Title:
ICC Award No. 1795, YCA 1999, at 196 et seq.

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Final award in case no. 1795 of 1 December 1996

Parties: Claimant: Company X (US)
Defendant: Company Y (Italy)

Place of arbitration: Milan, Italy

Published in: Unpublished. Original in Italian

Subject matters: - termination of contract

Facts

In 1983, the Italian company Y and the US company X entered into a joint venture which lasted until 1987, when Mr. Z, general manager of the US company, became the export director of the Italian company by a consultancy and brokerage contract concluded between the Italian company with the US company. The contract was entered into for two years and was tacitly renewable for the same period.

The contract was renewed twice and would have come up for a third renewal in the spring of 1994. In September 1993, however, the Italian company and Mr. Z negotiated an exclusive agency contract which was signed on 1 January 1994. The contract provided that Mr. Z would be based in Perth, Australia, as the Italian company’s exclusive agent in the Far East.

The agency contract was concluded for a period of three years and was to be tacitly renewed unless notice of non-renewal was given six months before expiry (Clause 3). Clause 18 of the contract provided:

"Each party may terminate this agreement before its expiry or renewal if the other party shall find that this agreement has been violated by the other party and the violation has not been cured. In case of termination by one of the parties, all the conditions of this contract shall be terminated as of the date of the notice, with the following exceptions: a) the
agent shall leave all advertising and sales materials supplied by the principal at the principal's disposal on the agent's premises; b) the principal shall pay to the agent all commission fees for orders received, independent of when the orders have been accepted or confirmed or when delivery takes place or the invoices are issued by the principal."

The contract also contained a clause referring all disputes to the Chamber of National and International Arbitration in Milan.

On 23 January 1995, the Italian company Y, alleging unsatisfactory sales results, terminated the contract as of 1 January 1995 by a fax to Mr. Z personally. On 9 March 1995, the Italian company confirmed the termination by a letter to the US company X.

The sole arbitrator deciding ex aequo et bono and applying the UNIDROIT Principles of International Commercial Contracts, held that the unilateral termination of the agency contract was invalid as it was in violation of the terms of the contract and the UNIDROIT Principles. The arbitrator awarded the commission fees due to the agent at the contractually agreed rate of 15% as well as compensation for loss of profit.

Excerpt

[...]

II. NO VALID TERMINATION

[...]

1. Failure to Reach the Contractual Sales Target

[7] "... As to the facts: According to the Italian company, the 1994 sales in the countries exclusively covered by the US company were ITL 1,746,489,224 (on a target of 2 billion) for product A and ITL 50,207,226 (on a target of 800 million) for product B, the total being ITL 1,769,696,450. This sum is accepted by the US company. The tribunal notes that the failure to meet the contractual target for product A was moderate; not so for product B. A termination of the contract of 1 January 1994 because of a 'fundamental' non-performance could thus only concern product B.

[8] "As to the law: It must be mentioned in the first place that according to Art. 1.3 of the UNIDROIT Principles, the basic principle of contract law, that of 'pacta sunt servanda' requires that 'a contract may be modified or terminated whenever the parties so agree. Modification or termination without agreement are on the contrary the exception and can therefore be admitted only when in conformity with the terms of the contract or when expressly provided for in the Principles'.

2. Was the Termination Allowed under the Contract?

[9] "... If no distribution or sales contracts were concluded, 'it will be decided by agreement if there will be a renegotiation as to the area and/or the agent's commissions'. Also, each party could terminate the agreement before its expiry 'if the other party shall find that this agreement has been violated by the other party and the violation has not been cured'.
(Clause 15 of the contract).

[10] "It clearly appears from the above that the parties to the contract explicitly intended that in case the sales target were not met (up to the point of not having concluded contracts or sales), the parties were to decide by agreement whether to renegotiate the area and/or the commission fees. Hence, the termination of the contract on this ground was excluded by the parties.

[11] "Further, Clause 18 of the contract, which concerns the possibility to terminate the contract before expiry, apparently should be interpreted, notwithstanding its meandering wording, in the sense that non-performance under the contract should be communicated to the non-performing party so that it could, if possible, remedy such non-performance. The Italian company does not contest that no oral or written warning preceded the termination of 23 January 1995. Hence, the termination was in any case not in agreement with the stipulations of the parties in the contract of 1 January 1994.

[12] "The same result is reached by applying the UNIDROIT Principles on termination. According to Art. 7.3.1 of the Principles, 'A party may terminate the contract where the failure of the other party to perform an obligation under the contract amounts to a fundamental non-performance'. In order to ascertain whether the non-performance, respectively the obligation which the non-performance concerns, is fundamental, we must again consider the intention of the parties. It seems impossible to deem fundamental for the termination a situation which was explicitly and expressly provided for by the parties to the contract as being renegotiable, by an agreement of the parties, as to the area or the commission fees.

