2022
Volume 4, Issue 2

Institute for Transnational Arbitration
ITA IN REVIEW

ITA IN REVIEW

The Journal of the Institute for Transnational Arbitration

ITA IN REVIEW

VOL. 4 **2022** **NO. 2**

TABLE OF CONTENTS

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a Publication of the
Institute for Transnational Arbitration
a Division of the
Center for American and International Law

5201 Democracy Drive
Plano, TX 75024-3561

INTERNATIONAL ARBITRATION AND THE RULE OF LAW: *THE LIBYAN OIL ARBITRATIONS*

by Sir Christopher John Greenwood, GBE, CMG, QC

Delivered at the 10th ITA-IEL-ICC Joint Conference on International Energy Arbitration held on January 20-21, 2022

It is a great honor to be asked to be here today. I was asked to talk about the three Libyan oil arbitrations as a historical landmark. That is a little nerve racking for me, because the first extended piece of writing I ever produced was an article on the three Libyan oil cases at the beginning of my career, at a time when they were regarded as the most important new development. It is perhaps rather daunting to find that I am now being asked to talk about my own past as if it were an area of history. When I listened to Claudia Salomon at the beginning, talking about the sculpture of the past, I felt as if I were looking into a mirror of the old man staring at the ground. However, I will try to show you that, far from being a museum piece, the three Libyan arbitrations are in fact groundbreakers in terms of the way that international law on investment was developed.

There are, of course, three of these cases, one brought by BP,[1] one by Texaco Calasiatic,[2] and one by the Libyan American Oil Company ("LIAMCO").[3] They all concern the concessions that the Libyan government had given in relation to its oil industry during the 1950s and 60s. It is worth keeping in mind two features of the period—the late 60s and early 70s—that were really quite radically different from today. The first is that the standard form of investment, in the oil industry at least, still took the form of the concession whereby the country in question granted investors the right to explore for and exploit oil resources over a defined area, often

[1] BP Exploration Co. (Libya) Ltd. v. Government of the Libyan Arab Rep., Ad hoc, Award on Merits (Oct. 10, 1973).

[2] Texaco Overseas Petroleum Co. v. Government of the Libyan Arab Rep., Ad Hoc, Award on Merits (Jan. 19, 1977).

[3] Libyan American Oil Co. (LIAMCO) v. Government of the Libyan Arab Rep., Ad Hoc, Award of Merits (Apr. 12, 1977).

for quite a long period of time—fifty years in the case of these concessions—in return for a percentage of royalties. In effect, the concessionaire controlled what was done, the price that was charged, and the return, both to itself and to the country, while also assuming the risks. The second is that by the time these cases arose, that model, and indeed the whole idea of investor protection, was under very considerable challenge internationally. The UN General Assembly was passing resolutions about the new international economic order. There was a sense that these concessions and all forms of direct investment in the Third World were a form of economic colonialism that had to be resisted. There was very considerable tension between the investor-exporting countries and the importing states at the time.

All three of the cases arose out of the concession in broadly the same language, a model concession laid down by Libya's petroleum law. The question that faced the oil companies during the early 1960s was essentially how to provide some form of protection and security for their investment over an extended period.

By 1966, these concessions evolved with greater protection in return for a higher royalty to Libya. Three forms of protection existed, which are closely interlinked. The first was a stabilization clause designed to preclude the Libyan government from making unilateral changes. It is worth quoting that clause. Clause 16 reads: "The government of Libya will take all steps necessary to ensure that the company enjoys all the rights conferred by this concession. The contractual rights expressly created by this concession shall not be altered except by mutual agreement." This clause was specifically designed to preclude unilateral nationalization by the state. Whether it was effective to do so, however, was problematic.

Only forty years or so before, the arbitration clauses designed to protect investors and bond holders against currency risks—the Gold Clauses of the 1920s—had been abrogated by virtually every state, including the US and the UK. That illustrated the fact that the state whose law is the proper law of the contract is able to change that law and, thereby, effectively override the provisions of the contract.

To avoid that problem, we come to the second limb of the protection that was laid down, the internationalization clause. Clause 28.7 of the concession reads:

> This concession should be governed by and interpreted in accordance with the principles of law in Libya common to the principles of international law. And in the absence of such principles, then by and in accordance with the general principles of law including such of those principles as may have been applied by international tribunals.

That clause gave rise to a considerable amount of difficulty. It was a private international lawyer's nightmare.

