AWARD MADE NOVEMBER 29, 1980, CASE NO. 3380 (ORIGINAL IN FRENCH)

Arbitrators: Ettore Mattera, Jacques El-Hakim, Pierre Lalive (pres.)

Parties: Claimant: Italian enterprise

Defendant: Syrian enterprise

Published in: 108 Journal du droit international (Clunet) 1981, no. 4 pp. 928-930, with comment by Yves Derains, pp. 930-931

Subject matter: - law applicable to substance [not included in the Trans-Lex]

- general principles of law and justice

- interpretation of contract

- amiable composition [not included in the Trans-Lex]

- drafting of arbitral clause [not included in the Trans-Lex]

FACTS

On February 13, 1974, the parties concluded a contract in Damascus, providing for the performance of works, the delivery of supplies as well as for other transactions. On that same date, the contract was approved by the Syrian Minister of petroleum, electricity and mineral resources, and it was ratified by a specific law on March 7, 1974.

The contract, in Article 19.6, contained the following arbitral clause:

"Arbitration shall be held at Geneva (Switzerland) and shall judge according to the general principles of law and justice."

The italicized words were handwritten, replacing the original text stating that the arbitrators were to decide "ex aequo et bono". On the other hand, Article 25 of the contract contained a choice of law clause which stated:

"This Agreement shall be subject to and constructed [sic] in accordance with the Laws in Syria."
The parties all agreed on the interpretation of these claims. Thereupon, the arbitral tribunal deemed it appropriate to settle first of all the questions in an interim (partial) award.

EXTRACT

[...]

"Another clause of the contract (article 25) provides (under the heading 'Law', which is, however, according to article 27.2, without legal value) that 'this Agreement shall be subject to and constructed in accordance with the laws in Syria'. This technique of drafting has resulted in a controversy between the parties, the Claimant requesting the tribunal to use article 19.6 exclusively as a basis, whereas the Defendant, on the basis of article 25, considers Syrian law to be solely, or in any case principally, applicable.

"The arbitral tribunal considers that the interpretation should seek to reconcile the various clauses of the same contract. Therefore, it cannot accept the respective contentions of the parties, who both of them reduce a contractual provision to a kind of 'clause de style' without meaning, in disregard of the principle of useful effect ('ut res magis valeat quam pereat'). Defendant's contention, that article 25 would have lost its effect after the contract had been performed, and would, in case of litigation, have to yield to the 'lex specialis' of article 19.6, cannot be accepted. Nor is it possible to consider article 25 as solely decisive, as the reference in article 19.6 to the general principles would then lose all practical meaning.

"By stipulating clauses 19.6 and 25 of the contract at the same time, the parties have intended, or should be considered to have intended to solve the question of the applicable law in a harmonious way. And it is hardly necessary to add that the principle of the autonomy of the arbitral clause does not impede this; detached from disputes on the competence of arbitrators, or even on the law applicable to the arbitration, this principle appears to be without relevance here, where the law applicable to the substance has to be decided, by using the sparse elements in the various contractual clauses, among which the arbitral clause.

"Article 25 provides that 'this Agreement shall be subject to and constructed in accordance with the Laws of Syria'. In itself, this hardly lends itself to interpretation. This is not the case for article 19.6 which has given rise to detailed analyses on an elevated legal, even philosophical, level, touching on the notions of Law, Justice, and Equity, as well as on that of the 'general legal principles'. In its endeavors to stick to the essentials, the tribunal takes the point of view that by inserting in art. 19.6 a reference to 'the general principles of law and justice', the parties have intended to produce legal effects. The contrary could not be assumed, in particular, from experienced negotiators, and especially not from negotiators representing an institution such as ..., which represents the Government of the Arab Republic of Syria.

"On the basis of general experience and international commercial practice in the field of contracts between private companies and governments or government controlled institutions, the arbitral tribunal holds that the essential aim of the clause in discussion was the protection of the private co-contracting party against a double risk: on the one hand that of future modifications of Syrian law which would affect the contractual balance to his disadvantage (in this sense article 19.6 contains an element of guarantee or of stabilization), on the other hand the risk that the contents of Syrian law, by possible 'exorbitant legal provisions', would only work to his disadvantage — a risk which is obviously totally unreal but exists in the mind of the merchant who often has only a vague concept of foreign legal systems.

[...]

Referring Principles:

I.2.3 - Presumption of professional competence and equality of parties

IV.5.3 - Interpretation in favor of effectiveness of contract