9. AWARD MADE IN CASE NO. 2478 in 1974 (ORIGINAL IN FRENCH)

Parties: Claimant: French buyer

Respondent: Rumanian seller

Subject matters: Re-adaptation clause [not included in the Trans-Lex]

Force Majeure: cancellation of export licence

Damages: duty to minimize

Facts

The arbitral tribunal, sitting in Paris, had to rule on a claim for damages made by a French company against a Rumanian company which had not delivered to it a certain quantity of fuel because of a change in the price of oil and had thus, according to the claimant, violated the sales contract concluded by the parties. The respondent, on the other hand, maintained that its refusal to deliver the oil was entirely justified, asserting among others the following two reasonings:

— An appendix to the contract contained a clause worded as follows: 'In the event of devaluation or revaluation of the French franc or the dollar, the parties shall come together to examine the consequences of the new situation and agree on the measures to be taken in order to reestablish the contractual equilibrium as intended by and in the initial spirit of the contract for the as yet undelivered quantities as well as for the as yet unpaid quantities'.

This clause was to be interpreted as a clause of 'unforeseeability or monetary parity' and it placed the parties under an obligation to adjust the prices when the contract's initial conditions had undergone a change. As the negotiations entered into by the parties following the devaluation of the dollar proved to be abortive, the contract had lost its reciprocal nature and no longer needed to be performed.

— The cancellation by the Rumanian authorities of the export licence concerning the oil, the subject matter of the contract, constituted a case of force majeure, exempting the seller from all contractual liability for having stopped the deliveries.

Award

1. The arbitral tribunal rejected the first reasoning.

[...]
'Appendix 3 to the contract actually constitutes only an obligation to negotiate in view of agreeing on measures to be taken in order to re-establish a contractual equilibrium in the event that the French franc or the U.S. dollar (the contract currencies) would be devalued or revaluated. It must be noted that the movement of prices on the world oil market as such is not covered by this provision, which is by no means a price revision clause. In addition, Appendix 3 does not automatically entitle the parties to the cancellation of the contract should the negotiations fail. The respondent could certainly have had recourse to arbitration had it considered that the other party's refusal to accept the new price offered by the respondent was unjustified. But as long as the arbitral award, which would be favourable to it, had not been made, nothing in Appendix 3 authorized the respondent to suspend unilaterally the deliveries provided in the contract.

[...]

2. On the other hand, the second reasoning was accepted in principle. However, in the instant case, respondent did not invoke in time the force majeure.

'The cancellation of the export licence by the Rumanian authorities undeniably constitutes a case of force majeure, both on the level of the general principles of law and on the level of Article 9 of the contract.

'However, Article 9 required the party invoking it to inform the other party without delay, in writing, of the occurrence of the event of force majeure and of the consequences which it intended to draw from it. Now, the Rumanian authorities' decision, dated May 10, 1973, was only made known to the other party, through the intermediary of the ICC Court of Arbitration, in an appendix to a letter dated November 29, 1973. The respondent thus lost the possibility of taking advantage of it with regard to the deliveries due during the second and third quarters of 1973.'

3. The respondent's responsibility being established, the arbitral tribunal proceeded as follows in calculating the extent of the damage suffered by the claimant:

[...]

'Regardless of the price which the claimant really paid in order to obtain the missing quantities, it must not be forgotten that under the general principles of law, which moreover are reflected in Articles 42, section 2, and 44, section 1 of the Federal Code of Obligations, it is up to the injured party to take all necessary measures so as not to increase the injury.

[...]

Referring Principles:
- IV.6.9 - Duty to notify / to cooperate
- VI.3 - Force majeure
- VII.4 - Duty to mitigate
- VIII.1 - Definition