Title:
ICC Award No. 5418 of 1987, YCA 1988, at 91 et seq.

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Final award in case no. 5418 of 1987

Arbitrators: Dr. Kurt Heller (Austria), Chairman; Anthony Colman (UK); Dr. Gyula Gal (Hungary)

Parties: Claimant: Importer in the UK
         Defendant: Exporter in Hungary

Place of arbitration: Paris, France (as agreed by the parties)

Published in: Unpublished (original in English)

Subject matters:
- exclusive distributorship agreement
- commission contract under Hungarian Law
- contract of sale and of delivery under Hungarian Law
- effect of Government order authorizing parallel exports
- waiver of right
- loss of profits
- standard of proof
- mitigation of damages by party
- mitigation of damages by arbitrators

[...]

Excerpt
E. Loss of profits (issue no. 4)

41. Turning to Importer's claim for damages, which is essentially concerned loss of profits, the arbitrators considered this claim at length and made the following pertinent observations:

"As described ... above (the law), the compensation of damages under Hungarian law includes loss of profit (Sect. 355(4) of the Hungarian CC).

"When estimating the damages the tribunal has to try to arrive at an amount of damage which is plausible under the given circumstances. The plausibility has, however, to be proven by the claimant, who has — in general — the burden of proof for damages.

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"The estimation of a loss of profit is mainly based on expectations of the future. In this context the tribunal has to start by taking into account the history of developments in the past. It was, therefore, an appropriate method of the claimant to present the calculation of their profit during the years 1980 through 1984 and for the first three months of 1985 .... The tribunal has no reason to doubt the correctness of these figures. They have been confirmed by Price Waterhouse, a very reputable international firm of certified public accountants. They were the official auditors of the group of companies to which the claimant belongs.

(....)

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"A claimant who seeks to recover damages for loss of profit upon wrongful termination of a long-term sales contract and who seeks to persuade a tribunal that the lost of profit would be more substantial that had been earned in the period immediately preceding termination of

the contract has to adduce strong and compelling evidence that marketing circumstances would have significantly improved had the contract continued. Forward predictions are necessarily to some extent speculative and it is therefore particularly important that a tribunal which is asked to award damages for loss of increased future sales should require a high standard of proof that such increases were probable. The evidence adduced by the claimants in this case falls well short of convincing this tribunal that such an increase would probably have occurred. Mere commercial optimism is not enough. It has to be supported by evidence of actual market developments and characteristics strongly indicating increased sales. In the present case the kind of evidence which would have carried weight would have established a substantial and sustained increase in actual demand for wine X or substantially similar wines after 1984. No such evidence has been adduced.

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"Indeed, the evidence presented by the claimant did not convince the tribunal that the figures for 1985 through 1987 for wine X would be substantially different from those in previous years. Therefore, the tribunal concluded
that the sales volumes for 1985, 1986 and 1987 would probably be about the same overall as the average of the three previous years.

(...)

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"It follows that the tribunal has reached the conclusion that the claimant has established that had the agreement been performed until the end of its term in 1987 the net profit which the claimant would have derived from it would have been most likely UK£ 692,000."

F. Mitigation of loss by importer (issue no. 5)

46. The arbitrators answered in the negative the fifth issue whether Importer had failed to mitigate its loss without justification:

"(....)

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"The tribunal is of the view that the claimants were not acting unreasonably in declining to attempt to expand their sales of Hungarian generic wines. If they had thought that it was reasonably possible to sell larger volumes profitably they could easily have obtained supplies from the defendants and would no doubt have done so. The tribunal accepts the evidence of Mr. S. that they could not substantially increase sales of generic wines and the evidence both of

Mr. S. and Mr. G. that to have any chance of increasing such sales would have required the launching of a new brand. This in turn would have involved a very substantial capital investment presented by promotion costs, with great uncertainty as to likely degree of success.

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"Sect. 340(1) of the CC provides as follows:

'The injured person shall make such effort in order to prevent or to mitigate the damages as might reasonably be expected generally in the given situation. Such part of the damages as has been caused by the injured person having omitted to comply with the said duty does not entitle him to compensation.'

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"The tribunal considers that the prospects of increased sales of generic wines were so uncertain and the capital expenditure in launching them was so great that the claimants were quite justified in refusing to take the risk of losing their capital. There was therefore no breach of the duty to mitigate."

[...]

Referring Principles:
VII.3.2 - Calculation of damages
VII.4 - Duty to mitigate