Title:
ICC Award Nos. 3099 and 3100, YCA 1982, at 87 et seq. (also published in: Clunet 1980, at 951 et seq.).

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AWARD OF MAY 30, 1979, CASE NOS. 3099 AND 3100 (ORIGINAL IN FRENCH)

Arbitrators: Prof. Robert Patry (Pres.), Prof. Nguya Ndila, Prof. Ahmed Mahiou

Parties:
Claimant: Algerian State enterprise, seller
Defendant: African State enterprise, buyer

Published in: 107 Journal du droit international (Clunet) 1980, no. 4, pp. 951-955, with comment by M. Yves Derains, pp. 955-959.

Subject Matter:
- law applicable to procedure [not included in the Trans-Lex]
- law applicable to substance (non-retroactivity of laws) [not included in the Trans-Lex]
- force majeure (State bank refuses to provide foreign currency)
- moratory interests [not included in the Trans-Lex]
- compensation for damages and interest [not included in the Trans-Lex]
- equity as compared to amiable composition [not included in the Trans-Lex]
- depreciation of the US dollar [not included in the Trans-Lex]
- costs of arbitration [not included in the Trans-Lex]

FACTS

1. In 1974 and 1975 Claimant and Defendant concluded two contracts, according to which Claimant sold to Defendant refined oil products (Contract no. I of 1974, with Annex) and crude oil (Contract no. II of 1975). Both contracts contained identical provisions concerning moratory penalties in favour of the seller, a force majeure clause, an exoneration clause, and an arbitral clause referring possible disputes to the ICC, specifying an arbitral tribunal of three arbitrators, having its seat in Geneva, and that Algerian law was applicable.
2. Claimant delivered all the products, which was acknowledged by Defendant. Defendant, however, did not pay some of the invoices within the time which was contractually fixed. Thereupon, Claimant filed two requests for arbitration with the ICC, claiming the principal sum of US $ 26,043,662.49, plus interest of 4.75% for Contract No. I as of the various dates of the invoices, 9% for Contract No. II; US $ 210,302.93 in total for contractual interests on invoices which had been paid, but with delay, and US $ 13,000,000.00 in total for damages and interest. Claimant further demanded that Defendant pay the costs of the entire procedure, inclusive of those for legal assistance. Finally, it requested that the decision could be provisionally executed.

The Defendant acknowledged the principal sum, but, concerning the penalties, and damages and interests, invoked the force majeure clause contained in art. 18 of the contracts. Defendant declared that it had in its bank the necessary sums for payment, but could not obtain, in spite of several representations to the Central Bank of Defendant's country, the authorization for payment. Defendant therefore stated that, without any fault on its part, it found it impossible to realize the payments. As proof of the aforementioned arguments, Defendant produced several documents and, in particular, a letter of April 21, 1977, from the Governor of the Central Bank in which he agreed to provide the necessary foreign exchange for payment of the debt (principal sum and interests) "in one sum after twelve months". Defendant transmitted this letter to Claimant but did not claim that Claimant accepted the moratorium of twelve months.

3. The arbitrators were appointed, one by each party, and the President by the Court of Arbitration of the ICC. A first hearing took place on February 4, 1978, at the Courthouse in Lausanne. On the same day the arbitrators rendered a partial award in which they joined the two cases and ordered Defendant to pay to Claimant the principal amount of $ 26,043,622.49, reserving the question of interests, and penalties and damages for their final award.

EXTRACT

[...]

3. Force majeure

Defendant acknowledged not to have paid the larger part of the purchase price, but invoked the exoneration clause of the contract because, through no fault of its own, it could not obtain the necessary foreign currency from the Central Bank in its country. Defendant relied on article 18 of the two sales contracts, reading:

"The parties will not pay any losses and damages, of whatever nature which have arisen from any delay or default in the performance of the obligations of the contract caused by force majeure, unless there is, however, fault or negligence on the side of the party who invokes force majeure. For the purpose of the contract a case of force majeure will exist especially when the seller or the buyer complies with any provision or measure resulting either from the text of a law or a regulation issued by any public authority in Algeria, or from an international agreement to which Algeria is a party, irrespective of whether the validity or application of such text or such agreement is contested or not."

The arbitrators considered:
the Defendant — may invoke a case of force majeure, which is not limited to the only example given in article 18, para. 1. This is clearly evident from the text where it is said in the first sentence that 'the parties' (plural) will not pay ..., and in the second sentence from the words 'among others' (notamment in French - Gen.Ed.) that merely an example was given.

"The Arbitral Tribunal therefore cannot reject without further consideration the defence raised by (Defendant). It has to examine whether the Defendant really found itself, without fault on its part, in a situation of force majeure.

"Lacking a general definition of the concept of force majeure in the contractual (art. 18, para. 1, of the two sales contracts) and legal texts, the arbitral tribunal must turn to jurisprudence and doctrine. In French law, force majeure is an unforeseeable and unavoidable event which comes generally from outside the person who invokes it. The concept is therefore defined by its three characteristics: externality, unavoidability and unforeseeability (see in this sense Francois Chabas, Répertoire Dalloz de droit civil, La force majeure, No. 1).

"First of all it should be examined in fact and in law whether the circumstance that the Central Bank (of Defendant's country) did not make the foreign currency timely available to (Defendant) should be considered as an exterior event (événement extérieur-Gen. Ed.). In its written pleadings of April 4, 1978, the Claimant contests this, as the Central Bank and (Defendant) are both legal persons, falling under the same authority — the Head of State (of Defendant's country) — under whose auspices the contractual relations were established. This contention is not without relevance.

