Case No. 534

DISPUTE BETWEEN TWO CONTINENTAL FIRMS CONCERNING A CONTRACT FOR THE SALE OF COPPER AT THE LONDON PRICE AFTER DEDUCTION OF SMELTING COSTS FIXED IN STERLING.


Extract from the Submission to Arbitration and from the Award rendered on December 23rd, 1932, by the arbitrator, Dr. H. Y. D. Van Lier, Secretary of the Rotterdam Chamber of Commerce.

EXTRACT FROM THE SUBMISSION TO ARBITRATION:-

By contract concluded on July 4th, 1930, the defendant sold the plaintiff . . . . tons of copper to be delivered CIF . . . . from (initial date) to (final date) inclusive, by monthly consignments of from . . . . to . . . . tons, at the plaintiff's choice.

The total copper content ascertained by the electrolytic process was to be paid per ton of 1,016 kgs at the London price for electrolytic copper, after deduction of the smelting costs amounting to k ... The plaintiff had the option of fixing the price by selecting any day before midday during the 4 weeks subsequent to the arrival of the boat at . . . . , and the account was to be made out on the basis of the London price ruling on the day selected.

Payment was to be cash against presentation of shipping documents in pounds sterling at the rate of exchange ruling an the day the boat arrived at . . . . The approximate total was to be paid according to a pro forma invoice made out on the basis of a copper content of 97 %, the pro forma invoice to be corrected by a final invoice as soon as the necessary data were available.

After Great Britain abandoned the gold standard an September 21st, 1931, the plaintiff requested that sterling should be replaced by the American dollar as the unit of account. The plaintiff pointed out that, after the depreciation of the pound, the method followed by the defendant, who fixed a provisional price equivalent to the price ruling in London six to eleven days before the date of the pro forma invoice, was in contradiction with the spirit of the contract, the intention of the parties and the principles of commercial equity. In, particular, the plaintiff accused the defendant of wishing to take advantage of the depreciation of the pound sterling in order to make illegitimate profits. In this connection, he alleged that all he was obliged to pay was the difference between the copper content at 97 % and the real content. As regards risks arising from exchange fluctuations, they should be borne by the defendant alone.

The plaintiff stated that there was a further point in dispute. The contract fixed a deduction of £ X. per ton for smelting costs. This amount was equivalent, at the time the contract was signed, to $ Y. Owing to the depreciation of the pound, on October 2nd, 1931, this amount had fallen to $ Z.

By letter of October 2nd, 1931, the plaintiff requested the defendant to consider the possibility of taking the dollar as a
basis for the sales. By letter of October 9th, the defendant proposed the following arrangement: conversion into dollars, at the current rate of exchange, of the price fixed by the plaintiff, after deduction of smelting costs. It was found impossible to come to an agreement on this basis. The plaintiff wished the fixed smelting costs to be converted into dollars at par, i.e. $ 4.86 to the pound, and the deduction to be made after the price had been converted into dollars at the rate ruling on the day selected for the fixation of the price.

The plaintiff stated that the refusal of the defendant to calculate the smelting costs on the gold basis would give the defendant - who was not of British nationality and was not affected by the depreciation of the pound sterling - an illegitimate profit at the expense of the plaintiff. The fact that the accounts were later converted into dollars proved, the plaintiff alleged, that his claim was justified.

The defendant considered that the plaintiff was not justified in appealing to the spirit of the contract and the intention of the parties, when the agreements governing the transactions between the parties were clear and precise. There was therefore no reason for interpreting them; all that necessary was to carry them out.

As regards the conversion into dollars of the unit of account, the defendant pointed out that by letter of November 20th, 1931, the plaintiff accepted the proposals made to him on October 9th, while reserving the question of the conversion into dollars of the smelting Coats for later. The new arrangement had been applied by the defendant to the deliveries effected after the agreement had been made. There could be no question of making this agreement retroactive and of applying fit to previous deliveries upon which provisional payments had already been made.

As regards the plaintiff's claim concerning the smelting costs, the defendant stated that the contract provided for a fixed deduction of £ X. without any exchange guarantee. The conversion of that amount at dollar parity would, in the opinion of the defendant, constitute a modification of the terms of the contract which could not be made without the consent of both parties. As he had never consented to such a modification, he (the defendant) concluded that the amount of X. in respect of smelting costs had been rightly deducted both on the pro forma as well as the final invoices in dispute.

In reply to the arguments of the defendant, the plaintiff endeavoured to show that the crucial point of the dispute was not so much the loss he would suffer if his claim were rejected, but rather the fact that the defendant would make an illegitimate profit, not provided for by the parties, at the expense of the plaintiff. He considered that this would be contrary not only to equity and to the spirit of the contract, but to the law itself. As regards commercial practice, he denied that such practice could be pleaded in favour of the defendant, since the depreciation of the pound sterling constituted a new fact impossible to anticipate.

The defendant maintained that the contract should be carried out in the form in which it had been signed, without modification, except with the agreement of both parties.

The plaintiff requested the Court of Arbitration of the International Chamber of Commerce to direct the defendant to repay him the difference between the amount of the provisional payments already made and the amount of the final invoices. This difference was in the plaintiff's favour since he had deducted from the price of the copper the smelting costs calculated on a dollar basis at $ 4.86 to the pound.

