Title:
ICC Award No. 5946 of 1990, YCA 1991, at 97 et seq.

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Content:

Final award in case no. 5946 of 1990

Parties: Claimant: Seller (France)
             Respondent: Buyer (US)

Place of Arbitration: Geneva, Switzerland

Published in: Unpublished

Subject matters:
   - scope of arbitration agreement [not included in the Trans-Lex]
   - scope of exclusive sales agreement
   - damages due to termination of exclusive sales agreement
   - compensation for legal fees in connected court proceedings [not included in the Trans-Lex]
   - punitive damages and Swiss public policy [not included in the Trans-Lex]
   - set-off of claim and counterclaim [not included in the Trans-Lex]
   - currency of award [not included in the Trans-Lex]

Facts

In 1983, parties concluded a sole and exclusive agency agreement, "the Agreement", whereby respondent as sole and exclusive agent for the distribution and sale of two varieties of controlled wines bottled and supplied by claimant, under all brand names belonging to claimant, undertook to use its best efforts to promote the sale of these wines within the contract territory. Invoices were to be paid ninety days from the date of ocean bill of lading by the quickest way possible.

Under the Agreement, respondent purchased wine from claimant bearing the label of "Brand X" from November 1984 through December 1984 for the amount of FF 840,315, which amount was unpaid at the time of the arbitration. In addition, during this period, respondent ordered and received other wine from claimant in 1983 and 1984.

On 5 February 1985, claimant wrote to respondent stating that respondent in 1983 had sold only 22,794 bottles bearing claimant's own tradename and in 1984 had sold none bearing its tradename, but that it had concentrated its forces on selling wine bearing respondent's own Brand X label. It stated that it considered this to be in violation of the Agreement
and expressed its intention

to invoke Art. 9.1 of their Agreement (cited below). After this, claimant refused to sell wine to respondent.

Claimant brought an action against respondent in the US Federal District Court and obtained a default judgment. This judgment was subsequently vacated and a stay was granted pending arbitration.

The sole arbitrator granted claimant's claim for the unpaid balances. He also granted respondent's counterclaim awarding damages for the improper termination of the Agreement, as well as compensation for his legal fees in connection with the court proceedings.

**Excerpt**

"Brand X" Wine as Subject Matter of Agreement

9 "The evidence shows that, in 1984, only an insignificant amount of bottles purchased by respondent bore brand names other than 'Brand X' while a substantial quantity of bottles bore the 'Brand X' brand. In 1985, the totality of orders concerned 'Brand X' wine. The question therefore arises on to whether 'Brand X' wine is a subject matter of the Agreement.

[...]

14 "The conduct by the parties prior to the execution of the Terms of Reference also indicates that the Agreement encompassed 'Brand X' wine.

15 "The Agreement provided in para. 6 that, after termination, respondent would have to reassign to claimant such trademarks 'with the exception of trademarks already held by respondent.' Such exception to the obligation to reassign would not make any sense if wine sold under such trademarks would not fall within the Agreement.

16 "In its letter to respondent dated 12 July 1984 ... claimant stated:

'We should like to remind you of the terms of our contract, because we are now certain that you are not respecting the exclusive supplier arrangement for two varieties of wines with respect to our company. In another connection, we inform you that in order to preserve our mutual interests we have registered the Brand X trademark and labels.' (translation)

A contractual obligation of respondent to purchase [two varieties of] wines exclusively from claimant and mutual interests regarding the 'Brand X' mark and label can only be found to exist if the 'Brand X' wine is also subject to the Agreement. In its closing statement ... claimant emphasized that Art. 6.1 of the Agreement is in contradiction with Art. 1.1 and that the latter, being the main

Article, should prevail. It is said that Art. 1.1 was renegotiated by the parties and everyone on claimant's side just 'forgot about' Art. 6.1.
17 "At the outset, it must be stated that the Agreement should be read as a whole and if one provision is unclear the reader may have recourse to another to ascertain the true meaning of the Agreement. It must be noted that Art. 6.1 specifically deals with 'TRADEMARK - BRAND NAMES' (in capitals in the Agreement) and that Art. 1 under the heading 'APPOINTMENT' deals with the status and the obligations of respondent as the 'sole and exclusive agent' of claimant. The subject matter of Art. 1.1, according to its heading, is to state the principle of the appointment not to define the term 'brand name' used therein. This is effected by Art. 6.1. This means that regarding the definition of 'brand names' Art. 1.1 is the general rule, whereas Art. 6.1 is the more specific one. Under the rule of interpretation lex specialis derogat legi generali the more specific provision takes precedence over the more general one. This leads to the conclusion that the 'Brand X' wine is included in the Agreement.

