Partial award in case no. 7920 of 1993

Parties: Claimant: Distributor (Spain); Defendant: Manufacturer (Italy)

Place of arbitration: Geneva, Switzerland

Published in: Unpublished. Original in French

Subject matters: - ambiguous reference to arbitral institution
- interpretation of contract according to principle of effectiveness
- Annex to the European Convention on International Commercial Arbitration

Facts

The distribution contract between the parties contained the following clause: “In case of litigation, parties hereby agree to appeal to International Chamber of Commerce of Geneva (Switzerland) according to international rules of arbitration”.

When a dispute arose, the Spanish party commenced ICC arbitration. Maintaining that the clause in the contract referred to arbitration before the Geneva Chamber of Commerce, the Italian defendant refused to take part in the proceedings.

In a partial award on the issue of jurisdiction, the sole arbitrator held that, although the arbitral clause was ambiguous, ICC arbitration in Geneva complied with the parties’ unambiguous intention to have their disputes settled by international arbitration in Geneva. Subsidiarily, the arbitrator also applied general principles of contract interpretation, and reached the same result that he had jurisdiction to hear the dispute.

Excerpt

[1] "Before even proceeding to an interpretation of the obscure or vague terms of this clause, the arbitral tribunal notes that there are in any case two clear and unambiguous elements here, that is: the parties undoubtedly and unambiguously intended to submit possible disputes to arbitration and not to a State court, as confirmed by counsel for the defendant in [his pleadings and correspondence]; the parties also clearly agreed that arbitration be held according to international procedural rules. In accordance with the principle of the autonomy of the [parties’] will, which prevails almost universally in contractual matters, the arbitral tribunal should not lose sight of its essential duty to respect this intention: the parties decided to refer their dispute to international arbitration.

[2] "The question to be decided is which arbitral institution (either the International Chamber of Commerce in Paris or the
Chamber of Commerce and Industry in Geneva) should fulfill this task. First of all, there is no 'International Chamber of Commerce of Geneva'. A strict reading of the clause at issue would thus result in the impossibility of referring the dispute to arbitration, which would manifestly run counter to the intention of the parties. Further, one of the advantages for which arbitration is chosen is, in principle, the speed with which the dispute is settled. As the ICC has appointed this tribunal with seat in Geneva, the intention of the parties has been respected as to the type and nature of the proceedings (arbitration in Geneva according to international rules). To admit, with the defendant, that proceedings should start again ab ovo before another body (Chamber of Commerce in Geneva), when the parties' intention in case of a dispute is complied with in the present proceedings, would mean to delay in an unjustifiable manner the resolution of the dispute, which the parties wanted to be swift.

[3] "The arbitral tribunal notes that, in objecting to the jurisdiction of this tribunal, the defendant does not raise any valid argument, so that its position appears to be dilatory.

[4] "Ad abundantiam and subsidiarily, the arbitral tribunal holds that it reaches the same conclusion, that is, that it has jurisdiction, by interpreting the arbitral clause at issue. It is impossible, on the basis of a literal analysis of the 'pathological' clause, to determine with absolute certainty which arbitral institution the parties intended. Hence, we must define principles for the interpretation of international contracts, with reference to the arbitral awards of the International Chamber of Commerce."

I. THE PRINCIPLE OF EFFECTIVENESS (EFFET UTILE)

[5] "The principle of effectiveness is a principle for the interpretation of international contracts which embodies a universal truth: it requires that when two different interpretations of the terms of a contract are possible, the interpretation to be preferred is that which gives some effect to these terms (Philippe Kahn, L'interprétation des contrats internationaux, Clunet 1981, p. 5 et seq.).

[6] "It is accepted, as a principle, that the valid constitution and powers of an arbitral tribunal depend entirely on the will of the parties, and that arbitral clauses must be interpreted strictly (ICC case no. 2138 of 1974, Clunet 1975, p. 934). Consequently, the arbitrators must limit their intervention when the parties did not give them adequate powers.

[7] "However, ICC arbitral award no. 2321 (Clunet 1975, p. 939 et seq.) limits the strict interpretation to the scope of application of arbitral clauses. On the contrary, where the validity or effectiveness of arbitral clauses is to be assessed, the arbitrator must keep in mind the aim of making the agreement concluded by the parties as to the settlement of their contractual disputes work.

The restrictive interpretation must be considered an exception to the consensual principle which prevails everywhere in arbitration.... The parties who include an arbitral clause in a contract certainly want this clause to allow for a settlement by arbitration of the disputes falling within its scope of application. This is premised on the parties having concluded a valid clause and that this clause is effective. Hence, in order to respect the intention of the contracting parties, we may legitimately interpret such clauses in a sense favourable to their validity and effectiveness.' (Clunet 1975, p. 941).

The interpretation of contracts is one of the fields in which international commercial arbitrators are most inclined to free themselves of national laws and refer to general principles of law' (ICC arbitral award no. 1434, Clunet 1976, p. 982).

[8] "Under certain circumstances, therefore, the arbitrator can depart from the general conflicts of law theory which generally refers, for the rules of interpretation, to the law of the contract. The arbitrator may depart from the applicable national law, but should not bend it by voluntarily ignoring its jurisprudential rules. Thus, the defendant raises the objection of lack of jurisdiction because of Spanish jurisprudence holding that a clause which is ambiguous as to the arbitral body can only be null and void. However, this Spanish jurisprudence is at odds with the principle of the effet utile (ut res..."
*magis valeat quam pereat*, also called principle of effectiveness, as it reduces this contractual clause to a meaningless formula.

[9] "Hence, we must ask ourselves what was the real intention of the parties."

[...]

\[1\] Reported in Yearbook I (1976) p. 133.

**Referring Principles:**

- IV.5.3 - Interpretation in favor of effectiveness of contract