Award of August 13, 1981, No. 3779

(ORIGINAL IN FRENCH)

Arbitrator: Prof. Jacques H. Herbots (Belgium)

Parties:
Claimant: Swiss seller

Published: not (yet) published

Subject matter:
- competence of arbitrators [not included in the TransLex]

FACTS

Three contracts were concluded in 1979 between the parties, all three concerning the same type of merchandise of which the quality was described in detail.

The merchandise, coming from a Canadian factory was to be delivered C.I.F. Rotterdam. The contracts were made in French and all contained - except for quantities - the same conditions, including an arbitral clause referring disputes to arbitration under the Arbitration Rules of the ICC. However, only the first two contracts were signed by the parties and executed. The third contract was not signed and before shipment from Canada took place, it was cancelled by the Respondent who complained that the merchandise delivered under the first two contracts was not in accordance with the quality prescribed in the contract.

The Canadian Factory sent one of its technicians, Dr. E., to the Netherlands and samples were taken and examined in an independent laboratory. It appeared that they were in accordance with the contractual requirements when analyzed under the North American method, but not when the European analytic method was used.

Arbitration followed in which the Swiss seller claimed US $ 55,000 (including inter alia $ 37,500 paid to the Canadian factory) in respect of the cancellation of the third contract. The Dutch buyer introduced a counterclaim of Hfl. 181,645. - covering losses in respect of the first two contracts.

EXTRACT

[...]

Permission Text:
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"IV. With Respect to the Merits of the Dispute

4. Shared responsibilities with respect to the origin of the misunderstanding

"From a telex from the Canadian factory to the Claimant (document 26) it appears that the factory claims to have been clear as to the description of the goods and the methodology, and that the contractual (possibly insufficient) description of the goods, given by the Claimant to his own clients, does not concern him at all, from which it can be deduced that the factory leaves the total contractual responsibility to the Claimant in the case he had not done likewise with his own principal, that is to say, the Respondent.

"The Claimant should have known that there was a possibility of error on the European market with respect to the appreciation of the description of the powder.

"One cannot presume that there is agreement on the (North American) method between a Swiss seller and a Dutch buyer.

"The Claimant should have mentioned that the contractual description was to be interpreted according to the (North American) method, as the Canadian supplier had done in his contract with the Claimant.


"With respect to the interpretation of the contract, the (also in Swiss law) traditional rule can be applied as well: 'in dubio, contra proferentem'.

"As Loysel wrote: 'qui vend le pot, dit le mot'.

"The seller is obliged to state clearly what obligations he is undertaking.

"The Respondent, on the other hand, knew very well that the goods were of Canadian origin, because he had had contact with the supplier.

"Consequently, the error is equally due to his negligence, for he should have asked about the meaning of the symbols used in the contractual description of the powder, of North American origin.

"The dialectics between the right of being informed, and the obligation of informing oneself is thus at the heart of the problem in the present dispute.

"The error of the Respondent is due to a negligence shared with the Claimant (in Swiss law one can find the following instances of shared negligence: A and B have concluded a sale, for which the price has been fixed on the basis of a tariff, the rectification of which has been published many times. A and B conclude a contract without informing themselves about the provisions of clearing that are applicable to their deal - see ENGEL, Pierre, Traité des obligations en droit Suisse, Neuchatel, 1973, p. 257).

The (North American) method being more frequently used than the other methods, the negligence of the Claimant as to the information seems less than that of the Respondent.
Referring Principles:

IV.5.4 - Interpretation against the party that supplied the term
IV.6.9 - Duty to notify / to cooperate