Award of September 27, 1983, case no. 3880

(ORIGINAL IN FRENCH)

Arbitrators: Dr. Werner Wenger; Prof. Lucien Simont; Prof. Marcel Storme

Parties: Claimant: Belgian buyer A; Defendant: Belgian seller B


SUBJECT MATTERS:
- agency? (no)

FACTS

On January 26, 1979, claimant A and defendant B entered into a contract whereby B undertook to supply A with 150,000 pairs of ladies' boots between April and August 1979. On the same date, B entered into an identical contract (differing only in relation to the price) with a Romanian State trading enterprise C, who was to supply the same quantity of boots to B. When the Romanian enterprise C defaulted, arbitration proceedings were commenced by A who sought damages for late delivery and defective goods. The arbitrators rejected a request by defendant B to join the claim with an arbitration it had commenced separately against its supplier, the Romanian enterprise C, based on that company's default in delivery. Claimant A was successful as to 75% of its claim.

EXTRACT

On force majeure:

"... (D)eendant B contends ... that to the extent that the contract obliged it to supply boots made at the factory D in Romania, the source proposed by its supplier, the Romanian enterprise C, the default of the latter constituted an insurmountable obstacle and an extraneous cause relieving it of any liability towards claimant A.

"To this, claimant A objects, on the one hand, that defendant B would be liable for the default of its supplier on the grounds of the liability of a principal for the acts of its agent, and on the other hand, that the default of a contractor can never as a rule amount to force majeure for a supplier of goods.

"Given, however, that principles of contractual liability for the acts of an agent have no relevance to this case, since B did not substitute the Romanian enterprise C nor called upon its assistance in the fulfillment of its obligations towards A.
"Given, furthermore, that it is inaccurate to maintain as a general rule that the default of a supplier can never in any circumstances constitute an element in force majeure for a seller of goods.

"But in this case, B has not proved that its supplier's defaults are of the unforeseeable and irresistible nature required to constitute force majeure.

"B has not adduced evidence that the delays on the part of the Romanian enterprise C were unforeseeable, since delay on the part of one's supplier is a foreseeable contingency.

"B has furthermore not proved that it could not . . . have foreseen or mitigated the consequences of a delay in delivery by C.

(. . .)

"This interpretation of the will of the parties is confirmed by the 'force majeure' clause which appears on page 4 of their contract. To the extent that

this clause requires that the force majeure be proven by a certificate of the competent Romanian authorities, it confirms the will of the parties not to consider the default of the Romanian supplier C as an event of force majeure from the point of view of B except to the extent that such default might be characterised in this way for the Romanian enterprise C itself.

(. . .)

"It follows that, B's obligations being in the nature of obligations of result, their non-fulfillment places B in default and involves it in liability vis-à-vis A, except for those cases where the latter company cancelled orders without justification . . . ."

[...]

Referring Principles:

VI.3 - Force majeure