Title:
ICC Award No. 8790, YCA 2004, at 13 et seq.

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Facts

Seller, claimant in these proceedings, concluded a contract in the Russian language with buyer, defendant in these proceedings, for the purchase of a processed food product. Under the contract, the buyer was to supply the seller with equipment, fuel, products and technological materials, and the seller was to deliver to buyer 440 tons of the product in periodic shipments. The price was established for the first four months of the contract, and was to be agreed upon for the rest of the year. Two versions of the contract were signed. One version of the contract was in the Russian language; it was dated and signed on behalf of both parties and bore the stamps of both companies. Another version of the contract, in both Russian and English, was also signed and stamped, but not dated. The bilingual contract was a summarized version of the Russian language contract and contained some variations from the Russian language contract. Art. 8 of the Russian language version of the contract provided for settlement of disputes (as translated by the ICC Secretariat):

"... any dispute or controversy which may arise out of the present contract or in connection with it should be settled as possible in an amicable way. If the parties fail to reach a settlement, any dispute or controversy without recourse to common courts shall be settled by the International Court of Arbitration of the International Chamber of Commerce in accordance with the Rules of Procedure thereof, awards of which shall be final and binding upon both parties."

The bilingual version did not contain an arbitration clause. Following four deliveries amounting to 90 tons in August of the contract year, seller informed buyer by fax of 15 August that it was compelled to suspend its deliveries for approximately a month due to a reduction in its supply of raw materials and modification in the assortments of the products of its plants. Moreover, it announced that the price had increased by 10%. Buyer responded, inter alia, that some of the lots had been received in bad condition requiring repacking and informed seller that it had withheld the payment for the last 90 tons of the product that had been delivered. The parties made several attempts to settle their differences, during the course of which seller offered to accept to bear 50% of the losses due to the re-packing. The settlement negotiations did not succeed and seller initiated ICC arbitration in which a sole arbitrator was appointed. The Terms of Reference were signed by the seller, but not by the buyer. Buyer did not take part in the arbitration proceedings after filing its Answer, until the eve of the first hearing when it informed the sole arbitrator that it could not and would not cooperate in the arbitration. The buyer, however, eventually submitted a Statement of Defence and attended the second hearing. In the arbitration, the seller submitted a copy of the Russian language contract and a copy of the bilingual contract. The buyer contested the jurisdiction of the arbitral tribunal, arguing that there was not sufficient evidence of an arbitration agreement because there was no original contract upon which a legally valid arbitration agreement could be based. Moreover, in its view, the
dispute settlement clause was to be interpreted as providing that the parties intended to submit their disputes to common tribunals, and only if this were not possible, then to ICC arbitration. Buyer stated that it did not remember having signed a contract including an arbitration clause, but it did not exclude that such a contract might exist. The sole arbitrator considered that there was sufficient evidence to show that the copy of the Russian language contract was a true copy of the original signed by the parties. There was no evidence that it was a forgery, each page was initialed by the parties' representatives, and the contract was signed and stamped. In the view of the sole arbitrator, the bilingual version of the contract was merely a summarized record of the parties' intentions as to the economic conditions of their agreement and did not supersede the Russian language version which contained an arbitration clause. After comparing various translations of the arbitration clause, the sole arbitrator concluded that the Russian text clearly excluded the competence of the common courts. A contract produced by the buyer to illustrate the usual terms on which it concluded its contracts contained an arbitration clause in Russian and English including the words "without recourse to the courts of law". This, in the view of the sole arbitrator, clearly illustrated the parties' intention to exclude the competence of the courts. Applying the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG) and the relevant Incoterms, the sole arbitrator found that the seller was entitled to the payment which had been withheld. The drought which the seller had given as the reason for suspending deliveries constituted force majeure, entitling the seller to suspend delivery. Buyer was not justified in withholding payment for the last deliveries as it had not documented or proved its quality complaints. The sole arbitrator awarded the full amount of the withheld payment minus 50% of the re-packing costs which seller had previously agreed to bear.

I. EVIDENCE OF CONTRACT CONTAINING ARBITRATION AGREEMENT

1. Russian Language Contract

1" The existence of a contract for the sale by claimant and purchase by defendant of one hundred tons of the product is a fact of this case which is undisputed by both parties. Both claimant and defendant refer to the existence of such a contract and each blames the other party for having failed to perform its obligations under such a contract.