The third element of protection that was offered was that each concession included an arbitration clause which, rather different from the BITs of today, could be invoked by either party and which contained various safeguards to ensure that neither party could frustrate the arbitration by refusing to take part.

It is against that background that the three arbitrations took place. They all involved unilateral nationalization by the Libyan government. The concessions had been granted by the old royal government of Libya, which was overthrown in 1968 by Colonel Gaddafi's revolutionary regime and took a radically different view of how the oil industry in Libya should be managed.

In December 1971, the new government moved against the first of the concessionaires, BP. The BP case is slightly different from the other two because BP was nationalized in a single go in December 1971, avowedly, in retaliation for the failure of the British government to prevent Iran from occupying some island in the Gulf. What happened here was that Britain had been the protecting state of what we now call the United Arab Emirates for many years. On the 30th of November of 1971, the UK withdrew its presence in the Gulf. The UAE became a fully independent state. One of the emirates that made up the UAE claimed three islands in the Gulf; Abu Musa, Greater Tunb, and Lesser Tunb, but so did Iran. Iranian forces occupied those islands on the night of the 29th to the 30th of November, the day of the British withdrawal. Ten days later, Libya nationalized BP in reprisal. There was no compensation. There was an offer to BP, as there was later to the other companies, to meet a Libyan committee, which would, in the terms of the Libyan legislation, be there to determine the amount of compensation due to or from the company following the nationalization. You will, of course, appreciate that this was not an offer

that was particularly attractive to any of the companies.

The two American companies, Texaco and LIAMCO, were dealt with slightly differently. In 1973, Libya nationalized 51% of the oil concession held by seven foreign companies. Then, when LIAMCO and Texaco commenced arbitration, the remaining 49% of their concessions was also nationalized.

In none of these three cases did Libya take part. It did, however, write to the president of the International Court of Justice to try and prevent the appointment of a sole arbitrator to hear the case. We have some glimpse of Libya's views in those memoranda and the one or two letters it sent to the tribunals, but there was no full argument by the Libyan state. Indeed, so hostile was Libya to the arbitrations themselves that . . . we wrote to the parties in the *BP* case to ask them permission to publish the award in the International Law Reports. The Libyan government replied saying they could neither give nor refuse permission, because they didn't accept that the award had any valid existence. We took that as permission and went ahead and published anyway.[4]

Of the three arbitrations, the first one, *BP*, was decided by Judge Gunner Lagergren, a Swedish judge, famous international arbitrator, and later president of the Iran-US Claims Tribunal. Judge Lagergren gave two awards, the 1973 main award and then a short supplementary award in 1974. *Texaco* was decided by Professor René-Jean Dupuy, one of the great figures of international law at the time. Professor Dupuy was a French professor who gave an award on jurisdiction in 1975 and a final award in 1977. *LIAMCO* was decided by Dr. Sobhi Mahmassani, a Lebanese jurist in 1977.

All three of these awards found for the companies. They did so in rather different ways and I just want to pick on three aspects of this. The first is the governing law. Interestingly here, Judge Lagergren decided that the governing law for the arbitration, the *lex arbitri*, was Danish law because the arbitration was seated in Copenhagen, but both Professor Dupuy and Dr. Mahmassani found that the

[4] *See BP Exploration Company (Libya) Limited v. Government of Libyan Arab Republic*, 53 INT'L L. REP. 297 (1979).

proceedings in front of them were governed by public international law. That is an important step forward.

On the *lex contractus*, the three tribunals got themselves into some considerable difficulty. You remember the rather convoluted clause I read to you a moment ago. Judge Lagergren in the *BP* case decided that the parties were able, if they wished, to remove the contract from the scope of Libyan law—from the scope of the national law of the State party—and that they had intended to do so in the case. He then held that the result of what they had done was to make the proper law of the contract: general principles of law. Now of course, that raises a question of whether the general principles of law are capable of being a proper law. They are not a legal system in their own right. Eli Lauterpacht who was counsel to BP once told me that he and Frances Mann, who was his co-counsel, had argued for ages about how to do this. With Lauterpacht wanting to argue general principles and Mann, who was something of a purist in private international law, insisting international law was the proper law. In the end the arbitrator followed Lauterpacht.

In *Texaco*, the arbitrator decided that the proper law of the contract was public international law. In *LIAMCO*, Dr. Mahmassani decided that it was Libyan law, but moderated by international law. However, the key point was that they all followed the notion of internationalization.

