Title:
ICC Award No. 3540, YCA 1982, at 124 et seq. (also published in: Clunet 1981, at 915 et seq.)

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AWARD MADE OCTOBER 3, 1980, CASE NO. 3540 (ORIGINAL IN FRENCH)

Arbitrators: M. Besarovic, J. Guillermain, J. Guyet

Parties: Claimant: French enterprise
         Defendant: Yugoslav subcontractor

Published in: Journal du droit international (Clunet) 1981, no. 4, pp. 914-921, with commentary by Mr. Yves Derains, pp. 921-927

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Subject matter: - amiable composition [not included in the TransLex]
                 - law applicable to substance (lex mercatoria) [not included in the TransLex]
                 - lex fori [not included in the TransLex]
                 - partial award [not included in the TransLex]
                 - "provisional" claim by Defendant [not included in the TransLex]
                 - set-off
                 - exceptio non adimpleti contractus

FACTS

On November 3, 1975, a French enterprise (Claimant) and a Yugoslav subcontractor (Defendant) concluded a contract by which the Yugoslav party was to construct a project in the USSR, for a Soviet principal, the project being the subject of a contract between the Soviet principal and the French enterprise.

Each month, Defendant was to give an account of his progress to Claimant, who had the right to verify this, and should sign the account. The contract, in Art. VIII, clause 8.1, specified that if the account had not been signed, and no reasons had been given therefor within a week after receipt by Claimant, it would be considered to be regular and to justify payment.
Payment was regulated in Art. VII of the contract; 80 % in accordance with the extent to which the work had been executed, on presentation of the account as verified and approved by Claimant, 45 days after the end of the month concerned; 5 % would be withheld, as a guarantee for good execution and for sums which Defendant owed during the construction period, and paid 45 days after the signature on the record of definitive acceptance of the work.

Defendant would be responsible for deficiencies resulting from bad performance of its obligations, and Claimant would notify each complaint without delay.

An arbitral clause referred to ICC arbitration, to take place in Geneva, the procedure being subject to the law of the Canton of Geneva, i.e., the Swiss Concordat on Arbitration, subsidiarily to the law of the Canton of Geneva for all matters not regulated in the Arbitration Rules of the ICC. The arbitrators were to decide as amiables compositeurs.

When a dispute arose, the French enterprise initiated arbitration. During the procedure, the Yugoslav Defendant raised an incidental counter-claim, seeking an interim award, condemning the French enterprise to pay it FF 12,212,788.01 with 15 % interest as of the day the arbitration was initiated, to be provisionally enforceable. The French enterprise invoked the exceptio non adimpleti contractus, and, subsidiarily, a set-off. Throughout, the parties disagreed on the law applicable to the substance of the dispute.

EXTRACT

[...]

C. Then, after having specified Defendant's claims, the arbitrators dealt with the objections from Claimant, namely the exceptio non adimpleti contractus, and set-off.

"Considering that Claimant invokes the exceptio non adimpleti contractus, and subsidiarily, as it seems, a set-off;

"That, having the power of amiables compositeurs the arbitral tribunal holds that it should equally be entitled to examine: whether such defences could have been brought forward and that, furthermore, like any jurisdiction, it is not bound by the judicial qualifications given to the defences and exceptions, in the same manner as it is not bound by the judicial qualification of a legal action;

payment of amounts which could be set off against claims forming the objects of these claims 'sur partie';

"Considering that this fundamental principle should be recalled immediately a principle to be found in Art. 108 of the procedural law of the Canton of Geneva, the lex fori subsidiarily applicable here, which admits or refuses a partial decision only 'as the circumstances require', leaving thus to the discretion of the judge;

"That, as said before a partial decision may only be allowed with caution;

