Title:
ICC Award No. 4145 (Second Interim Award), YCA 1987, at 97 et seq. (also published in: Clunet 1985, at 985 et seq.)

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Interim awards and final award of 1983, 1984 and 1986 in case no. 4145

Arbitr: DDR. Franz Matscher, (Austria) chairman; Me Jean-Claude Fivaz (Switz.); Prof. Dr. Sang Hyun Song (South Korea), who resigned after the interim awards and was replaced by Prof. W. Michael Reisman (USA)
Parties: Claimant: Establishment of Middle East country X; Defendant: South Asian construction company

Published in: 112 Journal du droit international (Clunet) 1985, p. 985, with commentary Y. Derains

Subject matters: First interim award: [not included in the TransLex]

FACTS

In the seventies, a Ministry of Middle East country X was calling for tenders for a project involving the construction of certain buildings for social purposes (hereinafter: the "Project").

During that period, defendant was trying to enter the construction market in country X. Its efforts were relatively unsuccessful. When the tender for the Project came out in 1978, defendant was eager to be the successful bidder, as were its competitors.

Defendant then entered in 1978 into an agreement with claimant, an establishment of country X, by the terms of which defendant appointed claimant as representative for the promotion and contracting of the Project (hereinafter: the "Agreement"). The services to be rendered by claimant were described in the Agreement as follows:

"Consultant shall, in consideration of the compensation hereinafter agreed to be paid to it by Company, provide Company with such counsel, guidance liaison assistance, facilities, value engineering, complete tender studies, inspections of site, or any additional service as shall be reasonably necessary and required from a Consultant and shall, in general use its best efforts to
promote and further the sale of the Projects. Further, the increased price sale of the Project through his services or through the services of other Consultants that he may hire out of his own funds."

Upon the conclusion of the Agreement, defendant signed similar agreements with companies related to claimant providing for a cooperation on other projects in the country concerned.

After negotiations lasting some eight months, defendant was awarded in early 1979 the Project for a final price equivalent to approximately US$374 million.

Thereupon, in a letter from defendant to claimant's bank in Geneva, defendant undertook the irrevocable and unconditional commitment to pay immediately upon receipt of its down payment from the Ministry "for services which were received in full in connection with the above mentioned Agreement" the sum of US$50 million. That sum was subsequently remitted by defendant to claimant's bank.

At the same time, the chairman of defendant expressed in a telex to the principal representative of claimant his "sincere thanks on your excellent efforts."

When negotiating an extension with the Ministry in 1979, claimant and defendant signed an amendment to the Agreement relating to the extension (hereinafter: the "Amendment").

In 1980 defendant obtained the extension of its original contract by the award of additional works for a total amount equivalent to approx. US$54.5 million, consisting of two parts: (1) works according to the Bill of Quantities ("BOQ") in the original contract (US$40 million) and (2) works which have no BOQ (US$14.5 million).

Having received the amount of US$50 million in 1979, claimant complained that this was not the full amount it was entitled to, which according to it, was US$57 million, the result being that it should receive US$7 million more.

Subsequently, claimant asked for compensation relating to the extension of the original contract, that is US$7 million (relating to the US$40 million) and US$2.5 million (relating to the US$14.5 million).

Defendant refused to pay anything more and, as the parties could not reach a settlement, in 1981 claimant submitted the case to the ICC for arbitration pursuant to the arbitration clause in the Agreement (which clause is quoted below), asking for the payment of US$ (7 + 7 + 2.5 =) 16.5 million plus interests and costs.

In absence of an agreement of the parties on the place of arbitration, the ICC Court of Arbitration fixed Vienna as place of arbitration.

In a first interim award, rendered in 1983, the arbitral tribunal held that it had jurisdiction to decide the case for the reasons partly reproduced below.

In a second interim award, rendered in 1984, the arbitral tribunal held that the Agreement was valid under Swiss law and rejected defendant's motion to dismiss the arbitration on the ground of forgery, with prejudice for the reasons partly reproduced below.

In the final award, rendered in 1986, the arbitral tribunal ordered defendant to pay an equivalent of US$1.5 million with 5% interest, for the reasons partly reproduced below.

**EXTRACT**

[...]

