Title:

Content:

1. Contractor (European Country) v. Owner (Middle Eastern Country) and others, Final award in case no. 4629 of 1989

Author: Albert Jan van den Berg

Jurisdiction: France

Organization: International Court of Arbitration of the International Chamber of Commerce

Case date: 1989

Case number. ICC Case No. 4629

Parties:

Claimants, 1. Contractor (European Country) Claimants, 2. Contractor (Middle Eastern Country)
Respondent, Owner (Middle Eastern Country)

Key words:

construction works (hotel)
existence of claimant
bankruptcy
necessity of appointing second expert
entitlement to suspend and terminate work
contract

exceptio non adimpleti contractus

calculation of liquidated damages
discretion of arbitrator in assessing damages
calculation of interest on set-off
reimbursement of performance bond
no price increase on lump sum contract
penalty interest at rate of place of payment


[...]

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[37] “The contract does not rule expressly the event of the suspension of the work. It must first be examined whether this procedure was nevertheless admissible. Art. 82 of the Swiss Code of Obligations (5) allows one party to page withhold his performance of the contract as long as the other party does not fulfill or refuses to fulfill his part of the contract. This exceptio non adimpleti contractus is applicable whenever the contractual parties are in a situation of exchange in which both of them must perform their obligation at the same time. It is a dilatory plea which allows one party to stop performing until the other has lived up with his own contractual obligation.

[...]

Referring Principles:

V.1.4 - Principle of simultaneous performance; right to withhold performance