"Considering that, having the power of amiables compositeurs, the arbitrators should look even closer at the circumstances of each specific case, and accompany their partial decision with measures to safeguard the legitimate rights of each party, since 'they have been given the opportunity to put the principles of equity above the strictness of law, deciding in accordance with their conscience, ex aequo et bono' (Bellot, 'Exposé des motifs de la loi de procédure civile de Genève', 2nd ed., p. 327), or 'in equity' (Art. 31, para. 3 in fine, and Art. 36, under f in fine, of the Swiss Intercantonal Concordat on Arbitration); that the amiable compositeur is thus authorized to set aside the application of the law within the limits set by the mandatory provisions of the applicable legal system (see Locquin, Revue de l'arbitrage 1976, p. 226; Derains, comment on ICC award no. 2694/1977, Clunet
1978, pp. 988-989), as the French case law has stated with regard to set-off. (Rép. Dalloz, under Arbitrage, No. 1025 - 4);

"a. Considering that according to the general principles of law, the set-off is a form of extinction of two obligations of the same kind existing reciprocally between two persons;

"Considering that, in the case at hand, the agreement of the parties has not discarded the principle of set-off as permitted in the various legal systems;

"Considering that, according to the general principles of law, non-contractual set-off is subject to four cumulative conditions: similarity and reciprocity of the subjects, performances of an identical nature, the claims should be certain and liquid, and finally maturity of the claims (i.e., not subject to a time limit);

"That it follows from the discussions that only the third condition is disputed;

"Considering that set-off takes place, in national legal systems, under different, but related conditions; for example in Swiss law it takes place by a simple declaration of intention of one party to the other (droit formateur resolutoire; art. 124 of the Code fédéral des obligations - 'CO'; see in particular Engel, 'Traité des obligations en droit suisse', pp. 451 et seq.), whereas in French law it occurs either de plein droit par le seul effet de la loi (independently, only by virtue of the law), which means without this being asked for or known by the parties (Art. 1290 Civil Code; see in particular Ripert and Boulanger, Vol. II, p. 706, no. 1995; Weill, 'Les obligations', p. 962, no. 1041), or by judicial decision (compensation judiciaire) according to the case law and doctrine quoted below.

"Considering that, in the framework of the lex mercatoria, the arbitral tribunal will accept the claim called 'provisionnelle', and will declare, in principle, that the plea for set-off is well-founded, meanwhile accompanying the eventual payment with conservatory measures in view of its power of amiable compositeur attributed to it by the parties, and this regardless of whether the plea for set-off was only, as it seems, made by Claimant subsidiarily or by way of implication as Claimant brought forward, in the first place the exceptio non adimpleti contractus, based on a different legal qualification;

"Considering that, by means of a counterclaim, a party can legitimately oppose to the set-off of a debt which is not yet liquid, which set-off will retrospectively apply from the day on which the two claims existed at the same time; that, for instance, in Swiss law the set-off may be invoked even in case the claim is contested (Art. 120, para. 2, (0): 'Le législateur ne veut pas priver le compensant de ce mode d'extinction du seul fait que la partie adverse conteste l'a créance' (Engel, op.cit., p. 455); that, as another example, according to French law, in such a situation the judge may at its own discretion decide whether or not to admit the defence of set-off and liquidate the claim which is invoked: this is the 'compensation judiciaire', which sets aside the application of the rules contained in Art. 1291 Civil Code on the legal set-off (in particular Ripert and Boulanger, op.cit.. p: 703, no. 1979; Weill, op.cit., p. 969-970, no. 1052; Cour de Cassation (Civ.), April. 10, 1973, JCP 1974,11, 17605); that, still according to French law, if the two debts are connected, the judge cannot reject the set-off for the reason that one of the claims does not comply with the condition of liquidity, or maturity (Ripert and Boulanger, ibid.; Weill, ibid.; Cour de Cassation (Civ.), January 18, 1967, D.S. 1967.358);

"As to the law applicable to the set-off the arbitral tribunal considers the law of the contract itself, on which the two claims are based, to be applicable (see e.g., according to Swiss private international law Vischer, op.cit., pp. 217-218; according to French private international law, in particular: Loussouarn and Bredin 'Droit du commerce international, p. 621, at least for legal set-off; for judicial set-off, French private international law applies here the lex fori, which is in the present case Swiss law);
"Considering that the arbitral tribunal has the power of *amiable compositeur* and applying the generally recognized principles of commercial law, the *lex mercatoria*, holds that in principle the set-off should be accepted (which, in addition, has not been discarded by the parties in their contract) but not without, at the same time, ordering conservatory measures as will be set out below, in the case that Defendant would nevertheless demand payment;