[...]

VII. Respondent's Damages for Improper Termination of the Agreement

44 "As the termination of the agreement and the subsequent refusals to sell were unlawful, claimant is liable to the extent that respondent is able to show that it suffered damages proximately caused to respondent by such improper behavior of claimant. Lost profits are a proper element of damages under applicable New York law when the injured party offers an adequate basis for computing the amount (Oneonta Dress Co. v. Ozona-USA, Inc., 503 N.Y.S. 2d 167, 169 [A.D. 3rd Dep't. 7 1986]). The distributor who has been terminated unlawfully may recover lost profits on the basis of sales made to him pursuant to the distributor agreement (Michael Todd & Co., Inc. v. Lacal Co., Inc., 583 F.2d 1056, 1059 [8th Cir. 1978])."

45 "An aggrieved party may recover all damages suffered from a breach of contract, including losses sustained as well as gains prevented .... The object is to put a party in the posture he would have enjoyed had the contract not been breached .... While the burden of proof rests upon Plaintiff in a case of this kind, damages need not be established with absolute certainty. As long as a sufficient basis is asserted from which damages can be approximated, any reasonable method of computation is permissible .... In the context of a breached exclusive dealership in which a manufacturer terminates the services of an exclusive distributor, sales consummated and business performed by the distributor in the exclusive territory before the breach or by the manufacturer after the breach often form the basis for a reasonable accurate estimate of the profits the distributor might have realized had the relationship not been terminated'. (Michael Todd & Co., Inc. v. Lacal Co., Inc., 583 F.2d 1056, 1058/1059 [8th Cir. 1978])."

46 "Regarding the amount of bottles that respondent would have sold had the Agreement not been terminated, the following might be stated:

47 "As shown above (...) the deliveries of non-'Brand X' wine were as follows: 42,852 bottles in 1983, 3,426 bottles in 1984 and zero bottles in 1985. Although the base period is rather short, the tendency is very clear: respondent almost entirely concentrated on 'Brand X' wine, and its performance regarding non-'Brand X' wine was very poor. Even if the Agreement had not been terminated by claimant, it could not have been expected that respondent would have attained a substantial volume regarding non-'Brand X' wine after 5 February 1985. In any event, claimant need not have foreseen, when it improperly terminated the Agreement, that respondent could have realized a substantial volume regarding non-'Brand X' wine. Accordingly, the Sole Arbitrator holds that respondent has failed to show any loss of business regarding non-'Brand X' wine on account of the termination of the Agreement on 5 February 1985. Accordingly, respondent is not entitled to damages regarding non-'Brand X' wine. See He-Ho Drive-In v. Allegany Tastee Freez Sales, Inc., 20 A.D. 2d 959 (4th Dept. 1964).

48 "Having considered the figures regarding 'Brand X' wine proposed by the parties, the Sole Arbitrator has achieved the following calculation of lost profits: In the first 20 months of the Agreement, from its signature through termination, respondent ordered a total of 233,124 bottles of 'Brand X' wine. This yields an amount of 139,874 bottles for a 12 months period. As was stated above, from the second half of 1983 to the second half of 1984 there was a drop of 34 percent. It can therefore safely be assumed that this diminution of turnover would have continued through the remaining 40 months of the term of the Agreement. Therefore, the calculation of the lost hypothetical profits is as follows: Through the first 20 months of the Agreement, a total of 233,124 bottles of 'Brand X' wine was ordered, which yields an average of 139,874 bottles..."
bottles per year. If this amount is discounted at the rate of 34 percent through the remaining 40 months of the term of the Agreement, the following amounts are obtained:

<table>
<thead>
<tr>
<th>Year</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>First remaining</td>
<td>92,317</td>
</tr>
<tr>
<td>Second remaining</td>
<td>60,929</td>
</tr>
<tr>
<td>Third remaining</td>
<td>40,213</td>
</tr>
<tr>
<td>Fourth remaining</td>
<td>8,847</td>
</tr>
<tr>
<td>Total</td>
<td>202,306</td>
</tr>
</tbody>
</table>

This amount could have been foreseen when claimant terminated the Agreement on 5 February 1985 (NYUCC Section 2-715(2)).

[...]

Sect. 2-715 of the New York Uniform Commercial Code reads in relevant part: “2. Consequential damages resulting from the seller's breach include (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise; and (b) injury to person or property proximately resulting from any breach of warranty.”

Referring Principles:
- I.3.2 - Lex specialis-principle
- VII.2 - Principle of foreseeability of loss