing the commanding heights. Since private enterprises assuredly could not raise the capital necessary for development, the government would mobilize and direct resources through state-owned companies. They would serve as the engines of modernization, the drivers of economic growth, the mobilizers of development, and the mechanisms for achieving a better future.

It is crucial to note that the investment law is revolutionary because it grants non-state actors the right to sue states at an equal level. At this juncture, state enterprises emerge as a hybrid between states and enterprises. They cannot be sued for the breach of a treaty because only the acts of a signatory state would engage treaty-based liability [9].

Therefore, generally, the acts of state enterprises do not attract international liability, but there is one exception: acts that can be attributed to a state. Under the fiction of state attribution, certain conducts of state enterprises can be imputed to states. Technically, state attribution is an exception to the "privity of contract" rule, a rule that dictates that only the parties to a contract can sue or be sued on it [10].

Suing an entity (the state) other than that (the State Enterprise) the contract was concluded with as many turns as possible under the state attribution doctrine. Yet, substantively, it is not the contract but the treaty that defines the boundaries of state responsibility. In other words, it is for the breach of a treaty that the state appears internationally accountable.

However, we will not focus on state liability from the perspective of treaty violations or other investment claims. Instead, we will examine the issue of extending the arbitration clause to state enterprises in commercial arbitration cases.

Analysis of research results

Against this background, it is appropriate to examine how arbitrators and national courts have dealt with the issue of sovereign non-signatories in recent cases. It is noteworthy that one of the first cases where a non-signatory state has been called to the arbitration procedure as an additional respondent is the *Pyramids case* [11].

In that case, Southern Pacific Properties ("SPP," a Hong Kong company (second claimant)), the Ministry of Tourism of Egypt and the Egyptian General Organization of Tourism and Hotels ("EGOTH," a state-owned company) signed Heads of Agreement on September 23, 1974, concerning the edification of a tourist village on the Pyramids Plateau and a similar tourist town at Ras-El-Hekma on the Mediterranean coast.

Under this agreement, EGOTH and SPP undertook to incorporate an Egyptian joint venture company for the projects. It was incorporated on December 4, 1975 as a joint venture between SPP Middle East ("SPP (ME)," first claimant, a wholly owned subsidiary of SPP) and EGOTH. The Heads of Agreement did not contain an arbitration clause. They were followed on December 12, 1974, by a second agreement between EGOTH and SPP. Following the signature of the parties, the words "approved, agreed, and ratified by the Ministry of Tourism" appeared together with the signature of the Minister. The agreement contained an arbitration clause referring disputes relating to this agreement to ICC Arbitration [12].

In 1976, EGOTH was transformed into a private company (second defendant). Subsequently, opposition to the Pyramids Oasis project developed and culminated in a series of Decrees in May 1978 that had the effect of cancelling the project.

SPP (ME) and SPP commenced an ICC arbitration claiming damages against the Arab Republic of Egypt (first defendant) and EGOTH. Egypt disputed the jurisdiction of the arbitral tribunal. The claimants' case was that the government had become a party to the December 1974 agreement in one of three ways: directly by the signature of the Minister; because EGOTH was acting not only on its behalf but also on behalf of the government; or because there was an essential governmental identity between EGOTH and the government.

The claimants further pointed out that although the arbitration clause only expressly related to disputes arising out of the December 1974 agreement, there was such a close connection or even identity between the September and December agreements that the clause was apt to cover the obligations of the Government under both agreements. The Government on the other hand, disputed that it was a party to the December agreement. It contended that the signature of the Minister on that agreement had no contractual significance [13].

The Minister signed in his capacity as supervisory authority and as chairman of the Assembly of EGOTH in order to indicate shareholders' approval. This did no more than perfect the obligation of EGOTH. The arbitral tribunal decided that it could exercise jurisdiction over the State. According to the tribunal:

"Disputes between the foreign investor and EGOTH would have to go to an ICC arbitration tribunal. It does not seem in any way unlikely or improbable that the government would have wished that all disputes concerning the same project would go to the same tribunal ... In this connection, one should remember that ... the transaction as a whole is to be viewed as a unified contractual scheme ... the three parties were to be involved throughout the venture ... the Claimant in future disputes might well have been either the Egyptian government or EGOTH or both."