"Considering that this is what Claimant ultimately has brought forward, while in the first place basing itself on the *exceptio non adimpleti contractus*, which will be examined below, under b;

"That Defendant contests Claimant's right to set-off by invoking Art. 1291 of the French Civil Code, which defence the arbitral tribunal cannot follow, while applying, as just stated, the 'lex mercatoria';"

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... *post alia*:

"b. Considering that, against the provisional pleas of Defendant, Claimant has above all invoked the *exceptio non adimpleti contractus*;

"Considering that, in the opinion of the arbitral tribunal this notion should be considered as belonging to the general principles of law which form the *lex mercatoria* which is applicable here;

"That, furthermore, this notion is well known in all national laws: in Switzerland in Art. 82 CO (See Engel, op.cit., pp. 442 et seq.), in France it results from case law and doctrine based on general principles (Arts. 1134 and 1135 Civil Code, and Art. 1612 for the sales contract; Ripert and Boulanger, op.cit., Vol. II, pp. 192-193, nos. 496 and 497; Weill, op.cit., pp. 484-485, nos. 467 and 468);

"That, already as *amiable compositeur*, the arbitral tribunal should accept the principle of this exception;

"Considering that the *exceptio non adimpleti contractus* is dilatory by nature, that is of a preventive nature, as it momentarily paralyzes the action for execution of the creditor, insofar as the latter has not executed or offered to execute his own performance, whilst the exception extinguishes when this performance is effectuated (Engel, op.cit., p. 443, no. 188 II A; Weill, op.cit., p. 491, no. 473);

"Considering, however, on the other hand that set-off is not a measure of prevention: 'elle constitue un procédé de dénouement, au moins partiel, de double rapport d'obligation en provoquant, au profit de chaque créancier, une appropriation de la créance de l'autre (Carbonnier, Droit civil, Vol. IV, par. 133) ...' (Jurisclasseur civil, arts. 1289-1293, fasc. nos. 108-111, no. 4); see also Messrs, Mazeaud, 'Leçons de droit civil', Vol. II, no. 1132, quoted by Claimant in his memorandum of January 4, 1980, pp. 10-11;

"Considering that it follows from the French case law relied on by Claimant that, in a construction contract, the reciprocity of the parties' obligations is opposed to the constructor obtaining the payment of the balance before the completion of the work, by making deductions for bad workmanship (four de Cassation (Civ.), November 15, 1968, Bull.Civ. III, no. 475, p. 362, as well as in Rev.trim. de dr.civil 1969, pp. 564-565); that, in the opinion of the arbitral tribunal, the decision of the Cour de Cassation of March 12, 1969, (Bu11.Civ. III, no. 220, p. 168) brought forward by Defendant, does not contradict this principle, a decision which, whilst rejecting the demand for cassation instituted by the principal who was condemned to pay the price in spite of seriously invoked bad workmanship, stated that the principal had not formulated any reservations when he took delivery of the work, as
Claimant has observed in its pleadings;

"Considering that the seizing of this arbitral tribunal, by means of principal demands and counterclaims, covers all the accounts between the parties, and that these, therefore, should be definitively fixed and approved as to capital and interests after any set-off between these demands;

As the set-off between the 'provisional' counterclaim and the principal claim has been accepted in principle (see above, under a) and as the set-off has a retroactive effect up to the day the two claims existed at the same time, it appears more expedient to this arbitral tribunal, which, in addition, has the power of amiable compositeur, to adopt the rule of set-off rather than accepting the exceptio non adimpleti contractus. This exempts the tribunal from examining whether this exception can be received as a defence to the substance in a reciprocal contract such as that of construction, which provides for subsequent performances;

"...

1 The Plaintiff is not entitled to sue because he has not performed his own part of the agreement.