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Second Interim Award

10. In the second interim award, the arbitrators first dealt with the law applicable to the substance. The claimant contended it to be Swiss Law, whilst defendant asserted it to be the law of country X.

11. The arbitrators observed:


12. "This is what the parties have done in mentioning Swiss Law, although at first sight less related with the Agreement than the law of country X. Such mention of Swiss Law in first place (before the law of country X) is in this respect an important indication.

13. "Moreover, Swiss Law constitutes a highly sophisticated system of law, which answers all the questions that may arise from the interpretation or fulfillment of an agreement of the kind of the one entered into.

14. "On the other hand, the law of country X, might partially or totally affect the validity of the Agreement.

15. "It is then reasonable to assume that from two possible laws, the parties would choose the law which would uphold the validity of the Agreement.

16. "It is also a general and widely recognized principle that from two legal solutions, the judge will choose the one which favours the validity of an agreement (favor negotii).

17. "In these circumstances, the arbitrators definitely decided to choose Swiss Law as the applicable law, assuming that this choice corresponds to what the parties had in mind by inserting the above mentioned provision in Art. 11 of the Agreement.

18. "(There is no reason to envisage the cumulative application of both Swiss Law and the law of country X to the Agreement, such solution being rejected by most of the authors; Vischer - von Planta, op. cit. p. 174)."

19. The arbitral tribunal then considered the issue of the validity and enforceability of the Agreement. Defendant contended that the Agreement was null and void because of bribery and extortion.

20. With respect to the issue of bribery, the arbitrators reasoned:

"The defendant has insisted that the Agreement was an agreement for bribery or was abused by the claimant for bribery. The claimant denied such allegation, stating that the Agreement was a consultancy agreement.

21. "This question has to be solved by trying to interpret the real intention of the parties, according to Art. 18 of the Swiss Code des Obligations (CO) which says:

`(1) As regards both the form and content of a contract, the real intent which is mutually agreed upon shall be considered, and not an incorrect statement or method of expression used by the parties, whether due to error, or with the intention of concealing the true nature of the contract.
22. "According to this provision, interpretation means trying to find the real intention of the parties, beyond the words used in their agreement.

23. "Circumstances prior and contemporary to the agreement as well as posterior to the agreement - especially the way parties have fulfilled their obligations have to be taken into consideration (Becker, Berner Kommentar VI, Obligationenrecht. Allgemeine Bestimmungen (Art. 1-183 OR) 2 (1941/45), ad Art. 18 CO, p. 70 et seq.; Engel, Traité des obligations en droit suisse. Dispositions générales du CO (1973), p. 165 et seq., especially p. 169; Jäggy-Gauch, Zürcher Kommentar. Obligationenrecht (1980), ad Art. 18 CO, no. 308, p. 79; ATF 95, 1969 II p. 320, 326).

24. "It is obvious that if the said Agreement were an agreement for bribery, it would be null and void, according to Art. 20 CO, which states:

'(1) A contract providing for an impossibility, having illegal contents, or violating bonos mores, is null and void.

'(2) . . .'


26. "It must be stressed that nullity implies that both parties agree an the immoral purpose to be achieved or an the immoral means to be used in order to achieve a certain result (Von Tuhr, Partie générale du Code Fédéral des Obligations, 2 (1933/34), pp. 224-225; Engel, op. cit., p. 205; various decisions of the Federal Court quoted ad Art. 20 - footnote c, p. 12 of the Swiss Code des Obligations annoté par Scyboz et Gilliéron, 1983).

27. "The defendant's accusation is not supported by direct evidence or even circumstantial evidence to be retained as convincing.

28. "In this respect, it must be stressed that, following general principles of interpretation (also recognized in Swiss Law; see ad Art. 8 Code Civil Suisse; ATF 105 III 43; ATF 74, p.202; 90 p. 227; 104 p. 68, 216) a fact can be considered as proven even by the way of circumstantial evidence. However, such circumstantial evidence must lead to a very high probability.

[...]

Referring Principles:
- IV.5.1 - Intentions of the parties
- IV.7.2 - Invalidity of contract due to bribery
- XIV.3 - Rule of validation/Lex validitatis