The defendant requested the Court of Arbitration to reject the claims of the plaintiff and to direct the plaintiff to pay the final invoices as made out by the defendant.

**EXTRACT FROM THE AWARD:**

Whereas, the solution of the dispute depends upon the answers to the following questions;

1) Is the depreciation of the pound sterling after September 21st, 1931, a sufficient ground for the plaintiff's claim that from that date onwards the sterling accounts arising out of the execution of the contract should be converted into dollars?

2) Should the amount of sterling to be deducted as smelting costs be revalorised and converted into American dollars?

Whereas it is clear from the documents filed by the parties that the defendant agreed in principle on October 9th, 1931, to the conversion of the accounts into dollars and that on November 20th, 1931, both parties came to an agreement on this
point while reserving for later the question of the conversion of the smelting costs, so that after the last-mentioned date the pro forma and final invoices for subsequent deliveries were made out in American dollars, but without conversion of the smelting costs;

Whereas it is first necessary to consider whether this partial agreement concluded between the parties after long negotiations should have a retrospective effect;

Whereas such a forced conversion would be contrary to the literal meaning of the contract which only mentions English currency;

Whereas, consideration cannot, however, be confined to the literal meaning of the contract, since agreements should be carried out in good faith;

Whereas the plaintiff alleges that the provisions of the contract were so worded as to guarantee him a price independent of market fluctuations, and whereas in the opinion of the plaintiff the defendant's interpretation would give the defendant an illegitimate profit not provided for by the parties;

Whereas it is possible, and even probable, that such was the plaintiff's intention, but whereas a distinction must be made between the unilateral intention of one party and the clauses drafted by that party in agreement with the other party in order to attain his purpose as far as possible;

Whereas in drawing up the contract both parties made the fixation of the prices due by the plaintiff dependent upon two factors, namely:

a) the London price of copper,

b) the plaintiff's free choice, within four weeks from the due date of each payment, of the day on which the price would be fixed according to the London price;

Whereas this selection of the London price for copper to regulate the prices payable for deliveries over a long period was entirely justified by the importance of the international market of London for this branch of trade, but whereas this method of determining prices - necessarily in pounds sterling - none the less entailed for both parties the risk of exchange fluctuations, and whereas they accepted this risk and were moreover able to cover themselves against such risk if they wished;

Whereas the plaintiff was likely to increase this risk considerably by postponing the fixation of the price for each delivery until a date subsequent to the arrival of the cargo at ... and whereas he did so on many occasions, particularly after the depreciation of the pound;

Whereas by so doing the plaintiff speculated on the London rate of exchange, while he could have removed or attenuated the risk of exchange fluctuation if he had refrained, at least after Great Britain had suspended the gold standard, from fixing the price at a date subsequent to the arrival of the cargo; whereas this might have involved his renunciation of a right given to him under the contract, but would have been far more prudent in a period of monetary crisis that placed serious difficulties in the way of the trade of all countries, and would have saved the defendant uncertainty over a long period as to the validity of all the accounts made between the depreciation of the pound and the conversion of the contract into dollars by agreement between the two parties, which uncertainty lasted until that decision was taken;

Whereas, for these reasons, the claim of the plaintiff for a retroactive conversion of the dollar discounts from the date of the depreciation of the pound must be rejected as unfounded and cannot therefore lead to the condemnation of the defendant;

Whereas, as regards the question of the conversion into dollars of the smelting costs, there is no ground for a solution other than that accepted for the conversion of the gross price;

Whereas, further, the claim of the plaintiff for the conversion of the amount deducted for smelting costs - a claim which is important even for the accounts converted into dollars after November 20th, 1931 - is logically based upon the intenable supposition that the real smelting costs are always equivalent to the amount of £ per English ton in gold currency, when, in reality, the fixation by contract of the amount to be deducted at this figure was only an estimate entailing risks for the plaintiff both from the point of view of the real smelting cost and from that of the exchange rate;
Whereas the latter risk turned out to be far more serious than in all probability the parties expected, but whereas that is a vicissitude of commercial life which could not justify a modification of the contract in dispute without the agreement of both parties;

Whereas the claim of the plaintiff for a conversion of the smelting costs is therefore unfounded;

Whereas the plaintiff is therefore bound to pay the final invoices of the defendant, made out along the lines approved above;

Whereas, once the claims of the plaintiff have been dismissed and the plaintiff has been directed to pay the defendant the amount claimed by the latter, it is fair that the total costs of arbitration should be paid by the plaintiff;

For these reasons, I, the arbitrator:

Award and find the plaintiff's claims to be void of foundation and dismiss those claims;

Award and find the counterclaim of the defendant to be justified;

Award and direct the plaintiff to pay the defendant the amount claimed by the latter;

Award and direct the plaintiff to pay the total costs of arbitration, amounting to Frs. fr. 3,956.40, including all duties, stamp duties and registration fees which might be levied an or in connection with the award, should it have to be enforced by recourse to law.

**Referring Principles:**

V.2.3 - Nominal-value principle