CASES
SCIMITAR v. BANGLADESH

Arbitration – Parties to agreement – Request submitted by persons other than a party to valid arbitration agreement

Applicable law – Agreement of parties as to law applicable to corporate transactions and governance – Agreement consonant with Article 42(1) of ICSID Convention

Jurisdiction – Request for arbitration instituted by persons not competent – Lack of authority or capacity to act on behalf of Claimant – No board of directors or shareholder ratification – Absence of documentary evidence relating to authority or representation

Parties – Request for arbitration instituted by persons not competent – Request submitted by persons other than a party to valid arbitration agreement – Lack of authority or capacity to act on behalf of Claimant – No board of directors or shareholder ratification – Absence of documentary evidence relating to authority or representation

SCIMITAR EXPLORATION LIMITED v. REPUBLIC OF BANGLADESH AND BANGLADESH OIL, GAS AND MINERAL CORPORATION

Award. 5 April 1994

(Arbitration Tribunal: Mr Keith Higet, President; Prof. Ian Brownlie, CBE, QC and Mr Edward C. Chiasson, QC, Members)

SUMMARY: The facts: — The Claimant’s request for arbitration claimed general damages in the amount of US $25,000,000 or, in the alternative, relief in the form of sever determinations or declarations in favour of the Claimant. The Respondents objected to jurisdiction on the basis that the Request had been instituted by persons not competent to act for the Claimant. They further argued that since the Claimant had not produced a resolution of the Board of Directors or the majority of the shareholders of Scimitar authorizing the institution of arbitration proceedings, the jurisdiction of the Tribunal had not been validly invoked. In response, the Claimant filed a document purporting to be a Ratification Resolution of the Board of Directors of Scimitar passed on 11 June 1993 confirming the capacity and authority of those persons instituting the arbitration on behalf of Scimitar. The Respondents disputed the validity of the Resolution.

On 30 June 1993, a letter was directed to the Tribunal on behalf of Scimitar indicating that there had been a change in ownership, that all previous officers had resigned, and that the Claimant’s counsel had withdrawn. Subsequent Observations on Respondents’ Submissions filed on behalf of the Claimant by new counsel stated that there was no evidence on which the Tribunal could reasonably conclude that the Ratification Resolution was not validly passed.
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At the hearings of the Tribunal to consider the jurisdictional issue, held on 15 and 16 November 1993, counsel for the Claimant stated that he had been instructed “not to resist” the Respondents’ submissions on the validity of the institution of arbitral proceedings or the validity of the Ratification Resolution.

Held: — The dispute was not within the jurisdiction of the Tribunal.

1. The Claimant expressly stated that it no longer opposed all the contentions and submissions raised by Bangladesh in regard to the jurisdictional issue, thus effectively conceding that the conclusions of Bangladesh were correct. In addition, the Claimant stated that it was no longer relying upon the Ratification Resolution of 11 June 1993, effectively conceding that the Resolution was to be considered as being of no effect in the proceedings (p. 9).

2. The parties agreed that the law applicable to the question of corporate transactions and governance was the law of the British Virgin Islands. The Tribunal saw no reason to depart from this position which was consonant with Article 42(1) of the ICSID Convention. Under the law of the British Virgin Islands, proceedings initiated by a corporation without proper authority or authorization are invalid (p. 9).

3. Based on the agreed positions of the parties and the uncontested evidence before the Tribunal, the proceedings were not initiated with proper authority or authorization, and there was no evidence that the absence of such authority or authorization had been remedied by any action subsequent to the commencement of the proceedings (p. 9).

4. The Tribunal awarded the Respondents their costs for the proceedings, noting that the Claimant did not contest the entitlement and took no issue with the quantum claimed (p. 10).

