Final award in case no. 8486 of 1996

Parties: Claimant: Manufacturer (Netherlands); Defendant: Buyer (Turkey)

Place of arbitration: Zurich, Switzerland

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Subject matter: - hardship
  - application of national law in light of UNIDROIT principles
  - application of national law in international relationships
  - termination of contract
  - costs influenced by behaviour parties

Facts

A Dutch manufacturer and Turkish buyer contracted by means of an order confirmation for the sale of a plant for manufacturing a certain product for the Turkish market. The agreed price was for the entire installation.

The order confirmation, which was on a form provided by the Dutch manufacturer, was based on the UN/ECE General Conditions for the Supply of Plant and Machinery for Export, to which it explicitly referred both in its introductory and final sentence. The General Conditions contain, inter alia, the following provisions:

"10. Delay in the Acceptance of the Delivery

10.1. If the buyer does not accept the delivery on the contractually agreed date, he shall nonetheless proceed to make the payments on the agreed dates as if the delivery had taken place ....
11. Payment

(....)

11.7. .... If the buyer does not pay within the time limit indicated in the Annex under C, the manufacturer can terminate the contract by a simple written communication (without judicial assistance) and claim compensation for damages up to the stunt mentioned in the Annex under A.

25. Grounds for Relief

25.1. The following circumstances are grounds for relief if they intervene after the conclusion of the contract and hinder its performance: labour disputes and all circumstances independent of the will of the parties, such as fire, mobilization, expropriation, embargo, prohibition to transfer currency, riots, lack of means of transportation, generalized lack of supplies, restrictions on energy.

(....)

26. Limitation of Damages

26.1. If a party owes compensation for damages, this compensation shall not exceed the damage which that party could foresee at the time of concluding the contract."

The order confirmation provided for ICC arbitration and the application of Dutch law. The order further provided that the equipment was to be delivered to the buyer on the condition that the buyer had paid 5% of the sales price one year prior to delivery and had opened an irrevocable letter of credit two months before delivery.

Due to financial difficulties, the buyer only paid 3% of the contractual price as advance payment and did not open the letter of credit within the agreed time limit. The manufacturer offered to deliver only half of the installation. The buyer accepted the offer and the manufacturer issued an invoice for half of the original sales price. The buyer made an offer of approximately 60% of the reduced delivery price. The manufacturer refused this offer and reserved its rights under the original agreement concerning the full delivery.

Following unsuccessful negotiations, the manufacturer commenced ICC arbitration as provided for in the contract. The manufacturer claimed an amount in payment for the part of the manufacturing system which could not be sold to other buyers as it had been made expressly for the Turkish buyer, interest and legal fees. The buyer objected that it was discharged of its obligations under the contract because of the dramatic drop in the price of the relevant product on the Turkish market, which amounted to hardship. The buyers also counterclaimed its advance payment.

The sole arbitrator granted the claim for damages of the manufacturer, denied in part its claim for interest and denied the counterclaim filed by the defendant, which sought to recover the advance payment made to the claimant. In particular, the sole arbitrator found that the circumstances for discharge from payment due to unforeseen circumstances were not met. The mandatory provisions of Dutch law on this matter were to be applied with restraint and international contractual and arbitral practice, including the UNIDROIT Principles, were to be taken into consideration.

Excerpt

[...]

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II. HARDSHIP

[3] "The circumstances alleged by the defendant do not allow the tribunal to discharge the defendant from its obligation to pay on the ground of unforeseen circumstances (onvoorziene omstondigheden) in the sense of Art. 6:258 of the Dutch Civil Code (Burgerlijk Wetboek, BW)."

[4] "The provisions of the Dutch Civil Code, being the law of the manufacturer, apply to the contract by virtue of Art. 13(3) first sentence of the ICC Arbitration Rules together with Clause [28] of the General Conditions. [The application of Dutch law] also ensues from Art. 13(3) second sentence of the ICC Arbitration Rules together with Art. 187(1) second alternative of the Swiss Federal Act on Private International Law (PILA). The Swiss PILA applies to the present arbitration by virtue of its Art. 176(1) because Zurich,

Switzerland, was indicated as the seat of the arbitration by the ICC and both parties have their seat outside Switzerland. Further, the claimant, being the manufacturer, performed the characteristic performance of the contract; hence, the dispute has its closest connection with the law of the claimant (see in general Berger, International Economic Arbitration (1993) p. 503 et seq.).

[5] "Art. 6:258 applies here even if the parties agreed on specific 'grounds for discharge' in Clause 25 of the General Conditions, as, according to Art. 6:250 BW, the parties may not derogate contractually from [Art. 6:258], which must be applied mandatorily (see Nieuwenhuis/Stolker/Valk, Burgerlijk Wetboek, 2nd ed. (1994), Books 3, 5 and 6, Art. 258, note 1).

[6] "However, the conditions of [Art. 6:258] are not met in the present case. We start from the premise that [Art. 6:258] must be applied with the utmost restraint because, among others, it is a special rule with respect to the general possibility, under Art. 6:248(2) together with Art. 3:12 of the Dutch Civil Code, to consider certain contractual provisions inapplicable on grounds of reasonableness and fairness (redelijkheid en billijkheid) in certain circumstances (see, on the lex specialis character of Art. 6:258, Nieuwenhuis/Stolker/Valk, op. cit.).

[7] "In Dutch national legal practice, the general provision [of Art. 6:248 BW] is applied with the utmost restraint (see Nieuwenhuis/Stolker/Valk, Burgerlijk Wetboek, op. cit., Art. 248, note 4). According to Art. 3:12 BW, 'Dutch common opinion of law' is the determining factor in the first place; it is replaced by the common opinion in international contract law when the provision is applied in an international context. Both are influenced in a

[8] "The same restraint should be exercised, according to the Dutch legislator, when applying the special provision of Art. 6:258 (Nieuwenhuis/Stolker/Valk, op. cit., Art. 258, note 1, with reference to the travaux préparatoires). This restraint is also in line with international contractual and arbitral practice. It is also to be taken into consideration in the context of Dutch national law (see Kuijer, op. cit., p. 20).

