CHEON KWANG DEVELOPMENT COMPANY Ltd ET AL v. GOVERNMENT OF RWANDA/MINAGRI

[Rwanda SUPREME COURT – RCOMA0004/16/CS - RCOMA0003/2016 (Kanyange P.J., Ngagi and Mukandamage, J.) 30 June 2017]

Law governing contract – Arbitration agreement – If parties to the arbitration agreement provided for adjudication before they go for arbitration, this must be respected, failure to do so, the arbitration tribunal has no competence to admit the claim arising from that contract.

Law governing commercial procedure – The arbitration tribunal has power to reject the additional submissions of parties in accordance with the delay of the modifications or completion to be added in – Law N°005/2008 of 14/02/2008 relating to arbitration and conciliation in commercial matters article 35.

Facts: There was a joint venture between CHEON KWANG DEVELOPMENT COMPANY Ltd and EXERT ENGINEERING GROUP Ltd and concluded a contract with the Government of Rwanda (MINAGRI) for the Construction works of high earth-fill dam and Hillside Irrigation System, both parties provided in their contract that in case of any dispute, it will be resolved by arbitration tribunal after being referred to adjudicator.

Those companies were not able to comply with the duration of works and requested the Government of Rwanda for an extension for completion of works, after examination, the Government of Rwanda refused to extend it, instead decided to terminate the contract. These companies were not contented with that decision and filed a claim to arbitration tribunal.

Both parties submitted their submissions, then the arbitration tribunal ordered that the hearing in merit will proceed after both parties have signed the document prepared by the arbitration tribunal, but the government of Rwanda/MINAGRI refused to sign that document on the ground that in its submissions it raised an objection, stating that arbitration is not possible as long as there is no decision of adjudicator, consequently, the arbitration tribunal ordered both parties to prepare submissions on that objection so that they can debate upon it, and it also gave a deadline to both parties to submit them.

In the submissions of the claimants, they indicated that the Government of Rwanda/MINAGRI refused the procedure of adjudication, thus they had no other choice than resorting to arbitration as provided by the contract, and it was not a prerequisite to submit their claim to the adjudicator. As regards to the additional submissions, the arbitration tribunal did not admit them because they were late filed and were of no use to the arbitration tribunal as it had already taken decision. The tribunal decided that it has no jurisdiction because there is no decision of the adjudicator.

The claimants were not contented with that decision and filed a claim to the Commercial High Court, requesting the Court to decide that the arbitration tribunal was competent, they again stated that, they were unsatisfactory with how the Court took decision before the pleadings of the parties and also, the tribunal disregarded the provisions of article 35 (2) of the Law N°005/2008 of 14/02/2008, relating to arbitration and conciliation in commercial matters, and also the provisions of the contract. The Court sustained the decision of the arbitration tribunal.

The claimants unsatisfied with that ruling, appealed before the Supreme Court stating that, the Commercial High Court based on the common procedural law while there is a specific law on arbitration and decided that the arbitration tribunal was competent to reject additional submissions filed by the claimants regarding the objection. Also, that court failed to interpret the provision of the contract related to the decision that should be taken to arbitration because this article does not consider adjudication as prerequisite to the admissibility of the claim by the arbitrators, also, the arbitration was not supposed to base on the decision of the adjudicator rather, it provides for any dispute arising from the contract.

The Government of Rwanda argued that there is no contradiction between article 69 of the Law N° 21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure and article 35 of the Law relating to arbitration. Also the procedure of disputes resolution provided in the contract begins with the adjudication and if it fails, that is when they resort to arbitration.

Held: 1. If parties to the arbitration agreement provided for adjudication before they go for arbitration, this must be respected, failure to do so, the arbitration tribunal has no competence to admit the claim arising from that contract.

2. There is no contradiction between General conditions of contract and Particular Conditions of Contract, rather, they should be read in complementarity.

3. The arbitration tribunal has power to reject the additional submissions of parties in accordance with the delay of the modifications or completion to be added in.

Appeal has no merit.
The appealed judgment sustained

Statutes and statutory instruments referred to:

Law N° 21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure article 69.

Law N°45/2011 of 25/11/2011 governing contract article 64.

Law N°005/2008 of 14/02/2008 relating to arbitration and conciliation in commercial matters article 35.

No case referred to.

