Final Award in Case 8331

Date: December 1996
Language: English

Claimant: Swedish manufacturer
Respondent: Iranian company
Place of arbitration: Paris, France

The parties entered into an agreement called Memorandum of Understanding (MOU) relating to the sale by Claimant to Respondent of trucks and spare parts and the organization of after-sales service and future co-operation. Respondent called the performance guarantee owing to alleged failure by Claimant to fulfil its contractual obligations. Claimant requests repayment of the performance guarantee plus interest, arguing that it had correctly performed all its obligations under the agreement and that the performance guarantee had expired. The Arbitral Tribunal examines (i) the legal status of the agreement and whether it has binding force on the parties, (ii) whether Claimant was in breach of any of its contractual obligations and, if so, whether, damages are due, (iii) whether Respondent was legally justified in calling the performance guarantee, and (iv) whether reimbursement of the performance guarantee is justified. In so doing, it applies the Unidroit Principles where appropriate and necessary (Articles 2.13, 4.1, 4.5, 5.1, 5.2, 5.4, 7.4.3 and 7.4.9).

[...]

Respondent's pleas:

'Respondent considers the MOU to be its basic agreement with Claimant regarding a vast project for the assembly and the manufacturing of Claimant trucks . . . The sale Contract was the first part of the MOU to be executed. The MOU was providing for the setting up of a joint venture . . . for the marketing of Claimant products, the organization of after-sales service activities . . . and for the strengthening of Claimant's position in the Middle East .... Claimant failed to execute its part of the deal by not forming the joint venture agreed on in the MOU. Claimant was in breach of its contractual obligations regarding the conformity of the trucks . . . The assortment rate of the spare parts was also not in conformity
with the international norms. Claimant also failed to meet its obligations with respect to training of the Respondent’s engineers and technicians.

Article 2.13 of Unidroit general provisions confirms that the MOU was a binding agreement between the parties and what has been left are secondary little matters to be clarified by the parties in further discussions. The binding character of the MOU should be found in the two parties’ common intention (Art. 4.1 of Unidroit). Such intention was clearly expressed in the various parts of the MOU. As an example, the confidentiality provided for in paragraph 6 of the MOU was binding on them and according to Article 5.1 of Unidroit Claimant's contractual obligations need not be expressly mentioned.

The implied obligations of Claimant in the MOU according to Article 5.2 of Unidroit derive from the nature of the Agreement, the good faith and fair dealing and reasonableness.

In that respect, Claimant has not respected the principle of good faith in dealing with its obligations . . . .'

With respect to the legal status of the MOU and its force on the parties:

'Whereas the Claimant contends that the Memorandum of Understanding (MOU) . . . has no legally binding effect between them and that specific contracts detailing the terms on which the parties will agree are necessary to have the provisions of the MOU becoming final and legal obligations between the parties.

Whereas the Respondent considers on the contrary that the MOU is by itself legally binding between the parties and that several parts of it have not been fulfilled by the Claimant.

Whereas the Arbitral Tribunal, in order to set forth the rules according to which it will examine the contentions of the parties regarding the various items of the MOU and their effects on the relations between the parties has examined the text of the MOU in light of Article 4.5 of Unidroit "Principles of International Commercial Contracts" together with the f comments thereon published by the International Institute for the Unification of Private Law, "Unidroit-Rome".

Whereas the MOU contains two kinds of provisions, the first of which defines specific conditions and terms that are the result of the parties’ agreement and consequently are to be considered as final obligations between them unless they are amended by subsequent contracts approved by the parties; the second one being a general description of the parties’ intention to enter into certain agreements.

Whereas the real issue to be determined with regard to the legal status of the MOU is to establish what is the legal effect of the above-mentioned general description of the parties’ intention if and when such intention has not been translated into specific contractual obligations.

Whereas the Arbitral Tribunal considers that when the parties agree upon general issues to be implemented by them at a later stage they cannot be released from their obligations to use their best efforts to ensure that such general issues become specific terms of contracts to be executed by the parties.

The Arbitral Tribunal having considered paragraph 2 of Article 5.4 of Unidroit "Principles of International Commercial Contracts" rules that the general description of the parties’ intentions to reach agreements on certain issues contained in the MOU obligates the parties to exert their best efforts in order to have such intentions become defined terms of Contracts legally binding for each of them.'

[...]

With respect to the legal consequences of the breach and payment of damages:
'Whereas the Claimant has been in breach of its obligations to exert its best efforts in respect of forming . . . and establishing with the Respondent the assembly of Claimant vehicles in Iran. Whereas the damages suffered by the Respondent in that respect may not be accurately determined due to the fact that they relate to assumptions on what would have been the benefit for the Respondent . . . The Arbitral Tribunal, after due consideration of Articles 7.4.3 and 7.4.9 of Unidroit Principles of International Commercial Contracts, rules that the Claimant should compensate the Respondent for the loss of the chance to enjoy the probable benefits of the two aborted projects mentioned above by bearing an amount of . . . US Dollars to be deducted from the Performance Guarantee amount of . . . US Dollars already cashed by the Respondent. The balance to be reimbursed by the Respondent to the Claimant, in Sweden, amounts to . . . US Dollars together with accrued simple interest at a rate which - due to the absence of any prime rate in dollars in Sweden - shall be the prime rate in dollars prevailing in the United States on [date of payment of performance guarantee] and as subsequently modified from time to time until the effective date of payment.'

[...]

**Referring Principles:**

- IV.5.1 - Intentions of the parties
- IV.5.3 - Interpretation in favor of effectiveness of contract
- IV.6.5 - Best efforts undertakings
- VII.2 - Principle of foreseeability of loss