[9] "Hence, the termination of a contract for unforeseen circumstances ('hardship', 'clausula rebus sic stantibus') should be allowed only in truly exceptional cases (ICC Award No. 1512, in Jarvin/Derains, eds., Collection of ICC Arbitral Awards (1990) p. 3, 4). In international commerce one must rather assume in principle that the parties take the risks of performing
under and carrying out the contract upon themselves, unless a different allocation of risk is expressly provided for in the contract (ICC Award No. 1512, cited above). Art. 6.2.1 of the UNIDROIT Principles expressly provides that the mere fact that the performance of the contract entails a higher economic burden for one of the parties does not suffice to assume that there is 'hardship' (see UNIDROIT, ed., Principles of International Commercial Contracts (1994)).

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p. 145). Also the ICC Principles on 'Force Majeure and Hardship' provide that a party cannot argue that performance is impossible only because the contract happens to have become unprofitable (ICC Publication No. 421, p. 22). Accordingly, a Dutch arbitral tribunal held that a dramatic fall in the price [of a product] as well as currency fluctuations alone are not unforeseen circumstances and thus do not justify the termination of a contract. In the opinion of the arbitral tribunal, these circumstances fall rather within the risk sphere of the party concerned (Ad Hoc [NOFOTA] Award of 10 September 1975, Yearbook II (1977) p. 156, 158; see also ICC Award No. 3099, 3100, Yearbook VII (1982) p. 87, 92; Nassar, Sanctity of Contract Revisited (1995) p. 205).

[10] "In the present case, the defendant bases its objections to the validity of its obligation to pay on such circumstances only. This clearly appears in particular from the fax of the defendant to the claimant ..., in which the changes on the Turkish market are described in detail. The defendant referred to this description several times in the course of the correspondence preceding the arbitration as well as in this arbitration. The rising of a private manufacturing sector and the connected fall in the price [of the product] described therein, as well as the general trade situation in Turkey, only concern the economic frame of the Turkish market and thus fall within the risk sphere of the defendant.

[11] "Further, the defendant also indicated that it was aware of these commercial risks in the relevant trade .... Defendant made clear that it was perfectly aware of the unstable commercial situation in Turkey and that it always had to consider that 'the situation ... can change suddenly'.

[12] "With respect to these unstable circumstances on the Turkish market, which were known to the defendant, it does not seem maintainable that the defendant wants to shift the commercial risks related thereto onto the claimant. Further, the claimant helped the defendant when concluding the contract, in that by accepting the financing clause [contained therein] it accepted a significant pre-financing risk, apparently in consideration of the good commercial relations which had existed until then between the parties. Also, during the entire proceedings the claimant has indicated its willingness to cooperate in an economic solution of the problem which is acceptable for the defendant.

[13] "In the light of the above situation, the circumstances raised by the defendant fall within the economic risk to be borne by the defendant, also according to the interpretation valid in international commercial relations. The arbitral tribunal may not, according to Art. 6:258(2) BW, consider them unforeseen circumstances in the sense of this provision (see also Kuijer, op. cit., p. 20)."

\[...\]

1 Art. 258 of Book 6 of the Dutch Civil Code (BW) reads: "1. The court may, upon request of one of the parties, modify the effects of an agreement or terminate it in part or in its entirety on the basis of unforeseen circumstances of such nature that the other party may not, according to criteria of reasonableness and fairness (redelijkheid en billijkheid), expect the agreement to be maintained in an unmodified form. The modification or termination may be given retroactive effect. 2. The modification or termination may not be pronounced to the extent that these circumstances are to be borne by the party relying upon them, according to the nature of the agreement or commercial common opinion. 3. For the application of this Article, the party to whom a contractual right or obligation has been ceded equals a party to the contract."

2 Art. 13(3) of the 1988 ICC Rules of Conciliation and Arbitration reads: "The parties shall be free to determine the law to be applied by the arbitrator to the merits of the dispute. In the absence of any indication by the parties as to the applicable law, the arbitrator shall apply the law designated as the proper law by the rule of conflict which he deems appropriate."

3 Art. 187(1) of the Swiss Private International Law Act (PILA) reads: "The arbitral tribunal shall decide the case according to the rules of law chosen by the parties or, in the absence of such a choice, according to the rules of law with which the case has the closest connection."

4 Art. 176 (1) of the Swiss PILA reads: "The provisions of this chapter shall apply to all arbitrations if the seat of the arbitral tribunal is situated in Switzerland and if, at the time when the arbitration agreement was concluded, at least one of the parties had neither its domicile nor its habitual residence in Switzerland."
Art. 248(2) of Book 6 BW reads: "A contractual provision valid between the parties does not apply to the extent that it would be unacceptable in the given circumstances according to requirements of reasonableness and fairness."

Art. 12 of Book 3 BW reads: "In determining the requirements of reasonableness and fairness (redelijkheid en billijkheid), generally recognised principles of law, Dutch common opinion of law and the social and personal interests concerned in the given case must be considered."

Art. 1.3 of the UNIDROIT Principles reads: "A contract validly entered into is binding upon the parties. It can only be modified or terminated in accordance with its terms or by agreement or as otherwise provided in these Principles."

Art. 6.2.1 of the UNIDROIT Principles reads: "Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship."

Referring Principles:

IV.1.2 - Sanctity of contracts

VIII.1 - Definition