The following is the text of the award:

Initiation of the Arbitration

1. On October 20, 1992, the International Centre for Settlement of Investment Disputes (the “Centre”) received from Scimitar Exploration Limited (“the Claimant” or “Scimitar”), a company established under the laws of the British Virgin Islands and having its registered office at Craigmuir Chambers, PO Box 71, Road Town, Tortola, British Virgin Islands, a request for arbitration (the “Request”) against the Government of the People’s Republic of Bangladesh (“Bangladesh”), represented by the Minister of Power, Energy & Mineral Resources (formerly Energy & Mineral Resources), with address for these purposes at Bhaban No. 6, New Building Second Floor, Secretariat, Dhaka, Bangladesh, and the Bangladesh Oil, Gas and Mineral Corporation (“BOGMC”), a corporation established under the Bangladesh Oil, Gas, and Mineral Corporation Ordinance (Ordinance No. XXI of 1985), with its head office at 3 Kawran Bazar, Petro-Centre, Dhaka 1215, Bangladesh. Bangladesh and BOGMC are collectively referred to herein as “the
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Respondents” and Scimitar, Bangladesh, and BOGMC are collectively referred to herein as “the Parties”.

2. The Request was drawn up in English, was dated October 19, 1992, and was signed for Scimitar by “H. S. Campbell” as “Secretary to the Company.” It was submitted on Scimitar’s behalf by a law firm identifying itself as “its counsel, Burnet, Duckworth & Palmer, 1400, 350-7th Avenue SW, Calgary, Alberta, Canada T2P 3N9, Attention: David R. Haigh, QC.” The Request contained the information required by Rule 2 of the Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (the “Institution Rules”) and was duly registered by the Secretary-General of the Centre (the “Secretary-General”) in accordance with Rule 6 of the Institution Rules.

Constitution of the Tribunal

3. Following registration of the Request, the Parties agreed that the arbitral tribunal (the “Tribunal”) should consist of three arbitrators, one appointed by each party and the third, the President of the Tribunal, appointed by agreement of the two party-appointed arbitrators or, in default of such agreement, by the Secretary-General. Claimant and Respondents respectively appointed as arbitrators Mr Edward C. Chiasson, QC, a national of Canada, and Professor Ian Brownlie, QC, a national of the United Kingdom, and the arbitrators so appointed then agreed on the appointment of Keith Highet, Esq., a national of the United States of America, as President of the Tribunal.

4. Each of the arbitrators so appointed duly accepted his appointment pursuant to Rule 5 of the Centre’s Rules of Procedure of Arbitration Proceedings (the “Arbitration Rules”) and submitted the declaration required by Arbitration Rule 6(2). On February 16, 1993 the Secretary-General notified the Parties that all the arbitrators had accepted their appointments and that the Tribunal was then deemed to be constituted in accordance with Arbitration Rule 6(1).

Initial Filings by the Parties

5. The Request contained various assertions of fact and law and requested general damages from Respondents in the amount of US $25,000,000 or, in the alternative, relief in the form of seven determinations or declarations in favor of Claimant, together with special damages in the amount of US $104,500,000.

6. On March 29, 1993 Respondents filed an Objection as to Jurisdiction and Preliminary Objections Regarding Competence of Persons Instituting the Arbitration, and made five specific additional requests for documentary production.

7. In paragraph 1 of their Objection, Respondents stated that:

Their preliminary objection is that the submission embodied in the letter of request for arbitration is unauthorised as having been instituted by persons not competent to act
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for the Claimant and therefore cannot be treated as a valid submission to arbitration on the basis of which the Tribunal can proceed.

8. In paragraph 2 of their Objection, Respondents stated that:

The Tribunal has no jurisdiction to entertain any request for arbitration, which is submitted by a person other than a party to a valid arbitration agreement by which parties have consented to ICSID arbitration.


First Session of the Tribunal

10. In accordance with Arbitration Rule 13, the Tribunal held its first session on April 6, 1993 at the offices of the World Bank in Washington, DC. At the outset of this session, the President ascertained the views of the Parties regarding questions of procedure, with particular reference to the matters specified inter alia in Arbitration Rule 20(1).

