Title:
ICC Second Preliminary Award Made In Case No. 1512, YCA 1980, 170, 174 et seq. (also published in: ASA Bull. 1992, at 505 et seq.).

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[...]

PRELIMINARY AWARDS IN CASE NO. 1512

Arbitrator: Prof. Pierre Lalive (Geneva)

Parties: Plaintiff: an Indian cement company
        Defendant: a Pakistani bank


Facts

By an agreement, dated September 30, 1964, a Pakistani cement manufacturer and Mr. M. undertook to repay a debt owed to an Indian cement company (the plaintiff) in the form of a delivery to the latter of quantities of cement over a period of years. This agreement was concluded together with a separate but adjacent agreement between the plaintiff and a Pakistani Bank (the defendant) under which the bank guaranteed the Pakistani cement manufacturer's undertaking and promised to pay the plaintiff 94 Pakistani Rupees for every ton of cement not delivered by the Pakistani cement manufacturer.

In 1965 there was a period of hostilities (September 6-22) between India and Pakistan, during which the respective governments adopted, inter alia, legislative measures restricting commercial relations between their nationals. Hostilities ceased after the Security Council Resolution ordering a cease-fire on September 22, 1966. Meanwhile the Soviet Union had offered its good offices which led to the Tashkent Declaration on January 10, 1966.

The bank guarantee provided that all disputes in connection with the guarantee were to be settled under the Arbitration Rules of the ICC by a sole arbitrator. When the Pakistani cement manufacturer failed to make any of the agreed upon deliveries for the years 1965, 1966 and 1967, and the Pakistani Bank (defendant) failed to make payment under the bank guarantee, the plaintiff began arbitration proceedings in July 1966.

Arbitrator: Prof. Pierre Lalive was appointed by the ICC Court of Arbitration as the sole arbitrator. The arbitration took place in Geneva, Switzerland.
II. SECOND PRELIMINARY AWARD (OF JANUARY 14, 1970) MADE IN CASE NO. 1512

Subject Matter:

- lis pendens [not included in the TransLex]
- competence of arbitrator [not included in the TransLex]
- estoppel
- law applicable to arbitration [not included in the TransLex]
- international commercial arbitration (concept) [not included in the TransLex]
- New York Convention, Art. V, para. 1 under d [not included in the TransLex]

When in February 1968 the arbitrator sent new draft Terms of Reference to the parties, the defendant Pakistani Bank raised a further objection to the arbitrator's jurisdiction. It was argued that the arbitrator had become functus officio due to:

- the pendency of an action introduced in February 1967 by the Pakistani cement manufacturer and Mr. M. against the defendant in the High Court of West Pakistan (this point was not brought up until March 1968);
- the pendency of an action introduced on May 27, 1968 (after the arbitrator had refused to stay the arbitration proceedings), by the defendant against the plaintiff as well as against the Pakistani cement manufacturer and Mr. M. in the High Court of West Pakistan;
- an injunction having been granted on the defendant's request by the High Court of West Pakistan on August 9, 1968, restraining the plaintiff from pursuing the present arbitration.

The plaintiff had signed the new Terms of Reference on March 13, 1968. The defendant signed on August 15, 1968, while stating that it was doing so subject to its various objections and contentions regarding the validity of the arbitration.

2. Estoppel

With respect to the arguments put forward by the defendant, the arbitrator considered them first from the point of view of estoppel:

'Assuming now, for the sake of argument, that the Defendant's propositions are correct in law as to the effect of suits pending in Pakistani Courts on the present international arbitration, the least that may be said is that the defendant was remarkably slow in putting them forward and acting accordingly.

'. . . It may be noted, in this connection, that if the defendant felt that its interests had to be protected by a West Pakistani Court, it could have acted a long time earlier, and was certainly under no legal compulsion to institute [reference is made to the second law suit ? Gen. Ed.] at the exact date it chose, i.e. on May 27, 1968. The sequence of events tends to show beyond reasonable doubt that the defendant's decision to institute this suit was essentially another tactical move to gain time and slow down or paralyse the arbitration proceedings.

'. . . However that may be, the fact remains that the defendant did not, for some time, act under the legal theory he now puts forward. Far from considering the arbitrator as *functus officio* after May 27, 1968, the defendant submitted to him, as shown above . . . , various proposals and suggestions. Had these suggestions been accepted by the arbitrator, the defendant would not, in all probability, have raised its "new objection" . . . . When its proposals were rejected, as being against the letter and the spirit of the ICC Rules, the defendant decided
that the arbitrator became "functus officio".

'Now there is a general principle of law, both international and municipal, well-known in Common Law systems in particular" that

"a man shall not be allowed to blow hot and cold ? to affirm at one time and to deny at another . . . Such a principle has its basis in common sense and common justice, and whether it is called estoppel or by any other name, it is one which courts of law have in modern times most usefully adopted".²

'Under this principle alone, the defendant's "further objection" to the arbitrator's jurisdiction ought to be rejected.'

[...]

²The arbitrator quotes from the English Court of Exchequer, Cave v. Mills (1862), Hurlstone & Norman, p. 913 at p. 927.

Referring Principles:

I.1.2 - Prohibition of inconsistent behavior