2" However, since there are two versions of the contract, and since only one version includes an ICC arbitration clause, the question to be decided is whether the arbitration can proceed on the basis of the ICC arbitration clause included in only one version of the contract.

3" On this issue, the arbitral tribunal holds as follows: The arbitral tribunal has not been provided with the original of any version of the contract. The file contains only copies of both versions. There is no evidence that the copy of the Russian language contract including the ICC arbitration clause would be a forgery; each page is initialed by Mr. X, representative of defendant, and the last page bears his signature as well as Mr. A's signature, representative of claimant; one can see the stamps of the two companies; both signatures and stamps are the same as those appearing on the other version of the contract.

4" While in its letter to the ICC defendant declared that it did not remember having signed a contract including an arbitration clause, it did not exclude that such contract might exist. In its aforementioned letter to the ICC, defendant declared that it did not even have a copy of the contract including an ICC arbitration clause. However, during the course of the arbitration, defendant was provided with a copy of this contract and, although it continuously denied the existence of a valid arbitration agreement, defendant never claimed that this copy was a forgery or that the signature of its representative, Mr. X, had been counterfeited.

5" While, in its Answer [to the Request for Arbitration], defendant wrote that its transactions are closed under its own terms, 'excluding any foreign governmental (or other instituts' [sic] law/contract rules', defendant has produced, as an annex to its Statement of Defence a copy of a contract which it signed with another Central European company [in the same period], bearing the signature of Mr. X, which includes an arbitration clause (Art. 8) similar to the one included in the
contract at issue in the present case, except that it does not refer to the ICC but to the Court of Stockholm. ¹ This arbitration clause is written in both the Russian and English languages.

6"For the above reasons, the arbitral tribunal considers that there is sufficient evidence to show that the copy of the contract in the Russian language including an ICC arbitration clause is a true copy of the original signed by both parties.

7"Concerning the copy of the undated bilingual version of the contract, the arbitral tribunal agrees with claimant that it should be considered as a summarized record of the parties' intentions as to the economic conditions of their agreement (specifications relating to the product, packing, quantity, price, method of payment, documents, delivery, etc.), in which the legal technicalities,

such as the arbitration clause and the clause relating to force majeure have not been reproduced. Significantly, defendant itself, when discussing the issue of force majeure, relies on the definition of force majeure given in Art. 7 of the version of the contract in the Russian language. The arbitral tribunal therefore considers that the undated bilingual summarized version of the contract does not supersede the other version in the Russian language, and does not deprive the arbitration clause contained therein of its validity.

2. Interpretation of Reference to Common Courts

8"The parties disagree on the interpretation of the arbitration clause contained in Art. 8 of the contract. While claimant argues that the parties have agreed that any dispute shall be settled through ICC arbitration, defendant claims that the parties have agreed to submit to ordinary courts, and that ICC arbitration would be possible only in the event that the ordinary courts are not competent. In support of such interpretation, defendant relies on the English translation of Art. 8 proposed by claimant, which reads:

‘... all disputes, except those for which common tribunals are competent, have to be solved by an Arbitration Court of the ICC...’.

The Russian text of the said clause reads as follows:

‘c izkloutcheniem podsoudnosti obchim soudam podlejat razrecheniou Arbitrajnom soudié pri Mejdourapodnoi Torgovo-Promychlennoi Palate’.

The English translation made by the ICC Secretariat reads as follows:

‘any dispute or controversy without recourse to common courts shall be settled by the International Court of Arbitration of the ICC...’.

The arbitral tribunal is of the opinion that the Russian text clearly excludes the competence of the common courts.

9"In support of this opinion, beyond a correct reading of the Russian text, one may observe that the title of Art. 8 which includes the arbitration clauses is ‘Arbitration’. The intention of the parties to have recourse to arbitration would be totally undermined if, at the same time, they had wished to exclude from arbitration all disputes over which common courts would accept jurisdiction (i.e., any possible dispute).

10"Moreover, it should be noted that in the contract produced by defendant and referred to above (see [5]), the Russian version of the arbitration clause is strictly identical to the one included in the contract at issue in the present case (except that it does not refer to ICC arbitration, but to ‘arbitration in Stockholm’). The English translation of the said arbitration clause reads as follows ‘all the disputes and differences are to be submitted, without recourse to the courts of law, to Arbitration in Stockholm’. The insertion of the words * without recourse to the courts of law* between two commas leaves no doubt as to the intention of the parties to exclude the competence of the courts. Defendant can therefore not seriously
claim that the same Russian wording of the arbitration clause included in the contract at issue in the present case should be interpreted differently.