Judgment

I. BACKGROUND OF THE CASE

[1] There was a joint venture between CHEON KWANG DEVELOPMENT COMPANY Ltd and EXERT ENGINEERING GROUP Ltd and concluded a contract with the Government of Rwanda (MINAGRI), for the construction works of a 14 meters high earth-fill dam and 267 ha Hillside Irrigation System in Rwamagana district, both parties provided in contract that in case disputes arise, they will be resolved trough arbitration.

[2] As provided by the contract, both parties appointed two (2) arbitrators, who chose another one to chair the panel, then the parties were summoned to Nairobi in Kenya, in preliminary hearing, both parties agreed that the Rwandan laws will apply. During that hearing, the Government of Rwanda/MINAGRI raised an objection that the arbitrator appointed by the claimant companies is its advisor, thus, he cannot be an arbitrator, but the panel overruled that objection.

[3] Both parties filed their submissions, the panel of arbitrators ordered that the hearing in merit will take place on 16/06/2016 and 17/06/2016.On 16/06/2016 that panel drafted a document and requested the parties to sign it. The content of that document was as follows: Notwithstanding the provision of clause 24 of the contract which obliged the parties in the first instance to refer their disputes and differences to an adjudicator and only refer the matter to arbitration after the adjudicator's written decision thereon, the parties agree to refer the disputes and differences between them arising out of the contract to arbitration by a tribunal of three arbitrators two of whom shall be the parties appointees and the third one who shall be the presiding arbitrator shall be appointed by the two party arbitrators.

[4] After issuing the aforementioned document, the representative of the Government of Rwanda /MINAGRI stated that he cannot sign that document because he raised an objection in his submissions, alleging that the arbitration is not possible as long as there is no decision of the adjudicator. This led the panel to order both parties to prepare submissions on that objection, which had to be submitted not later than midnight of 16/06/2016 so that the hearing on that objection takes place the next day (on 17/06/2016).

[5] During the hearing of 17/06/2016 and in their submissions, the claimants (joint venture) stated that the Government of Rwanda/MINAGRI refused the adjudication procedure as they requested it through a letter to appoint an adjudicator but it replied in non-cooperative way, thus, they had no other alternative but resort to arbitration, as provided for by the contract, even though, it was not compulsory to prior submit the claim to the adjudicator.

[6] On 29/06/2016, the claimants filed additional submissions as a rebuttal on the objection, based on article 35 (2) of the Law N^{o} 005/2008 of 14/02/2008 relating to arbitration and conciliation in commercial matters, then on 25/07/2016, the panel decided that it is not competent on the ground that the decision of the adjudicator is not available.

[7] CHEON KWANG DEVELOPMENT COMPANY Ltd and EXERT ENGINEERING GROUP Ltd were not contented with the decision of arbitrators, and lodged a claim before the Commercial High Court requesting the Court to decide that the arbitration tribunal was competent to hear and decide on their disputes, those companies further stated that, they were also not satisfied with the fact that the pannel of arbitrators took decision before the parties were heard, and delibarately ignored both the provisions of article 35 (2) of the Law N^{o} 005/2008 of 14/02/2008 relating to arbitration and conciliation in commercial matters and those of the contract.

[8] In judgment RCOMA00476/2016/CHC/HCC rendered on 28/10/2016, the Commercial High Court sustained the decision of the arbitration tribunal. In rendering that judgment, the Commercial High Court, found with no merit, the ground that the arbitration tribunal decided on

the case without hearing of both parties, because if both parties agreed that the Rwandan Law will be applicable in the hearing of their case, thus, article 78, paragraph 2, and article 142 of the Law N^{o} 21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure allows the judge on his own motion to raise the objection of lack of jurisdiction any time before the pronouncement, in this case the arbitration tribunal raised that objection after hearing both parties, and took a decision about it, that indicates that it did not contradict with Rwandan Law agreed upon by both parties.

[9] CHEON KWANG DEVELOPMENT COMPANY Ltd and EXERT ENGINEERING GROUP Ltd were not contented by the decision of the Commercial High Court and appealed to Supreme Court on the following grounds:

> The High commercial Court based on article 69 of the Law No21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure to decide that the Court has jurisdiction to admit additional submissions or other document submitted after the closure of the hearing, but it ignored that the Law N^{o} 21/2012 forementioned is a general procedural Law which applies only when the specific law is silent about a given issue, thus, the arbitration Law which is specific to arbitration issues should have been applied because its article 35 indicates when additional submissions are admissible or inadmissible.
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> The commercial High Court did not interprete article 24 of the contract which provided for the type of a decision to be submitted to the arbitration, that article does not provide for arbitration to be conducted based on the decision of the adjudicator, instead it provides that all disputes relating to the contract and it does not consider adjudication procedure as prerequisite for the claim to be admissible before arbitration , however that procedure is provided in other document titled General conditions of contract in article 24.1-3 relating to decisions taken by the project manager only.

