Award of February 17, 1984, case no. 4237

(ORIGINAL IN ENGLISH)

Sole arbitrator: Loek J. Malmberg

Parties: Claimants and Counter-defendants: Syrian State trading organization, buyer

Publication: Unpublished

Subjects: - law applicable to substance

FACTS

By a contract dated August 15, 1979, Claimants bought from Defendants 5.000m³ plywood and 5.000m³ blockboards according to specified qualities, Ghana origin. The contract stipulated the price and shipment schedule as follows:

"A. First shipment 3.000m³ plywood and 1.000m³ blockboards within two months from credit opening date provided ship transporting the first shipment sails before expiry of these two months.

"B. Second shipment 2.000m³ plywood and 2.000m³ blockboards after one month from first shipment.

"C. Third shipment 2.000m³ blockboards after one month from second shipment."

The contract further stipulated: payment by confirmed and irrevocable letter of credit; a performance guarantee covering five per cent of the total contract value to be provided by Defendants "immediately before opening the relevant letter of credit"; the applicability of Claimants' General Conditions; a delay penalty for late delivery; an ICC arbitration clause; and a force majeure clause which read:

"(a) In the event of confronting force majeure of any nature, the Suppliers shall undertake to advise buyers thereof and immediately after it discontinues."
After signing the contract there was some delay in the provision of the performance guarantee. Finally, the guarantee was confirmed to Claimants on November 22, 1979. Accordingly, the last shipment should take place on or before March 22, 1980. On November 26, 1979, two letters of credit in favour of Defendants were confirmed, one for the blockboards and one for the plywood, both having the expiry date February 22, 1980. Meanwhile, Claimants had procured the marine insurance policies and nominated a German inspection company.

On December 14, 1979 Defendants sent a telex in which they informed Claimants that they were not able to ship according to the shipment schedule, "due to heavy rains, fuel shortage and other disturbances". On December 16, 1979, a ship loaded with 218,671m³ lywood and 415,904m³ lockboards only departed from Ghana.

Furthermore, Defendants subsequently proposed to Claimants a shipment of 2,500m³ plywood and 1,500m³ blockboards at the end of January 1980, which was accepted by Claimants. However, this shipment was not carried out by Defendants, who advised the inspection company on February 20, 1980, that a second quantity of plywood and blockboards was to be shipped around March 7, 1980. Claimants reminded Defendants several times of the shipment schedule and the contractual delay penalties; they also requested to advise shipping details of the announced shipment of March 7, 1980, and to send the originals of the letters of credit to London for extension. The shipment period and the validity of the letters of credit were extended by Claimants until May 31, 1980.

Defendants did not react to Claimants’ correspondence until May 2, 1980, when they accepted Claimants’ proposal to discuss the execution of the contract during a meeting in Damascus. Meanwhile it appeared that the second shipment had not been carried out. On May 7, 1980, Defendants proposed a price increase of 40% to recover their losses caused by "the increase of oil price”. During a meeting between both parties in Damascus on July 28-30, 1980, it became apparent that this price increase was unacceptable to Claimants. Defendants wished to abolish the contract and relied on force majeure. Further, they requested payment for the first shipment, which request was repeated several times after the meeting.

On December 28, 1980, however, Claimants obtained an injunction in respect of the performance guarantee and the two letters of credit before the Court of First Instance in Damascus. A second meeting between the parties took place in Damascus on March 24-26, 1981, during which Defendants proposed to cancel the contract and requested payment for the first shipment and release of the performance guarantee. On April 22, 1981, Defendants alleged that Claimants had made a proposal during the meeting on March 26, 1981, consisting in a compensation of 50% over the first shipment, which Defendants accepted, but which was calculated on the FOB value of the goods. Claimants denied to have made this proposal.

A final round of settlement negotiations in Damascus on May 20, 1981, failed as well. Subsequently, Claimants started a court action against Defendants in Damascus, claiming the price differences and loss of profit. This action was stayed, due to the invocation by Defendants of the arbitration clause in the contract. The above-mentioned injunction was renewed by Claimants on September 8, 1981.

Claimants initiated arbitration before the Court of Arbitration of the ICC on August 25, 1981. The Terms of Reference provided, inter alia, that Paris would be the place of arbitration and that French International Arbitration Law would be applicable to the procedure.

Claimants claimed a price difference of US$ 656,070.35, a lost profit of US$ 468,301.10, bank charges of Syrian Pounds 620,719, - as well as 9% interest over these amounts.

Defendants counterclaimed payment of US$ 306,988.42 for the shipment of December 16, 1979, with an interest of 15% per year, a declaration that Claimants are not entitled to payment under the performance guarantee and damages for repudiation of contract. Both parties claimed and counterclaimed payment of the costs of arbitration.
The Arbitrator first determined the law applicable to the substance of the dispute:

"The question of the law applicable to the substance of the dispute poses the preliminary question which conflict of laws rules are to be applied in order to determine this law. Claimants relied on Syrian conflict of laws rules under argument (a) above (i.e., application of Syrian law because contract was signed in Syria). However, Claimants overlook the fact that this arbitration is expressly subjected to French International Arbitration Law, which Law, as rightly pointed out by Defendants, contains conflict rules for determining the law applicable to the substance of the dispute. The Arbitrator notes that it is controverted in literature whether an international arbitrator should apply the conflict rules of the law applicable to the arbitration, but since the new French Law itself contains conflict rules the Arbitrator feels himself obliged to follow these rules. Art. 1496 of the Law provides:

The arbitrator shall decide the dispute according to the rules of law (règles de droit) chosen by the parties; in the absence of such a choice, he shall decide according to such rules as he deems appropriate.

'In all cases he shall take into account trade usages.'

Referring to Art. 13 (3) of the ICC Rules the Arbitrator considered:

"As no documents submitted by the parties and admitted by the Arbitrator point to 'rules of law chosen by the parties', the Arbitrator shall, in virtue of Art. 1496, have to determine which are the appropriate rules governing the substance of the dispute.

"This poses the question which rules of law are appropriate. It is argued in literature that international arbitrators should, to the extent possible, apply the lex mercatoria. Leaving aside that its contents are not easy to determine, neither party has argued that a lex mercatoria should be applied. Rather, each party strenuously argued on the basis of a national law, i.e., Syrian and Ghanaian/English law respectively. Accordingly, the Arbitrator shall follow the implied desire of the parties to apply a national law."

"In view of the international character of the present arbitration, the Arbitrator deems it appropriate to apply those conflict rules which are generally followed in international arbitrations of the kind under consideration. The decided international awards published so far show a preference for the conflict rule according to which the contract is governed by the law of the country with which it has the closest connection. The country with which it has the closest connection is the country where the party who has to carry out the most characteristic performance has its head office. In the case of a contract for the sale of goods on C & F conditions, the most characteristic performance has to be carried out by the seller. Accordingly, Ghanaian law would in principle be applicable. However, Defendants argued that English law should be applied. As Defendants' arguments are convincing and English law is not different from Ghanaian law, especially since Ghana has enacted the English Sale of Goods Act, the Arbitrator accepts that the dispute is to be resolved on the basis of English law."
"Art. 1496 of the new French Law requires the Arbitrator in all cases to take into account trade usages. Art. 13(5) of the ICC Rules requires him in all cases to take into account the terms of the contract and the trade usages. It goes without saying that the Arbitrator shall have regard to these bases to the extent that they do not deviate from the mandatory rules of the applicable law."

[...]

Referring Principles:

- XIV.2 - Law applicable to international contracts