[13] "The conclusion to be drawn from this analysis of the facts, the contract and the law applicable to the dispute is that the termination of the contract of 1 January 1994 on 23 January 1995 was unfounded. Hence, it is unnecessary to ascertain whether, as maintained by the US company and contested by the Italian company, the failure to meet the sales target did not as such allow the Italian company to terminate the contract, this is irrelevant for reaching a decision in this arbitration."

[14] The tribunal also rejected the Italian company's further allegations mentioned under [5].

[15] ...

IV. DAMAGES

[18] "As the termination of the contract of 1 January 1994 was not in agreement with the contract and was not 'excused' under the UNIDROIT Principles (Art. 7.4.1), the agent is entitled to the commission fees under the contract and also to compensation of the damages caused by the termination of 23 January 1995, which damages, according to Art. 7.4.2. of the UNIDROIT Principles, include 'both any loss which it suffered and any gain of which it was deprived, taking into account any gain to the aggrieved party resulting from its avoidance of cost or harm'."

1. Loss suffered

[19] "... [T]he agent maintains that 'the Australian choice' was thought of and agreed upon in order to give effect to the agency contract stipulated with the Italian company, since nothing could have prevented the agent and the US company from requesting the continuation of the preexisting relationship in Italy, as [that relationship] was not terminated timeously by the Italian company. Hence, the US company claims the costs incurred by its managing director Mr. Z for settling down with his family in Australia, being ITL 198,227,000.

[20] "According to the comment to Art. 7.4.3 of the UNIDROIT Principles (UNIDROIT, ad 3 p. 218), harm must be certain and must be a direct consequence of the non-performance. It appears here that the expenses listed by the US company relate to the performance of the contract of 1 January 1994 and have not been caused by the termination thereof on 23 January 1995. This would not apply to the fact that Mr. Z had to sell his house because the [agency] contract was terminated before expiry. However, according to Art. 7.4.4 of the UNIDROIT Principles,
‘The non-performing party is liable only for harm which it foresaw or could reasonably have foreseen at the time of the conclusion of the contract as being likely to result from its non-performance.’

The purchase of a house by the agent does not fall under the above definition of damage.

[21] "We can add that it is doubtful that the US company, as a party to the contract of 1 January 1994, is the creditor for the expenses incurred by the family of Mr. Z. The arbitral tribunal holds that the US company may not claim a credit of another party, in casu the family of Mr. Z, in the arbitration. For the above reasons, the claim of the US company for a compensation of the expenses incurred by the family of Mr. Z for settling in Australia may not be granted.

[22] "The US company also claims as set-up costs 50% of the expenses for furnishing its office,... being ITL 21,759,105. The US company itself stresses that 'these costs would certainly not have been incurred if the Italian company had not stipulated ... the agency contract at issue'. The Italian company maintains that these expenses concern goods and services relating to the US company's activity. The contract provided that the US company would pay the costs relating to its activity as an agent, and that the Italian company would only pay commission fees. Hence, there is again no causal link between the termination of the contract of 1 January 1994 and the costs claimed by the US company according to Art. 7.4.4 of the UNIDROIT Principles discussed above.

[23] "Further, refunding the costs incurred for setting up the office would be contrary to Art. 7.4.2 of the UNIDROIT Principles, according to which 'the aggrieved party must not be enriched by damages for non-performance' (UNIDROIT ad 3 p. 215).

[24] "It should be noted that according to ... the contract, the agent was entitled to a compensation of 'legal costs', that is, apparently, of the legal costs incurred in the performance of its contractual obligations. However, the US company does not claim 'legal and commercial costs' under this heading and the sole invoice concerning legal costs submitted by the US company concerns Mr. Z's [taking up] domicile [in Australia] and is addressed to him and not to the US company. For the above reasons, the US company's claim for compensation of set-up costs may not be granted."

[25] The arbitral tribunal also rejected the US company's claim for certain costs incurred in the performance of the contract (travel, secretarial assistance, rent of the office, etc.) on the same grounds.

[...]

1 Art. 7.4.1 of the UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles) reads: "Any non-performance gives the aggrieved party a right to damages either exclusively or in conjunction with any other remedies except where the non-performance is excused under these Principles."

Referring Principles:

- IV.1.2 - Sanctity of contracts
- VI.1 - Termination of contract in case of fundamental non-performance
- VII.2 - Principle of foreseeability of loss