Title:

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Final Award in Case 8264

Content:

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Date: April 1997
Lang French
Usage:
Claimant Civil engineering equipment manufacturer (USA)
Respondent State-owned industrial development corporation (Algeria)

Place of arbitration:
Paris, France

The parties entered into an agreement relating to the design, production, start-up and initial management of industrial facilities by Claimant. Annexed to the agreement was a contract providing for the transfer by Claimant to Respondent of the industrial property rights and know-how required for or useful to the design, manufacture, development, use, sale and upkeep of the factory equipment and products covered by the agreement, together with all improvements and changes thereto. Respondent agreed to pay not only a fixed fee, but also a proportional fee for each machine manufactured. Claimant accuses Respondent of stopping payment of the proportional fees without justification and of furnishing incomplete dispatch reports initially and of then sending no reports at all. Respondent considers it was justified in stopping payment of the fees due to Claimant's failure to provide it with the improvements likely to be of relevance to production. Accordingly it seeks compensation for the harm thereby caused to it.

The Arbitral Tribunal considers Respondent to have fulfilled its duty to forward the dispatch reports and to provide information on the changes made by it to the licensed products. There is no question, however, that payment of the proportional fees is still outstanding. The Arbitral Tribunal begins by determining the amount of such proportional fees and then considers Respondent's counterclaim based on Claimant's alleged breach of contract, especially its duty to provide the improvements and changes relating to the design, manufacture, use and upkeep of the products and equipment covered by the contract. The Arbitral Tribunal considers that, since this duty is limited to improvements to the products and equipment covered by the contract, Claimant was not in breach of its contractual obligations strictly speaking. It therefore dismisses the plea of non-performance raised by Respondent, but admits that Claimant fell seriously short in its general duty to provide information, leading to a loss of opportunity for Respondent, for which amends should be made in accordance with Article 7.4.3. (2) of the Unidroit Principles. The Arbitral Tribunal estimates the harm caused at one tenth of the sum claimed and orders this to be offset against the fees due by Respondent to Claimant. It decides not to order payment of interest on overdue amounts, as Claimant's omissions were largely to account for the lack of payment. The Arbitral Tribunal does not consider there to have been any abuse of procedure by the parties, but rather that the arbitration was necessary in order to assess their respective liability; it thus orders arbitration costs to be borne equally by both parties.
Il est certain que, dans les contrats synallagmatiques, les prestations promises par chaque partie doivent être exécutées simultanément, et que, si l'une réclame ce qui lui est dû sans payer ou faire ce qu'elle doit, l'autre peut refuser d'exécuter sa propre prestation en lui opposant l'execeptio non adimpleti contractus. Cette voie de justice privée conduit donc à la suspension de l'exécution de la prestation de celui qui l'invoque, mais la pression ainsi exercée laisse subsister le contrat, du moins aussi longtemps qu'il n'est pas résolu. Consacrée en droit algérien dans l'article 200 du Code civil, elle est connue dans la plupart des systèmes juridiques, elle peut être considérée comme un principe général du droit des contrats internationaux.

Referring Principles:

V.1.4 - Principle of simultaneous performance; right to withhold performance