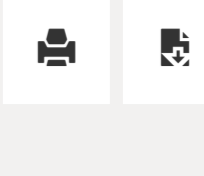


The Lex Mercatoria (Old and New) and the TransLex-Principles

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Title

Texaco Overseas Petroleum Company v. The Government of the Libyan Arab Republic, YCA 1979, at 177 et seq. (also published in: ILM, 1978, at 1 et seq.; Int'l L. Rep. 1979, at 389 et seq.; Clunet 1977, at 350 et seq.).

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Content

Texaco Overseas Petroleum Company v. The Government of the Libyan Arab Republic, AD HOC AWARD OF JANUARY 19, 1977.*

Arbitrator: Prof. René-Jean Dupuy (France)

Parties: Claimants: Texaco Overseas Petroleum Company (U.S.); California Asiatic Oil Company (U.S.), Respondent: The Government of the Libyan Arab Republic

Published in: French original text: 104 *Journal du Droit international* pp 350-389 (1977), with introduction by Lalive, J.-F., entitled '*Un grand arbitrage pétrolier entre un Gouvernement et deux sociétés privées étrangères*', id. pp. 320-349.

Subject matter:

- Preliminary Award: [not included in the TransLex]
- Award on Merits:
 - law governing arbitration
 - law applicable to concession agreement (State as party, international contract)
 - breach of international contract
 - administrative contract
 - sovereignty
 - nationalization (nature)
 - resolution U.N. on sovereignty on natural resources
 - *restitutio in integrum*

I. Facts

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

Decrees 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:

- '1. 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.
2. 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.

[...]

[...]

III. Award on the Merits

[...]

1. BINDING NATURE OF THE DEEDS OF CONCESSION

[...]

[...]

C. Meaning and scope of internationalization of the contracts

The arbitrator made it clear that international law governing contractual relations between a State and a foreign private party means neither that the latter is assimilated to a State nor that the contract is assimilated to a treaty. It only means that 'for the purposes of interpretation and performance of the contract, it should be recognized that a private contracting party has specific international capacities'.

Furthermore, considering that some contracts may be governed both by municipal law and by international law, the arbitrator held that the choice of law clause referred to the principles of Libyan law rather than to the rules of Libyan law. In this connection the arbitrator said:

'The application of the principles of Libyan law does not have the effect of ruling out the application of the principles of international law, but quite the contrary: it simply requires us to combine the two in verifying the conformity of the first with the second'.

Applying the principles stated above, the arbitrator declared that he would refer on the one hand to the principle of the binding force of contracts recognized by Libyan law, and on the other to the principle of *pacta sunt servanda* which is a general principle of law constituting an essential foundation of international law. The arbitrator found therefore on this point that the principles of Libyan law were in conformity with international law and concluded that the Deeds of Concession in dispute had a binding force.

2. BREACH OF OBLIGATIONS BY LIBYA?

The second main question was whether the Libyan Government, in adopting the nationalization measures of 1973 and 1974, breached its obligations under the contracts. This question was examined under three types of reasons which could be envisaged in order to justify the behaviour of the Libyan Government. These reasons are summarized below under A, B and C.

[...]

B. Concept of Sovereignty and Nature of Nationalization

The arbitral tribunal stated here that 'the right of a State to nationalize is unquestionable today. It results from international customary law, established as the result of general practices considered by the international community as being the law'.

The arbitrator questioned, however, whether the act of sovereignty which constitutes the nationalization authorizes a State to disregard its international commitments assumed by it within the framework of its sovereignty. In this respect the arbitrator drew a distinction between a nationalization concerning nationals of a State or a foreign party in respect of whom the State had made no particular commitment to guarantee and maintain their position, and a nationalization concerning an international contract. The former type is completely governed by the domestic law. But in the case of an internationalized contract the State has placed itself under international law. In the instant case the arbitrator investigated therefore whether Libya had undertaken international obligations which prevented it from taking nationalizing measures, and whether the disregard of such obligations is justified by the sovereign nature of such nationalization measures.

(a) The arbitrator found first that both under Libyan law and international law the State has the power to make international commitments, including those with foreign private parties. Such a commitment cannot be regarded as a negation of its sovereignty, but, quite to the contrary, is a manifestation of such sovereignty. As a result a State cannot invoke its sovereignty to disregard commitments freely undertaken through the exercise of this same sovereignty.

The arbitrator considered that Libya had undertaken specific commitments which could not be disregarded by the nationalization measures. The arbitrator referred here to the fact that Libya had granted a concession of a minimum duration of 50 years, and to the stabilization clause (clause 16, see under *I Facts* above). This provision does not, in principle, impair the sovereignty of the Libyan State to legislate in the field of petroleum activities in respect of other persons. Clause 16 only makes such acts invalid as far as the Companies are concerned for a certain period of time. The arbitrator observed that:

'The recognition by international law of the right to nationalize is not sufficient to empower a State to disregard its commitments, because the same law also recognizes the power of a State to commit itself internationally, especially by accepting the inclusion of stabilization clauses in a contract entered into with a foreign private party'.

[...]

* 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)).

Referring Principles

[Trans-Lex Principle: IV.1.2 - Sanctity of contracts](#)

[Trans-Lex Principle: IV.2.3 - No repudiation of contractual consent by state party](#)