11. The Tribunal then heard the preliminary arguments of the representatives of the Parties, being Mr David Haigh, QC for the Claimant and Mr Badrul H. Chowdury and Dr Kamal Hossain for Respondents, on the Objections by Respondents as to Jurisdiction and Competence of the Tribunal.

Procedural Order No. 1

12. On April 27, 1993 the Tribunal issued Procedural Order No. 1 in accordance with Arbitration Rule 41(3). By this order the proceedings on the merits were suspended, and time-limits were fixed for observations of the parties on the question of jurisdiction and on the competence of persons instituting the arbitration.

Written Pleadings and Submissions of the Parties

13. On June 21, 1993, Respondents submitted Observations on the Jurisdictional Question. In paragraph 13 of the Observations, it was submitted that:

... the Claimant having failed to controvert the Respondents’ submission that the arbitration has been instituted without authority, since no resolution of the Board of Directors of Scimitar, a corporate entity, or the majority of its shareholders has been produced, Scimitar ... cannot be said to have invoked the arbitration clause and therefore, the jurisdiction of the ICSID Arbitral Tribunal has not been validly invoked and the present arbitration must be treated as a nullity.

In paragraph 14(a) of the Observations, the prayer was made that:
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. . . the Arbitral Tribunal may be pleased to strike out the name of the company and/or decide that it has not jurisdiction to proceed with the arbitration by accepting the Objection as to Jurisdiction based on lack of authority and capacity or the person/s who instituted the arbitration in the name of the corporate entity, Scimitar.

By paragraph 14(b) of the Observations, the Tribunal was requested to award “costs against the Claimant and/or the lawyers who purported to represent Scimitar.”

14. On June 21, 1993, Respondents also submitted Observations on the Request for a Stay of the Arbitral Proceedings (on unrelated grounds). Paragraph 15 of this latter request contained a request that the arbitration be stayed until a proceeding referred to in the Request “is finally adjudicated upon in the appropriate criminal Court in Bangladesh.”

15. On June 21, 1993, Scimitar filed Observations on the Question of Capacity and Authority, enclosing a document purporting to be a resolution of the Board of Directors of Scimitar passed on June 11, 1993 confirming the capacity and authority of those persons initiating the arbitration on behalf of Scimitar. In paragraphs 6(a) and (b) of its Observations, Scimitar invited the Tribunal to dismiss Respondents’ objection and to declare “that, by reason of the [attached] Resolution passed by the Board of Directors of Scimitar, on June 11, 1993 . . . Scimitar has complete capacity and full authority to commence and conduct this arbitration.” (This resolution is hereinafter referred to as the “Ratification Resolution.”)

16. On July 20, 1993, Respondents filed with the Tribunal additional observations on the issues of authority and representation and, in paragraph 3.1(a), (b) and (c), requested the Tribunal to order: “(a) That having regard to the developments reported in the letter dated 20 June, 1993 . . . no further steps can be taken in the arbitration and/or that the arbitration may be treated as having come to an end”; and/or (b) that the Ratification Resolution “cannot be accepted as a valid ratification and/or [that] it cannot provide authority for commencement of the arbitration and/or the continuation of the arbitration beyond 11 June, 1993”; and/or (c) that in the absence of certain documentary evidence relating to authority and representation the Ratification Resolution “cannot be accepted as a ratification . . . or as providing authority to commence the arbitration and/or continue the arbitration beyond 11 June, 1993” and/or further requesting such documentary production “failing which, the arbitration may be treated as having come to an end.”

17. On June 30, 1993, a letter was directed to the Tribunal on behalf of Scimitar indicating that there had been a change in ownership of Scimitar, that all previous officers, including its Secretary, had resigned, and that Claimant’s counsel had withdrawn from representation of Scimitar before the Tribunal.