11"The arbitral tribunal therefore considers that the ICC arbitration clause included in Art. 8 of the Russian language contract is unequivocal and clearly excludes the competence of ordinary courts.

12"Moreover, in view of the fact that the parties have validly and unequivocally agreed to submit the dispute to arbitration under the ICC Rules of Arbitration, the arbitral tribunal cannot accept defendant's argument, that recourse to ICC arbitration in the present case would be in violation of Art. 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950).

13"On the basis of the above, the arbitral tribunal decides that there is sufficient evidence of the existence of the Russian language contract, which includes an ICC arbitration agreement binding on both parties. Consequently, the arbitral tribunal considers that it has jurisdiction over the claim brought by claimant.

II. APPLICABLE LAW TO THE MERITS

14"Both parties agree that the dispute should be settled in accordance with the UN Convention on Contracts for the International Sale of Goods signed in Vienna on 11 April 1980, ratified and in force in the countries of the seller and the buyer. The subject matter of the dispute relates to the performance of a contract for international sale of goods between parties whose places of business are in different Contracting States. The Vienna Convention is therefore applicable to the present case, in accordance with the provisions of Art. 1 of the said Convention.

15"Moreover, since the contract refers to the term 'FOT ...', the arbitral tribunal will apply the relevant provisions of the Incoterms 1990, i.e., the FCA terms ('Free carrier'), which, in the 1990 version of Incoterms, replaced the terms dealing with some particular modes of transport (FOR/FOT/FOB).

16"The arbitral tribunal has further examined whether it might be necessary to refer to the provisions of law of the country of the seller. But it has not seen any reason to do so. All the points at issue can be decided in accordance with the Vienna Convention supplemented by the relevant provisions of the Incoterms.

III. ENTITLEMENT TO RELIEF

1. Claimant's Obligations

17"In order to determine whether claimant is entitled to any or all of the relief it seeks the arbitral tribunal has examined how claimant has fulfilled its obligations under the contract.

18"The contract provided that claimant would sell during the course of the contract year, 1,000 tons of the product at a fixed price, for a period of four months from April to July. For the remainder of the year, the prices would be agreed in June of the contract year. The deliveries would take place on FOT terms ... in equal lots packed and marked.

19"It is an established and undisputed fact of the case that, following previous deliveries which are not the subject of the dispute, claimant delivered a quantity of 90 tons of the product, in four equal lots of 22.5 tons each, during the month of August, at the agreed price. Defendant had sent its instructions for a prepayment of the delivery of these 90 tons of the product on 10 August. There is no dispute between the parties regarding the fact that the price for the product thus delivered in August was the agreed price, whereas the contract provided that such price was valid only for the period from April to July 1994.

20"Claimant had no obligation concerning the carriage. The agreed delivery terms under the contract were ‘FOT ...’. Moreover, the contract expressly stipulated that the carriage was defendant's responsibility and at its own costs. In accordance with Art. 67(1) of the Vienna Convention and Clause B.5 of the
FCA Incoterm, all risks of the goods were transferred to defendant at the time of delivery of the goods by claimant to the carrier designated by defendant. Claimant has produced as required the waybills, customs declaration CMR (Convention on the Contract for the International Carriage of Goods by Road) delivered by the authorities of seller's country.

21"The contract stipulated the claimant also had to present to defendant after loading the goods a certificate of radioactivity, a health certificate, a certificate of quality, and a certificate of origin of the product. These certificates have not been produced in the arbitration. However, it is not disputed by defendant that these documents were actually issued in due time. Moreover, as noted by claimant, failing such certificates, the export of the goods would not have been authorized by the customs officials.

22"Claimant argues that the suspension of further deliveries, which it announced by fax of 15 August to defendant, was justified by a case of force majeure. Claimant has produced a certificate issued by the competent local Chamber of Commerce, which states that climatic conditions during the period led to a reduction of raw material yield and that these circumstances, which are beyond human control prevented claimant from fulfilling its contractual obligations towards defendant.

