Title:
ICC Award No. 7110, 10 ICC Bull. No. 2, 1999, at 1029 et seq.

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Partial Awards in Case 7110

Dates: June 1995, April 1998, February 1999
Origin: English
Claimant: State party (State X)
Respondent: Private contractor (United Kingdom)
Place of Arbitration: The Hague, Netherlands

The parties entered into a number of contracts covering the sale, supply, modification, maintenance and operation of equipment, and support services relating thereto. The contracts were terminated following events in State X and disputes arose in connection with the amounts claimed by the parties from each other. An initial partial Award was issued with respect to the governing law. A majority of the Arbitral Tribunal found that the contracts should be governed by and interpreted in accordance with the Unidroit Principles. There followed a second partial Award dealing with substantive issues, in which reference is made to Articles 1.7, 2.18, 2.4, 2.14, 7.1.3, 7.4.8 and Chapter 4 of the Unidroit Principles, and subsequently a third partial Award, in which further decisions were delivered with respect to certain of these issues.

With respect to the applicable law (first partial Award):

[...]

With respect to payment for and retention of substitute equipment (second partial Award):

It is a general principle of interpretation widely accepted by national legal systems and by the practice of international arbitral tribunals, including ICC arbitral tribunals, that in case of doubt or ambiguity, contractual provisions, terms or clauses should be interpreted against the drafting party (contra proferentem) . . . On the other hand, the meaning to be ascribed to expressions contained in international transactions ab initio submitted to international commercial arbitration should be consistent with the nature and expected role of the dispute-resolution method chosen by the parties and the concomitant impact of such choice not only on procedural aspects but also on the law governing the merits. Finally, it is also a generally accepted practice by international arbitral tribunals, predicated upon elementary notions of coherence
and rationality, to assume that the same words or expressions shall have the same meaning throughout the documents containing them . . . This Tribunal finds that, without unduly extending the scope of such principle, it also applies to situations such as the one faced by this Tribunal, in which the same or similar expressions are repeated in different contracts between the same parties showing some noticeable functional interrelation, which, in addition, are to be considered as a whole for the purpose of determining the applicable law to the merits.

[...]

With respect to payment for and retention of substitute equipment (second partial Award):

'The Contract . . . contains no provision dealing with the situation . . . Consequently, the solution has to be found in generally accepted legal principles enjoying a wide recognition (Partial Award No. 1), including Unidroit Principles.

It is a principle of law widely accepted that if a buyer does not perform its obligations as to payment of the balance of the price when due, the seller may, in the absence of an express contractual provision to the contrary, suspend performance of its obligation to arrange for shipment and/or delivery. The civil law concept of *exceptio non adimpleti contractus* corresponds to the principle laid down in the Unidroit Principles 7.1.3. . . .

The Tribunal is of the opinion that Respondent was entitled to retain . . . until it received full payment therefor.'

[...]

With respect to use by Respondent of goods returned or accepted by Claimant (second partial Award):

'The Tribunal finds that Respondent's conduct under the circumstances was entirely consistent with the generally accepted principle of the mitigation of harm, as expressed in Article 7.4.8 of the Unidroit Principles.'

[...]

With respect to the validity of a levy provided for in a side letter (second partial Award):

'The Tribunal finds that, in the Side Letter of . . ., the Parties had agreed on the principle of a licence and of a levy, and on the amount of such levy, i.e. the essential terms of a licence . . . The circumstance that the Parties have left certain contractual terms to be agreed upon . . . does not prevent the agreement from coming into existence (see Unidroit Principles, Article 2.14).'

Referring Principles:

- II.1 - Prerequisites and effects of agency
- IV.5.4 - Interpretation against the party that supplied the term
- V.1.4 - Principle of simultaneous performance; right to withhold performance
- VII.4 - Duty to mitigate