18. Observations on Respondents’ Submissions of July 20, 1993 were then filed on behalf of Claimant with the Tribunal on August 18, 1993, by Biddle & Co., 1 Gresham Street, London EC2V 7BU, United Kingdom. In paragraph 4.1 of those Observations it was stated that “Scimitar reiterates the previous observations and submissions made by Burnet, Duckworth & Palmer.” In paragraph 4.3 the Ratification Resolution was referred to, and it was stated that “there is no evidence on which the Tribunal can reasonably conclude that this resolution was not validly passed.”
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Procedural Order No. 2

19. On September 17, 1993 the Tribunal issued Procedural Order No. 2, by which inter alia hearings were set for November 15, 1993. It was therein indicated that the first order of business would be the jurisdictional issue, and the capacity and authority of those who initiated the arbitration. If the Tribunal were to conclude that the proceedings had been initiated properly, it would then turn to the request by Respondents for a stay of proceedings pending the determination of certain criminal matters in Bangladesh.

Second Session of the Tribunal

20. Accordingly, on November 15 and 16, 1993 the Tribunal conducted hearings at the World Bank offices in London on the question of jurisdiction. Following an initial presentation of oral observations by Dr Kamal Hossain on behalf of Respondents, Mr William Dixon of Biddle & Co. introduced Mr. Richard Lord as Counsel for Applicant.

21. Mr Lord stated that in his view the first two issues presented to the Tribunal for decision were:

(a) Whether the arbitral proceedings were validly instituted on October 19, 1992? and
(b) Whether the resolution of June 11, 1993 [the “Ratification resolution”] subsequently validated the institution of proceedings?

Mr Lord then stated, both directly and in response to questions from the Tribunal:

(i) that he had been instructed by his client “not to resist,” on behalf of Claimant, Respondents’ submissions on either of points (a) and (b);
(ii) that Claimant “was not relying upon” the Ratification Resolution of June 11, 1993; and
(iii) that Claimant “did not resist” the assertions of fact by Respondents that the arbitration had been improperly instituted without authority.

22. Asked whether his client intended to seek agreement on settlement and discontinuance of the proceedings under Rule 43 or to discontinue the proceedings pursuant to Rule 44 of the Arbitration Rules, Mr Lord responded in the negative and reasserted that his client did not rely on the Ratification Resolution and that his client did not resist any of the assertions or submissions made by Respondents in respect of competence, authority, and jurisdiction.

23. The Parties then made observations concerning costs, and the Tribunal requested that they forward to the Centre their statements of costs.

Submissions of the Parties

24. The Respondents contend that in the absence of a valid resolution of the Board of Directors of the Claimant specifically authorizing the initiation of the
proceedings, it cannot be said that the Claimant has properly invoked the contractual arbitration clause in the relevant documentation, that the jurisdiction of the Centre has not been validly invoked, and that the Tribunal does not have competence in the matter.

25. The Claimant originally denied that a resolution of the Board of Directors was required, but in any event did produce and initially sought to rely on the Ratification Resolution of June 11, 1993 which purported to ratify and approve the decisions of management and the actions taken by the officers of Scimitar in commencing and conducting the arbitration proceedings and in instructing counsel. At the Second Session of the Tribunal in London on November 15, 1993, however, Claimant through its counsel expressly stated to the Tribunal that all the contentions and submissions raised by Respondents in regard to the jurisdictional issue were no longer opposed by Claimant, thus effectively conceding that Respondents’ conclusions were true and correct. In addition, Claimant through its counsel then further stated to the Tribunal that the Ratification Resolution of June 11, 1993 was no longer being “relied upon” by Claimant, thus effectively conceding that such resolution was to be considered as being of no effect in these proceedings.

Applicable Law

26. It is the joint position of the Parties that the law applicable to the question of corporate transactions and governance is the law of the British Virgin Islands. Upon its own review of applicable law, the Tribunal sees no reason to depart from this position, which is consonant with Article 42(1) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (entered into force on October 14, 1966) (the “Convention”).

