Final award in case no. 6962 of 1992

Parties:                  Claimant: Seller (Switzerland)
                         Defendant: Buyer (Romania)

Place of arbitration:   Paris, France
Published in:           Unpublished
Subject matters:        - triangular clearing arrangement constituting "delegation of duty" or "assignment of debt"
                         (barter trade)
                         - burden of proof of novation [not included in the Trans-Lex]

Facts

Claimant is a trading company, selling chemical products on domestic and export markets. It is the legal successor to a company which entered into a supply agreement with defendant. Defendant was established as a state controlled "Foreign Trade Enterprise" engaged in the import and export business, but was subsequently privatized due to political and economical changes in Romania.

The parties' legal predecessors entered into a basic agreement, whereby they laid down a framework of terms for the supply of products to defendant (Basic Agreement). The Agreement contained an arbitration clause providing for ICC arbitration to be held in Paris.

The obligations pursuant to the Basic Agreement were fully performed in the three year period following its conclusion, although sometimes very belatedly. To overcome defendant's shortage of foreign currency, the parties agreed upon a triangular clearing arrangement whereby a US Company, importing products from Romania, was to pay to claimant amounts owed to defendant, thus setting off defendant's debt to claimant (triangular clearing arrangement).

A few payments were received by claimant and credited to defendant's account, but the triangular clearing arrangement broke down in early 1988, when the US Company filed a petition for bankruptcy. A similar arrangement was suggested with Company Y, but Claimant never received any payment from it. Consequently, invoices issued between August and December 1987 remained largely unpaid.

Claimant submitted a request for arbitration. In the meantime, defendant started court proceedings in Romania against the US Company, its President and several others, claiming payment for the goods exported.
The sole arbitrator held, *inter alia*, that despite the triangular clearing agreement, defendant remained claimant's debtor and awarded claimant the dull extent of his claim, with the addition of interest.

**Excerpt**

**I. EFFECT OF TRIANGULAR CLEARING ARRANGEMENT**

1 "This issue constitutes a key issue for the resolution of the dispute, defendant alleging that the arrangement whereby claimant agreed to receive payment from the US Company (or from other customers) instead of defendant has had the effect of discharging the latter from its obligation to pay claimant, which claimant eagerly contests. In its request for arbitration, claimant indeed contends that defendant never assigned claims against its customers with the effect of being discharged from its obligation towards claimant. It further asserts that it has always made clear that it would not accept such discharging assignments of credits, unless the credits were supported by bank guarantees. Claimant also states that defendant in fact acknowledged it by (1) confirming its responsibility for finding a solution for the outstanding amounts and (2) starting court proceedings against the US Company, its President and other customers, claiming, in its own name, the amounts of defendant's invoices earmarked for the settlement of its debt to claimant.

[...]

4 "In this respect, the criteria for the application of the relevant provisions of French law have actually been a matter subject to discussion between the Parties. Under French law, an arrangement involving three parties, and whereby a creditor will receive payment from that party which is not his original debtor, may belong to one of a few categories hereafter discussed. To begin with, the simplest case is one where the debtor advises his creditor that payment will be made on his behalf by a third party. In this case known in French as *indication de paiement*, the third party intervenes merely in the capacity as debtor's agent instructed to make a payment. Pursuant to a general principle of agency law no contract regulationship [sic! contractual relationship] will arise between an agent and he with whom he deals on behalf of his principal, any right or obligation thus created resting solely upon the principal. If a debtor instructs an agent to make a payment to a creditor, the agent's failure to pay will leave debtor's obligation to pay unfulfilled and creditor will keep his right to claim payment from debtor. This is also expressly confirmed by Art. 1277 **CC**, providing that 'a simple indication by a debtor of a person who shall pay in his stead does not effect a novation'.

5 "This being said, it shall now be observed that the facts in the present case definitely show that the US Company was not remitting, or was not to remit, payments to claimant in the capacity as agent of defendant, the relationship and communications between the US Company and claimant exceeding those of purely administrative nature which may normally take place between a payee and an agent instructed to pay. Moreover, both Parties describe the arrangement under discussion as 'triangular', thus acknowledging that the US Company did not act in the capacity as agent, but was actually a party to such arrangement. It is also clear from relevant documents, namely from claimant's invoices marked *Zahlung gegen Kompensation* (Settlement per contra), and also from the numerous telexes exchanged, that claimant agreed to supplying [chemicals] to defendant and to receiving payment for such supplies from credits in 'hard' currency available to defendant in the form of claims to payment on the US Company for exported Romanian products. Consequently, it is not pursuant to the concept of the mere payment indication, or to the provision of Art. 1277 **CC**, that claimant can successfully claim to have kept its right to obtain payment from defendant.

[...]

**III. AMOUNTS TO BE PAID (PRINCIPAL AND INTEREST)**
The arbitrator determined that defendant was obligated to pay claimant the amount claimed for the unpaid invoices.

"Concerning the claim for interest, its merit is to be assessed under French law and, in this respect, reference is to be made to Art. 1153 CC. This article of the Civil Code provides that, where an obligation is limited to the payment of a money amount, damages for delayed performance shall consist only in interest on such amount at the legal rate of interest, with the reservation of special rules applying to commerce. It also provides that the creditor is under no obligation to produce evidence of a loss. It still provides that interest is due from the date of a formal notice to pay given to the debtor. It finally does not exclude the possibility of awarding damages in addition to interest for delayed payment.

"Concerning the rate of interest of 9% per annum, claimant asserts that it corresponds to market conditions and that defendant never objected to such rate. It is a fact that debit notes for interest were issued as from 1 September 1988, quoting a rate of interest of 0.75% per month which corresponds to 9% per annum. At no time during this arbitration did defendant show that he had ever protested against such interest rate.

"Although no evidence of money market conditions is produced, the rate of 9% per annum shall nevertheless be held reasonable on the ground of actual business experience. Moreover, such rate is also in the order of magnitude of the French legal rate of interest, and even for some of the years concerned, on the low side of it. As earlier recalled, no evidence of a loss is required under French law for claiming interest on overdue amounts at the legal rate of interest .... Compound interest was neither provided for in the contract nor claimed in the request for arbitration and is therefore not to be awarded pursuant to Art. 1154 CC."

Art. 1154 of the French Civil Code reads: "Interest due on capital can produce interest, either by a petition in court or by a special agreement, provided that, either in petition or in the agreement, it involves interest due at least for one entire year."

Referring Principles:
- II.1 - Prerequisites and effects of agency
- VII.6 - Duty to pay interest