Then on the stabilization clause, *BP* says very little about this. The arbitrator simply assumed that the nationalization was a repudiation of the contract. That is easier to do because of the special facts of the *BP* case.

In *Texaco*, you have a detailed analysis by Professor Dupuy, which rejected the idea that the new international economic order had become part of customary international law and found that there had been a clear breach of the stabilization provision. There is a very interesting analysis in the award of how General Assembly resolutions do or do not affect customary international law. It was picked up by the International Court obliquely in the nuclear weapons advisory opinions in 1975.

LIAMCO was the least enthusiastic about the stabilization clause, but it held that the nationalization was illegal because of the absence of any compensation.

In *BP*, Mann argued that the repudiation of the contract had not been accepted by BP and, therefore, the contract was still in force. BP sought specific performance, clearly thinking about the possibility of bringing pursuit actions in national courts to try and seize shipments of oil from their oil field. That argument was rejected by the arbitrator. He found that the nationalization was unlawful, but that specific performance could not be ordered. The nationalization had terminated the contract and all that was left was an action for damages. We will never know how he would have dealt with damages because the case then settled out of court.

In *Texaco*, the arbitrator decided that specific performance could be awarded, although he seems to have thought of this more in terms of the effect on damages if specific performance ended up not being provided by Libya.

In *LIAMCO*, the arbitrator, having spent some twenty pages analyzing detailed submissions by the claimants on the measure of damages, said in a single paragraph he thought the appropriate measure was an equitable one and that equitable damages would be sixty-six million US dollars. He never explained what was equitable about that or how he arrived at that figure.

Now very briefly, are these cases museum pieces or groundbreakers? In one respect, they are undoubtedly museum pieces. The idea of internationalizing a contract as a form of legal protection is now largely a thing of the past. Instead, investors look to bilateral investment treaties and multilateral agreements like the Energy Charter Treaty for protection. These mechanisms have superseded the need for internationalizing a contract. I suppose the nearest you would come to that today would be the use of the umbrella clause.

Also, Dr. Mahmassani's approach, which everybody trumpeted at the time as an idea of the future of equitable damages, has given way completely to damages calculated on the basis of discounted cash flow or other methodologies. Although, I have to say, as an arbitrator, I have seen a number of claimants' assessments and damages which are just as fanciful and difficult to justify as those of Dr. Mahmassani in the *LIAMCO* case.

Of course, the debate has moved on. The new international economic order is

now very much a dated thing of the past. The idea of investment flows is much more readily accepted than it used to be and you have less of the old style concession. But in one respect, at least, I think there really is a groundbreaking element to these three cases and that is the emphasis on the stability of the contractual framework and the stability of the investment generally.

It is done differently these days and it is done more comprehensively, with prohibitions not only of expropriation, but also the insistence on compliance with contracts, fair and equitable treatment, full protection. and security. I think it is possible to see elements, especially in the *Texaco* case, of what paved the way for this later jurisprudence. Of course, at the time of the three cases, there was no shortage of bilateral-investment treaties. It is just that nobody ever thought of using the arbitration provisions in them. It is also because an arbitration from the past is sometimes a rebuke to those of us in the present. Every time I write an award, I remember the fact that none of the awards in the three Libyan cases, complicated as they were, was longer than a hundred pages. I'm ashamed to say I very seldom manage to live up to that brevity.

Thank you very much for inviting me to take part in the conference. I wish you all success with the remaining two days.

SIR CHRISTOPHER JOHN GREENWOOD, GBE, CMG, QC is Master of Magdalene College, Cambridge, where he was awarded a BA (Law) (First Class Hons) in 1976, LLB (International Law) (First Class Hons) in 1977 and became an MA in 1981. Elected a Fellow of Magdalene College in 1978, he taught law there and at the Cambridge University Law Faculty for nearly twenty years. He was appointed Professor of International Law at the London School of Economics in 1996, where he remained until becoming a Judge of the International Court of Justice. On 6 November 2008, Sir Christopher was elected a judge at the International Court of Justice, where he served from February 2009 to February 2018, when he joined the Arbitrators at 24 Lincoln's Inn Fields as an arbitrator specializing in public international law, including Investor-State disputes. Sir Christopher was appointed Companion of the Order of St Michael and St George (CMG) in 2002 and knighted in 2009 for services to international law. In 2018 he was created GBE (Knight

Grand Cross) for his services to international justice. He sits as a Member of the Iran-US Claims Tribunal and is a Member of the ICSID Panel of Arbitrators.

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Table of Contents

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