Decision

27. The question to be determined by the Tribunal is whether the proceedings are within the jurisdiction of the Centre and the competence of the Tribunal.

28. The Tribunal has reviewed the assertions of law and statements of fact contained in the submissions and observations presented to it and in the submissions of counsel. The Tribunal has also examined the question of corporate authorization under the law of the British Virgin Islands, which is that proceedings initiated by a corporation without proper corporate authority or authorization are invalid.

29. Based on the agreed positions of the Parties and the uncontested evidence before the Tribunal, the present proceedings were not initiated with proper authority or authorization, and there is no evidence relied on by the Claimant that the absence of such proper authority or authorization has been remedied by any action subsequent to the commencement of the arbitration proceedings. In accordance with Arbitration Rule 41(5), the Tribunal therefore hereby renders an award that the dispute before the Tribunal is not within the jurisdiction of the Centre and not within the competence of the Tribunal.
30. In accordance with Arbitration Rule 28(2), the Claimant and the Respondents have respectively submitted to the Tribunal costs in the amounts of US $115,123.80 and US $94,157.39 and the Secretary-General has submitted to the Tribunal a provisional account of all amounts paid by each party to the Centre and of all costs incurred by the Centre for the proceeding.

31. The Respondents claim their submitted costs of US $94,157.39 against the Claimant. The Claimant does not contest the entitlement of the Respondents to recover costs and has taken no issue with the quantum claimed.

32. In view of the fact that the Respondents have succeeded in their contention that the arbitration was instituted without proper authority and in light of the position taken by the Claimant with respect to the costs claimed by the Respondents, the Tribunal hereby awards to Respondents the sum of US $94,157.39, being the costs submitted by them in these proceedings.

[Source: The text of the award was supplied by, and is published with the permission of, the Respondents.]
AMT v. Zaire

Jurisdiction – Competence of ICSID and the Tribunal – Article 25 prerequisites of ICSID competence – Legal dispute arising out of investment – Dispute arising between Contracting State and national of another Contracting State – Consent to submit dispute to Centre

Non-appearance – Absence of representation on the part of Zaire – Oral phase inevitable – Issues of competence and merits joined


State responsibility – Obligation of protection and security of investment – Measures necessary to ensure full enjoyment of rights – Zaire responsible for inability to prevent consequences

Expropriation – No expropriation found – Failure to respect minimum standard of treatment – Soldiers acted individually – Armed forces not found to have expropriated property

Compensation – Method of calculating compensation – What is plausible and realistic in the circumstances – Not reasonable to expect same levels of compensation as in Switzerland or Germany

American Manufacturing & Trading, Inc. v. Republic of Zaire

Award. 21 February 1997

(Arbitration Tribunal: Mr Sompong Sucharitkul, President; Mr Heribert Golsong and Mr Kéba Mbaye, Members)

Summary: The facts: — American Manufacturing & Trading Corporation (Zaire), Inc. (AMT), through its 94 per cent owned subsidiary Société Industrielle Zairoise (SINZA), was engaged in the production and sale of dry cell and automotive batteries and the importation and resale of consumer goods and foodstuffs in the Republic of Zaire. On 23–24 September 1991 and 28–29 January 1993 AMT incurred losses as a result of looting and destruction of its property during riots and acts of violence in Kinshasa.

AMT initiated an ICSID action against Zaire, claiming that Zaire had violated AMT’s rights under the 1984 US–Zaire bilateral treaty concerning the Reciprocal Encouragement and Protection of Investment (“the BIT”) by failing to fulfil its obligations of protection, and to compensate AMT for property damage and losses caused by elements of Zaire’s armed forces. Soldiers had broken into SINZA’s commercial complex and stores, destroyed, damaged and carried away all the finished goods and most raw materials found on the premises. After the second destruction, the commercial complex was permanently closed. AMT requested a sum of