"In a decision of April 15, 1970, the French Supreme Court, in relation to contracts concluded between Air France and its employees, judged that 'the ulterior, irregular intervention of the guardian authority (l'autorité tutelle — Gen.Ed.), i.e., the State, to try, in that capacity, to impede Air France from carrying out its obligations, cannot be objected to by the debtor who is submitted to the guardianship as an unforeseeable and unsurmountable intervention of a third person, extraneous to the debtor. The link between the State and the debtor prevents the intervention by the State from being constituted as a fait du prince'. The avocat général, in turn, expressed the following opinion in this case: 'If the contention of Air France were admitted, it would become much too easy for companies, which are submitted to the guardianship of the State, to exonerate themselves from their obligations. It would then be sufficient for them to provoke withdrawal of authorization and subsequently invoke the fait du prince. The legal relations would be without stability or security. In fact, in relation to third parties, such a company and the State form one and the same legal entity; the intervention of the public authority, which is organically linked to the normal functioning of the company, does not constitute an outside event which can be invoked against third persons and contract parties' (see Recueil Dalloz 1971, Jurisprudence p. 107 et seq., especially pp. 109 and 110)."

The arbitrators equated this case to the one at hand:

"According to Claimant, the two sales contracts of February 14, 1974, and January 28, 1975, at the personal initiative of the Head of State (of Defendant's country), were negotiated and signed by one of the Presidential Counsellors of (that country) and not by Defendant's responsible organs. These contentions have not been seriously contested. Logically, the principles formulated by the French Supreme Court in the above decision should therefore be applied to the present case: this seems warranted by the security of international contracts. However, the arbitral tribunal cannot ignore the fact that (Claimant), which itself seems also to be an entity of public law or mixed law, submitted to the guardianship of the Algerian State, has reserved for itself in Art. 18 (para. 1, 2nd sentence, and para. 2) the possibility of bringing forward the Algerian State's intervention as a case of force majeure. It, therefore, appears doubtful that the Claimant would be able to deny the Defendant to invoke the default of the Central Bank of its country as the intervention of a third person, extraneous to it (le fait d'un tiers qui lui serait étranger)."
"Meanwhile, it is not necessary to deal with this question. In view of the documents produced by (Defendant) at the request of the arbitral tribunal, it should be considered here in any case that the element of unforeseeability is lacking. Indeed, it appears clearly from the legal provisions (of Defendant's country) that the foreign exchange regulations were already in force at the moment that the two sales contracts were concluded."

The arbitrator stated that the present foreign exchange regulation dates from 1967, and continued:

"It has not been contested that the payment in foreign currency of the amounts due was subject to a previous authorization by the Central Bank of (Defendant's country). Well established case law has, since 1927, affirmed in principle that ‘a fact which falls under the application of a law, anterior to the contract out of which the obligation arises, does not constitute a case of force majeure, freeing the debtor of his obligation. Thus, the buyer of a product... cannot invoke as force majeure the fact that he failed to obtain the required authorization of the export of capital control committee... as it is up to him to take the necessary ‘measures to secure timely the desired authorizations’ (see La Semaine juridique 1927, p. 138)."

The arbitrators further considered the argument of (Defendant), that it had fulfilled its obligations as importer by obtaining import licences and putting sufficient national currency at the disposal of its bank to allow payment in foreign currency. The arbitrators considered:

"A careful study of the produced documents reveals that the sums mentioned in the import licences — in foreign currency — do not correspond with the amounts mentioned in the invoices of (Claimant). The dates do not correspond either. Moreover, the Central Bank (of Defendant's country) has not given its authorization: the relevant item in the import licenses is left open."

Next the arbitrators referred to the serious economic situation to which the 1979 annual report of the Central Bank referred.

"Under these circumstances (Defendant) knew — or at least should have know — that its country found itself in a difficult monetary situation and that the Central Bank would perhaps not be in a position, when invoices became due, to provide the necessary foreign exchange. This is a risk which the Defendant could not ignore, taking into account the exceptional importance and the frequency of the payments to be made in US dollars. Therefore it was up to (Defendant), and not its bank, to obtain the necessary guarantees from the Central Bank (of its country); either at the moment the contracts were concluded, or at the latest before taking delivery of the refinery products or the crude oil.

"According to the rules of good faith Defendant could not bind itself in respect to Claimant to pay for the products without having the certainty of being able to effectuate these payments in foreign currency on the dates they became due. However, Defendant does not claim to have asked the Central Bank for this guarantee. It was only later, after having taken delivery of the larger part of the products, that Defendant approached the Central Bank (in its country), the sole authority empowered to make the necessary foreign currency available to Defendant."

The arbitrators therefore concluded:

"As the Defendant did not succeed in proving that the three conditions for force majeure (externality, unavoidability, and unforeseeability) have been met, it cannot invoke the exoneration clause provided for in art. 18, 1 of the contracts concluded on February 14, 1974, and January 28, 1975. For Defendant it is not a case of force majeure that the Central Bank did not provide it with the necessary foreign currency for the payment of the invoices. Moreover, Defendant itself is not without fault. It did not, as was warranted by the circumstances, take the precaution of obtaining from the Central Bank the assurance that it would receive this currency. In this way..."
the Defendant made a relatively grave mistake which should be attributed to it, and not to its bank. Indeed, in view of the exceptional importance of the amounts to be paid, it is Defendant who should have made arrangements that the payments in US $ could be effectuated within the contractual time limit.

"Therefore, in principle, (Defendant) should be held responsible for any damage resulting from the nonperformance or belated execution of its obligation to pay for the products which (Claimant) delivered regularly. It remains to be considered only whether Claimant's demands are justified."

[...]

**Referring Principles:**

VI.3 - Force majeure