War Series: Civil War and Force Majeure in Global Construction

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The arbitration between Ermir İnşaat Sanayi ve Ticaret A.Ş. and Biwater Construction Ltd., adjudicated by a sole arbitrator under the ICC Arbitration Rules, offers several critical lessons for construction companies operating in regions vulnerable to civil unrest. This case, which revolved around a construction project in Libya that was interrupted by the First Libyan Civil War, underscores the complexities and risks associated with working in conflict zones.

Lesson 1: Force Majeure in the Context of Civil War

One of the key lessons from this arbitration is the interpretation of force majeure clauses when civil war interrupts a construction project. The sole arbitrator, Tobias H. Zuberbühler, meticulously examined whether the Respondent, Biwater Construction Ltd., could have reasonably been expected to resume the project after the cessation of the First Libyan Civil War. The arbitrator determined that the **“ongoing force majeure situation”** justified the Respondent’s decision not to resume the project, highlighting that **“Libya was and has been a dangerous country since 2011”** (para. 155).

This case illustrates that civil war, as a force majeure event, can extend beyond the immediate conflict period. The arbitrator accepted that the dangers in Libya persisted long after active hostilities ceased, making it unreasonable to

expect project resumption. The lesson here is clear: construction companies must recognize that the effects of civil wars are prolonged and can render contract performance impossible for extended periods.

Lesson 2: The Interplay Between Security and Financial Risks

Another significant takeaway from this arbitration is the intricate relationship between security risks and financial considerations in post-conflict environments. The sole arbitrator acknowledged that Biwater's decision not to resume the project was influenced by both **"substantial security concerns"** and the financial risks associated with non-payment by the Libyan client, HIB (para. 154). This dual consideration emphasizes that in conflict zones, security and financial stability are deeply intertwined.

Companies must therefore conduct thorough risk assessments that consider both factors equally. This lesson is particularly relevant for projects in regions where the local government or clients may be financially unstable or unable to fulfill payment obligations, as seen in Libya during the post-war period.

Lesson 3: The Limits of Claims for Lost Profits

The denial of Ermir İnşaat's claim for lost profits is another crucial lesson from this case. The Claimant sought compensation under Clause 3.7 of the Agreement and Article 378 of the Swiss Code of Obligations (CO), arguing that Biwater's failure to resume the project led to lost profits. The arbitrator, however, rejected this claim, stating that the **"ongoing force majeure situation"** made it impossible for the Respondent to resume the project and that Biwater was not at fault (para. 280).

This lesson underscores the difficulty of substantiating claims for lost profits in situations where force majeure is involved. When a civil war or similar event disrupts a project, proving that one party is at fault for non-performance becomes challenging. Construction companies must be cautious when drafting contracts to ensure that lost profit claims are clearly defined and that force majeure events are appropriately addressed.

Lesson 4: The Importance of Clear Settlement Agreements

The arbitration also highlights the importance of drafting clear and comprehensive settlement agreements in the aftermath of a conflict. The December 2015 Agreement between the parties was intended to resolve certain outstanding issues, but the arbitration revealed that ambiguities in the agreement led to further disputes. For instance, the arbitration had to interpret various clauses of the December 2015 Agreement, particularly those related to payments and legal disputes in Turkey (para. 88-90).

This lesson teaches that settlement agreements must be carefully negotiated and drafted to prevent future litigation. Ambiguities can lead to prolonged disputes and additional arbitration, as seen in this case.

Lesson 5: Documentation and Evidence in Conflict Zones

Finally, this arbitration underscores the challenges of gathering documentation and evidence in conflict zones. The arbitrator acknowledged that the Claimant faced difficulties in providing documentation for its site clearance costs due to the chaotic circumstances of evacuating personnel from Libya. The arbitrator allowed for a relaxation of the substantiation requirements, recognizing that **“under these circumstances, the**

requirement of substantiation can be alleviated” (para. 263).

This lesson is particularly important for companies operating in similar environments today. It emphasizes the need for flexible evidentiary standards in arbitration when the usual documentation is not available due to war or other emergencies. Companies should ensure that their contracts allow for such flexibility, anticipating the possibility that certain records may be lost or unobtainable in the event of a conflict.

Conclusion

The Ermir İnşaat Sanayi ve Ticaret A.Ş. v. Biwater Construction Ltd. arbitration provides essential lessons for construction companies and arbitrators alike. It highlights the extended impact of civil wars on construction projects, the intertwined nature of security and financial risks, the challenges of substantiating claims for lost profits, the importance of clear settlement agreements, and the need for flexible evidentiary standards in conflict zones.

These lessons are particularly relevant in today’s global construction industry, where projects frequently intersect with geopolitical instability. As this case demonstrates, the aftermath of civil wars continues to shape the legal landscape, requiring companies and arbitrators to navigate these challenges with foresight and adaptability.

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