[10] The case was heard in public on 14 /02/2017, CHEON KWANG DEVELOPMENT COMPANY Ltd and EXERT ENGINEERING GROUP Ltd represented by Counsel Butare Emmanuel, while the Government of Rwanda was represented by Counsel Rubango Epimaque, the State attorney, who raised the objection of lack of jurisdiction of the Supreme Court, but the Court overruled that objection, the hearing of the case was held in public on 23/05/2017, both parties were represented as it was in hearing of 14/02/2017.

II. ANALYSIS OF LEGAL ISSUES

1. Whether the arbitration tribunal's rejection of additional submissions is illegal.

[11] Counsel Butare Emmanuel states that, by rejecting the additional submissions of rebuttal to the objection of lack of jurisdiction raised by the Government of Rwanda, the arbitration tribunal contradicted the provisions of article 35, paragraph two of the Law N^{o} 005/2008 of 14/02/2008 relating to arbitration and conciliation in commercial matters. He explains that, for the submissions to be inadmissible, they have to be late filed. When they were pleading in arbitration tribunal, they were notified that the pronouncement will be on notice, then on 29/06/2016, they submitted additional submissions, then on 08/07/2016 they received an e-mail notifying them that those submissions are inadmissible, but it is clear that those submissions

were submitted on time, thus, they pray the Supreme Court to hold that, those additional submissions should have been admitted. He further states that regarding filing the additional submissions, the Commercial High Court based on article 69 of the Law N° 21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure and disregarded the fact that it is a general law, instead, it should have based on article 35 of the Law relating to arbitration and conciliation in commercial matters.

[12] Counsel Rubango Epimaque, representing the Government of Rwanda, argues that, with regards to the fact that the judge can admit or reject additional submissions, he finds that there is no contradiction between article 69 of the Law N°21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure and article 35 of the Law relating to arbitration.

VIEW OF THE COURT

[13] Article 35, paragraph two, of the Law N°005/2008 of 14/02/2008 relating to arbitration and conciliation in commercial matters provides that, unless otherwise agreed by the parties, any party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it.

[14] The case file indicates that, after submitting the dispute to arbitration tribunal of Nairobi in Kenya, during the hearing of 16/06/2016, the Government of Rwanda raised an objection related to lack of competence of the Arbitration tribunal , then that tribunal decided to postpone the hearing to 17/06/2016, so that both parties can prepare submissions relating to that objection, on that date, the hearing took place and was closed, then on 29/06/2016 the counsel for claimants submitted other additional submissions regarding that objection, then on 08/07/2016 the president of the panel of arbitrators replied that, those submissions are not admitted because, apart from being for no use to the panel in reaching a decision , they were also received after the panel has decided on the competence of the arbitration tribunal[1].

[15] The Court finds that as provided by article 35, paragraph two, of the Law N°005/2008 mentioned above, any claimant in arbitration tribunal has the right to submit additional submissions in the course of examination of the claim, however this article provides also that the arbitration tribunal also has the power to reject those submissions in accordance with the delay of the modifications or completion to be added in. Thus, as motivated above, if that tribunal explained that, it rejected the additional submissions of the claimants for the objection raised by the Government of Rwanda/MINAGRI because they were not useful and also they were submitted after the arbitrators had already deliberated, this shows that, the tribunal did not contradict with the Law.

[16] Concerning the fact that, in solving the issue of admissibility of additional submissions for the claim before the arbitration tribunal, the Commercial high Court applied article 69 of the

[1] Letter of July 8, 2016: "They are additional submissions made by party after the close of proceedings, and while an Award is pending, without any direction to that effect by the Tribunal. […] even though it is not material to our above decision, the said submissions were received after the deliberations by the Tribunal on the substance of the award on jurisdiction. […]".

law N°21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure, the Court finds that, based on principle of law that "Specialia generalibus derogant"[2] which means that, specific law derogates to general law, the Commercial High Court should have not applied article 69 of the Law N°21/2012 mentioned above instead it should have based on article 35, paragraph two, of the Law N°005/2008 mentioned above which resolves specifically the issue related to the admissibility or inadmissibility of additional submissions filed by the party to the arbitration. The Court finds that, though, the Commercial High Court applied article 69 aforementioned, the interpretation of article 35 also aforementioned, as it is clear in previous paragraph, indicates that the arbitration tribunal had jurisdiction to reject the submissions of the claimants rebutting on objection raised by the Government of Rwanda/MINAGRI because they were submitted after the arbitrators have already deliberated, thus, on this issue, the grounds of the appellants lack merit.