The tribunal ultimately decided that by signing the December agreement and thereby contractually assuming a number of obligations under this agreement, the Government became a party to it, engaged its responsibility with respect to the performance of the said obligations, and agreed to the arbitration clause contained therein.

An action to set aside was initiated by the State of Egypt against the award. The Paris Court of Appeal set aside the award on July

12, 1984 [14], considering that the State had signed the December contract as supervisory authority, that its signature did not express any intention to become party to the contract or its arbitration clause, or to waive its sovereign immunity; and that the tribunal's statement that the two contracts formed a unified contractual scheme and that the State would have admitted that all the contracts concerning the same project should be submitted to the same tribunal, which was purely hypothetical and unsupported by evidence. The decision was confirmed by the French Cour de Cassation on January 6, 1987 [15].

Interestingly, in *Zeevi Holdings v. The Republic of Bulgaria and The Privatization Agency of The Republic of Bulgaria*, the arbitral tribunal based its decision on the agency theory [16]. The dispute stemmed from the purchase of 55% of the share capital of Bulgaria's national airline, Balkan Bulgarian Airlines (the "Company"), by Zeevi Holdings together with Nafaim-Arkia Holdings Ltd. from the Republic of Bulgaria. Zeevi Holdings invested substantial amounts in the Company.

On the other hand, the Government of Bulgaria did not fulfill its obligations pursuant to a privatization agreement, with the consequence that the Company was forced to declare bankruptcy. The tribunal decided that both the Republic of Bulgaria and the Privatization Agency were proper respondents to the claim. As far as the Republic was concerned, the tribunal's reasoning was that it was bound by the arbitration agreement, which had been signed by the Privatization Agency as a *"mere agent"* of the Republic.

According to ordinary principles of contract law, this would have meant that the tribunal had jurisdiction over the Republic only. The tribunal nevertheless decided otherwise. With respect to the merits, after concluding that the actions of both respondents had to be taken into consideration in evaluating the conclusion and performance of the contract, the tribunal decided that if it were to make a finding of liability, only Bulgaria would be liable since the Privatization Agency had acted on behalf of and with the authorization of the State.

Conclusion

As the above case law demonstrates, the answer to the question of whether the scope of an arbitration clause extends not only to signatories of the arbitration agreement or underlying contract but also to non-signatory states depends very much on the specific factual circumstances of the case.

The case law confirms that consent to arbitration may not only be expressed by words or by signature but also by conduct – although to a variable extent, depending upon the applicable law. From this perspective, an arbitration agreement can be interpreted as covering a non-signatory state on the basis of an explicit (by a specific wording) or an implicit intent to be bound.

More particularly, the role played by the state at the time of the conclusion, during the performance or in relation to the termination of the agreement is a determinative factor. It is also clear that the factual indicia retained by the arbitral tribunal must demonstrate a contractual intent and not simply an intervention of a state in the context of its regulatory or supervisory authority.

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YURISPRUDENSIYA

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2023-YIL 5-SON

VOLUME 3 / ISSUE 5 / 2023

DOI: 10.51788/tsul.jurisprudence.3.5.

Tahririyat manzili:
100047. Toshkent shahar, Sayilgoh ko‘chasi, 35.
Tel.: (0371) 233-66-36, 233-41-09.
Faks: (0371) 233-37-48.

Veb-sayt: www.tsul.uz
E-mail: lawjournal@tsul.uz
Obuna indeksi: 1387.

Jurnal 27.10.2023-yilda tipografiyaga topshirildi.
Qog‘oz bichimi: A4. Shartli bosma tabog‘i 15,3.
Adadi: 100. Buyurtma raqami: 89.
TDYU tipografiyasida chop etildi.