Title:
ICC Award no. 5713 of 1989, YCA 1990, at 70 et seq.

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Content:

Final award in case no. 5713 of 1989

Parties:                       Claimant/counterdefendant: Seller
Defendant/counterclaimant: Buyer

Place of arbitration:    Paris, France
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Subject matters:         - applicable law
                          - Art. 13(3) and (5) ICC Rules [not included in the Trans-Lex]
                          - Vienna Sales Convention of 1980 [partly included in the Trans-Lex]
                          - international trade usages
                          - set-off [not included in the Trans-Lex]
                          - Art. 70 French New Code of Civil Procedure [not included in the Trans-Lex

Facts

In 1979, the parties concluded three contracts for the sale of a product according to certain contract specifications. The buyer paid 90% of the price payable under each of the contracts upon presentation of the shipping documents, as contractually agreed.

The product delivered pursuant to the first and third contracts met the contract specifications. The conformity of the second consignment was disputed prior to its shipment. When the product was again inspected upon arrival, it was found that it did not meet the contract specifications. The product was eventually sold by the buyer to third parties at considerable loss, after having undergone a certain treatment to make it more saleable.

The seller initiated arbitration proceedings to recover the 10% balance remaining due under the contracts. The buyer filed
a counterclaim alleging that the seller's claim should be set off against the amounts which the buyer estimates to be payable to the buyer by the seller, i.e., the direct losses, financing costs, lost profits and interest.

Excerpt

I. Applicable Law

1 “The contract contains no provisions regarding the substantive law. Accordingly that law has to be determined by the Arbitrators in accordance with Art. 13(3) of the ICC rules. Under that article, the Arbitrators will 'apply the law designated as the proper law by the rule of conflicts which they deem appropriate'.

2 “The contract is between a Seller and a Buyer [of different nationalities] for delivery [in a third country]. The sale was f.o.b. so that the transfer of risks to the Buyer took place in [the country of the Seller]. [The country of the Seller] accordingly appears as being the jurisdiction to which the sale is most closely related.

3 "The Hague Convention on the law applicable to international sales of goods dated 15 June 1955 (Art. 3) regarding sales contracts, refers as governing law to the law of the Seller's current residence.... [The country of the Buyer] has adhered to the Hague Convention, not [the country of the Seller]. However, the general trend in conflicts of law is to apply the domestic law of the current residence of the debtor of the essential undertaking arising under the contract. That debtor in a sales contract is the Seller. Based on those combined findings, [the law of the country of the Seller] appears to be the proper law governing the Contract between the Seller and the Buyer.

4 "As regards the applicable rules of [the law of the country of the Seller], the Arbitrators have relied on the Parties' respective statements on the subject and on the information obtained by the Arbitrators from an independent consultant .... The Arbitrators, in accordance with the last paragraph of Art. 13 of the ICC rules, will also take into account the 'relevant trade usages'."

II. Admissibility of the Counterclaim

[(b)]

(b) Under the international trade usages prevailing in the international sale of goods

5 "The Tribunal finds that there is no better source to determine the prevailing trade usages than the terms of the United Nations Convention on the International Sale of Goods of 11 April 1980, usually called 'the Vienna Convention'. This is so even though neither [the country of the Buyer] nor [the country of the Seller] are parties to that Convention. If they were, the Convention might be applicable to this case as a matter of law and not only as reflecting the trade usages.

[(b)]

9 "In any case, the Seller should be regarded as having forfeited its right to invoke any non-compliance with the requirements of Arts. 38 and 39 of the Vienna Convention since Art. 40 states that the Seller cannot rely on Arts. 38 and 39, 'if the lack of conformity relates to facts of which he knew, or of which he could not have been unaware, and which he did not disclose'. Indeed, this appears to be the case, since it clearly transpires from the file and the evidence that the Seller knew and could not be unaware [of the non-conformity of the consignment to] contract specifications."

[(b)]

1 Art. 13 of the ICC Rules of 1975 (not amended by the 1988 amendments) reads in relevant part: "3. The parties shall be
free to determine the law to be applied by the arbitrator to the merits of the dispute. In the absence of any indication by the parties as to the applicable law, the arbitrator shall apply the law designated as the proper law by the rule of conflict which he deems appropriate. (...) 5. In all cases the arbitrator shall take account of the provisions of the contract and the relevant trade usages.

2 Art. 3 of the Hague Convention on the Law Applicable to the International Sales of Goods reads in pertinent part: "In default of a law declared applicable by the parties under the conditions provided in the preceding article, a sale shall be governed by the domestic law of the country in which the vendor has his habitual residence at the time when he received the order..."

Referring Principles:

- VI.2 - Deadline for notice of defects
- XIV.2 - Law applicable to international contracts