2. Whether the adjudication clause of the contract was ignored

[17] Counsel Butare Emmanuel, representing CHEON KWANG DEVELOPMENT COMPANY Ltd and EXERT ENGINEERING GROUP Ltd states that the arbitration tribunal disregarded the provisions of the contract. He explains that, in article 2.3 of General conditions of contract, the hierarchy of different documents related to contract agreement was agreed upon, thus, Particular conditions of contract precede the General conditions of contract. He continues stating that article 24.4 of Particular conditions provides that all disputes that may arise related to contract, whether related to termination of the contract or any other dispute, they should go for arbitration; and this article, does not provide that arbitration should be conducted based on the decision taken by the adjudicator, instead , it provides for all disputes related to contract, and it does not consider adjudication procedure as prerequisite for the admissibility of the claim by the arbitration tribunal, instead that procedure is provided in article 24.1-3 of General conditions of contract as regards to decisions taken by project manager only. He states that, the grounds of that claim contains also the decisions taken by the project manager, but that claim was based on termination of the contract.

[18] Counsel Rubango Epimaque, representing the Government of Rwanda/MINAGRI, argues that regarding the hierarchy of different documents of the contract, raised by the appellants basing on article 2 of the contact, it is not true unless they prove it, that article 24 of General conditions of contract titled Procedure for Disputes, explains how disputes that may arise relating to contract or to its application can be resolved, also that article, provides for the procedure to follow in order to file a claim to the arbitration tribunal, thus, if the appellants cannot indicate other alternative to resolve disputes other than that provided in that article, consequently the statement of the appellants that the Court disregarded the provisions of the contract has no merit. He continues explaining that the procedure to resolve disputes provided in contract begins at first level by adjudication, if the agreement is not reached, they go for arbitration at the second level.

VIEW OF THE COURT

[19] Article 64 of the law N°45/2011 of 25/11/2011 governing contract, provides that contracts made in accordance with the law shall be binding between parties. They may only be

[2] *La loi spéciale déroge à la loi générale.*

revoked at the consent of the parties or for reasons based on law. They shall be performed in good faith.

[20] The case file indicates that the disputes between two parties is based on termination of contract titled « Construction works of a 14 meters high earth-fill dam (lot 1) and 267 ha Hillside Irrigation System (lot 2) for Rwamagana-34 site in Gahengeri Sector, Rwamagana District, Eastern Province » and was a result of delay in its execution. The contract provides for the project manager in charge of supervising the works and the compliance of the terms of the contract, on 15/06/2015 he received a request from CHEON KWANG DEVELOPMENT COMPANY Ltd and EXERT ENGINEERING GROUP Ltd (joint venture) to extend the duration to complete the works aforementioned, but on 03/07/2015, project manager rejected their request, then the Government of Rwanda/ MINAGRI decided to terminate the contract.

[21] The Court finds that article 1.1(c) of General Conditions of Contract (GCC) explains that the adjudicator is a person appointed by both parties to the contract through the procedure of article 23 of GCC, so that he can resolve the disputes at first level[3]. Also article 24.[4] of GCC explains that the decision of project manager which is not in his authority or wrongly taken , has to be submitted to the adjudicator within 14 days starting when that decision was notified to the concerned party, and also the adjudicator has do deliver a written decision not later than 28 days , ,and each party has 28 days to submit the claim to the arbitrator and the arbitration has to be conducted at the place indicated in particular conditions of the contract and follow the procedure provided for by the institution also indicated in particular conditions of the contract.

[22] The Court finds that, in general, the table format of « particular conditions of contract » (PCC) shows that its content is complementary and explanatory to some articles of general conditions of contract (GCC). In particular, article 24.4 of General Conditions of Contract (GCC) is complemented by explanations available in particular conditions of contract on page 28, where it indicates that both parties have agreed to apply the Law governing United Nations Commission on International Trade and the arbitration will be held at Nairobi/Kenya.[5]

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[3] 1.1(c): The Adjudicator is the person appointed jointly by the Employer and the Contractor to resolve disputes in the first instance, as provided for in GCC 23.

