Title:
ICC Award No. 2795, YCA 1979, at 210 et seq.

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AWARD MADE IN CASE NO. 2795 IN 1977 (ORIGINAL IN FRENCH)

Arbitrators: Dr. Anghélos Foustoucos (Greek), President; Robert Brassens (French); Prof. Tudor R. Popescu (Rumanian)

Parties:
Claimant: Swiss buyer

Subject matter:
- interpretation of contract;

Facts

By exchange of telexes occurring November 19-20, 1974, a Swiss company (buyer) bought from an enterprise of a socialist country (seller) 18,000 tons of oil products: The sale was F.O.B. at a port of seller's country. The oil was to be loaded on ship X chartered by the buyer, between November 21-26, 1974. The buyer had opened a letter of credit in favour of the seller for the total sales price of US $ 1.755,000.

Ship X chartered by the buyer gave Notice of Readiness to the seller on November 26, 1974, at 15 : 15 hours. According to the charter party concluded between the ship owner and the buyer, the loading should have started within six hours after the notification (i.e. before 21 : 15 hours on November 26, 1974). However, the seller could start the loading only on December 2, 1974, on 22 : 30 hours. The loading was finished on December 7, 1974, on 15 : 15 hours.

In the meantime, on December 2, 1974, the parties signed a final contract in seller's country, which contract was in fact a codification of the agreements concluded before by exchange of telexes. The printed contract contained a certain number of specific type written clauses by which the parties arranged especially the delay of the delivery. Accordingly, in one clause there was stated 'Time for loading of (ship X) (November 21-30, 1974) will be 60 hours . . .'. The dates November 21-30, 1974, were indicated also in an Annex to the contract, notwithstanding the fact that the contract was signed on December 2, 1974. As regards the liability of the seller for demurrage, a typewritten clause provided 'Possible demurrage will be calculated on the basis of Worldscale and conform the freight level as determined in the charter-party but may not exceed the basic rate indicated in World-scale under the heading Demurrage Rates. In order to determine the basic rate (demurrage rate) there shall be taken in consideration the quantity effectively loaded, and not the capacity of the ship'.

The contract contained also a clause which declared that disputes would be solved by means of arbitration under the ICC Arbitration Rules according to Swiss law. A final clause stated that 'Preceding negotiations and correspondence have no effect whatsoever (sont nuls et non avenus').

The Swiss buyer had to pay to the owner of the ship US $ 37.290 which amount represented 206: 30 hours of demurrage being calculated in accordance with the charter party on the basis of Worldscale 220 (which is US $ 4.334 per 24 hours). The Swiss buyer requested then the seller to pay US $ 45.838 which represented 253: 50 hours of demurrage calculated on the basis of Worldscale 220. The seller answered that he admitted that he owed US $ 13.253
which represented 179:42 hours of demurrage calculated on the basis of Worldscale 100 (which is US $ 1.770 per 24 hours). The seller paid this amount to the Swiss buyer.

Before the arbitrators, the Swiss buyer (who had initiated the arbitration) claimed amongst other things the difference between the US $ 45,838 and the amount paid by the seller.

**Award**

**Interpretation of the contract**

The question was whether the parties had regulated by contract the consequences of the delay. The arbitrators found that this was the case. The fact that the contract signed on December 2, 1974 stated twice as delivery time November 21-30, 1974, was interpreted as an implied waiver by the buyer of any right to assert a claim in respect of the delay in delivery by the seller other than that based on the specific clauses in the contract.

The Swiss buyer had also alleged that the clause concerning the demurrage would be obscure and should be interpreted against the seller who had drafted the clause. The arbitrators found, however, that the clause was drafted by both parties as it was added in type writing to a printed form in the mother language of the Swiss buyer i.e. French. In this respect the tribunal cited Art. 18 of the Swiss Federal Code of Obligations which reads: ‘In order to appreciate the form and clauses of a contract the true and real intent of the parties must be searched for, without sticking to inexact expressions and declarations which may be contained therein, either because of error, or . . .’.

[...]

**Referring Principles:**

- IV.5.1 - Intentions of the parties
- IV.5.4 - Interpretation against the party that supplied the term