Preliminary Award of September 22, 1983, case no. 4132

Arbitr: B. H. ter Kuile

Parties:
Claimant: Italian supplier

Published in:

Subject matters:
- public national law and validity of contract [not included in the TransLex]

FACTS

The dispute arose out of a “Supply and Purchase Agreement” entered into between the parties on November 11, 1976. Arbitration proceedings were commenced before the ICC Court of Arbitration, who confirmed the nomination of the sole arbitrator sitting in The Hague.

The present Preliminary Award deals with two interlocutory matters: the succession of the Italian supplier to the rights and obligations of its predecessor as a result of the latter's merger with the Italian supplier, which had been conceded by the defendant subject to any contradictory evidence that might appear; and a ruling on the request submitted by the South Korean buyer for a Preliminary Award declaring the Agreement of 1976 unenforceable on the basis of Korean public law (antitrust law, price law and fair trade law). The sole arbitrator found that for the purpose of the arbitration, the Italian company was the legal successor to its predecessor; and that the Agreement of November 11, 1976, was governed by Korean private law. He dismissed the request for a declaration that the Agreement was unenforceable, and ordered that the arbitral proceedings continue.

EXTRACT

[...]

On the law governing the contract:

“The Agreement has been executed and performed partly in Italy and partly in Korea. At the time the Agreement was made the parties did not express themselves as to the law that would govern their contractual relationship. Lacking such choice of law by the parties and all further direct points of contact which could be decisive for the
determination of the governing law, the Centre of Gravity test, as proposed by the defendant, could indeed be relevant in order to decide this question.

"Notwithstanding the name of the Agreement (Supply and Purchase Agreement) this contract is not just of the nature of a mere supply and purchase contract. Claimant has granted to defendant the right to use their technical know-how relating to the manufacture of [the product], on an exclusive basis in the Republic of Korea. Defendant purchased from Claimant the raw materials required for the production of [the product] in Korea.

"Taking these special elements of the Agreement into account this Tribunal is satisfied that the Agreement is for a larger part to be performed in Korea and that for that reason Korean private law should prevail as the law governing the Agreement."

Referring Principles:
XIV.2 - Law applicable to international contracts