[4] 24.1: If the contractor believes that a decision taken by the Project Manager was either outside the authority given to the Project Manager by the Contract or that the decision was wrongly taken, the decision shall be referred to the Adjudicator within 14 days of the notification of the Project Manager's decision.24.2: The Adjudicator shall give a decision in writing within 28 days of receipt of a notification of dispute. 24.3: […]. Either party may refer a decision of the Adjudicator to an Arbitration within 28 days of the Adjudicator's written decision. If neither party refers the dispute to arbitration within the above 28 days, the Adjudicator's decision shall be final and binding. 24.4: The arbitration shall be conducted in accordance with the arbitration procedures published by the institution named and in the place specified in the PCC (Particular Conditions of Contract)

[5] Institution whose arbitration procedures shall be used: "Unites Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules: Any dispute, controversy, or claim arising out of or relating to
this Contract, or breach, termination, or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force." The place of arbitration shall be: Nairobi, Kenya.

[23] The Court finds that the provision of article 24 (1,2,3,4) of GCC does not contradict with the provision of Particular Conditions of Contract on GCC 24.4, rather they complement each other, because the point 3 of article 24 of GCC provides for the procedure to submit the claim to the arbitrator from the adjudicator, while point 4 of that article provides that, the arbitration has to be conducted at the place and in accordance with the procedure provided by the institution , indicated in Particular Conditions of Contract (PCC). It finds then that the pleadings of Counsel Butare Emmanuel that Particular Conditions of Contract (on GCC 24.4) does not provide for arbitration to be conducted basing on the decision taken by the adjudicator, is groundless because, as aforementioned, what was explained in that part of the contract complement article 24.4 of GCC which is in the part titled «Procedures for Disputes» which provides for new claims to be submitted to the adjudicator before submitting them to the arbitrator, especially even him (Counsel Butare Emmanuel), during the hearing, stated that the claim submitted contains the decisions taken by the Project manager, furthermore, there is no other provision in the contract providing that the issues related to termination of contract are to be submitted to the arbitration without prior examination of the adjudicator.

[24] The Court finds that if the project manager decided not to extend the period for completion of works provided in contract, and this decision was not submitted to adjudicator at first instance level, before submitting it to arbitrator as provided for in article 1.1. (c) and 24 (1.2.3.4) of GCC aforementioned, this proves that the arbitration tribunal could not admit the claim because it was submitted through the procedure contrary to the provisions of the contract.

[25] The court finds that, based on motivations above and on article 64 of the Law N°45/2011 of 25/11/2011 afore mentioned, the adjudication clause of the contract was not ignored.

3. Whether the Government of Rwanda/MINAGRI can be awarded procedural fees.

[26] Counsel Rubango Epimaque states that, as the appellants appealed the case while it was not necessary, the Government of Rwanda/MINAGRI has to be paid 1,000,000Frw used for procedural fees.

[27] Counsel Butare Emmanuel argues that, MINAGRI is the one which terminated the contract, thus, it cannot be awarded the procedural fees. Therefore, to charge his clients that money would be an excessive burden.

VIEW OF THE COURT

[28] The Court finds that as companies CHEON KWANG DEVELOPMENT COMPANY Ltd and EXERT ENGINEERING GROUP Ltd appealed for this case, and their appeal found without merit, it is obvious that the government of Rwanda/MINAGRI got damages and lost time to follow up the case, thus, these companies have to pay the government of Rwanda/MINAGRI procedural fees equal to 300,000Frw, these damages are awarded in Court's discretion, because the requested ones are excessive and were not evidenced.

III. DECISION OF THE COURT

[29] Decides that the appeal of CHEON KWANG DEVELOPMENT COMPANY Ltd and EXERT ENGINEERING GROUP Ltd (Joint venture) has no merit;

[30] Decides that the judgment RCOMA00476/2016/CHC/HCC rendered on 28/10/2016 by Commercial High Court is sustained except the procedural fees awarded to the Government of Rwanda/MINAGRI at this level;

[31] Orders CHEON KWANG DEVELOPMENT COMPANY Ltd and EXERT ENGINEERING GROUP Ltd to pay the Government of Rwanda/MINAGRI 300,000Frw for procedural fees;

[32] Orders that, the Court fees deposited by CHEON KWANG DEVELOPMENT COMPANY Ltd and EXERT ENGINEERING GROUP Ltd equal to the work done in this case.