23"The arbitral tribunal sees no reason to question the truthfulness of this official statement. Moreover, under Art. 7(3) of the contract, the parties agreed that evidence of circumstances of force majeure shall be brought through 'certificates issued by the Chamber of Commerce for each of the parties'. Defendant argues that drought was not specifically mentioned as a case of force majeure in Art. 7(1) of the contract. But though it is true that drought is not specifically mentioned, Art. 7(1) refers to 'natural catastrophes' and also to 'other circumstances outside control', terms under which one is entitled to include drought.

24"Defendant also argues that it has been able during the same period to sign a contract for the supply of the product with another company in the same country as seller, which it considers as a proof that the existence of a drought can be put into doubt. But it can be observed that this other company is located in a city ... more than 300 kilometers [distant] from [claimant's seat], which does leave the possibility of the existence of a drought in the territory of [claimant's seat].

25"Defendant further argues that in its fax of 15 August, announcing the suspension of its deliveries, claimant also mentioned a modification of its assortments, which, in defendant's view, is not a sufficient reason to suspend the deliveries. Taken at its face value this argument may have some weight, but one should also consider:

   i that the modification in the assortments could be a consequence of the reduction in the production of the raw material due to the drought;
   ii that at any rate it is only a subsidiary reason for the suspension of deliveries, the main one being the drought.

26"The allegation by defendant that claimant is liable for an anticipatory breach of contract cannot be accepted. The facts of the case demonstrate that, prior to the occurrence of a case of force majeure, claimant fulfilled its obligations and that, when the case of force majeure materialized, claimant notified defendant, not an impossibility to fulfil the remaining portion of the contract, but only a suspension of the deliveries for a period of one month. Defendant was therefore not entitled to suspend the payment of the purchase price for 90 tons on the grounds of an alleged anticipatory breach.

27"As far as the payment of costs is concerned, there is no indication that claimant did not fulfil its obligations in accordance with the contract and the FCA Incoterm (Clauses A.6 and A.9).

2. Defendant's Obligations

28"The arbitral tribunal has also examined defendant's fulfilment of its obligations under the contract. Defendant's main obligation was to pay the price for the goods delivered (Art. 53 of the Vienna Convention, Clause B-1 of the FC A Incoterm). The facts of the case establish, and defendant itself confirms, that after having given instructions for the transfer of an amount... for payment of 90 m. tons of the product delivered by claimant, defendant has withheld the
effective transfer of this amount to claimant.

29"In order to justify such a decision, defendant, apart from rebutting the case of force majeure (see above, [22]), claims that it has found dust and cockroaches in some bags of the product, so that it had to clean and repack the product. Defendant also claims that it had to resell previous deliveries at a lower price because the product was downgraded. It says that a Danish laboratory has inspected the product and confirmed its bad quality. However, on the one hand, defendant has not produced any certificate emanating from this Danish laboratory, on the other hand, defendant does not seem to have inspected the goods before their delivery (Pre-shipment Inspection - PSI) as usually recommended by trade practice (see Clause B.9 of the FC A Incoterm 1990). Furthermore, at the time of the reception of the deliveries at its own place of business, defendant did not ask for a contradictory inspection of the goods.

3. Conclusion

30"On the basis of these facts and arguments, the arbitral tribunal decides the following: Claimant was entitled to announce a suspension of the deliveries due to the occurrence of a case of force majeure. Therefore, the withholding by defendant of the payment to claimant of the agreed purchase price for the effective delivery of 90 tons of the product is not justified insofar as it was based on the announced suspension of deliveries.

31"Concerning defendant's claim relating to the quality of the goods and of the packaging, the relevant facts are the following: - Although claimant has not produced in the arbitration copies of some of the certificates (health, radioactivity, quality, origin), which claimant had to present to defendant, defendant never claimed that these documents were not actually presented in accordance with the contract. - Moreover, at the time of delivery of the goods by claimant to the carrier, defendant did not conduct any Pre-shipment Inspection (PSI), as usually recommended when the sale is on FOT (FCA) terms, thus taking a serious risk and making it difficult to prove when the alleged deterioration of the goods occurred. Defendant further failed to produce evidence to show that an independent inspection of the goods was conducted when the goods were received in its country.

32"For the above reasons, defendant was not entitled to withhold the payment of the price of the goods on the grounds of alleged quality problems regarding the goods and/or the packaging. For the same reasons, defendant is not entitled to claim that the alleged losses incurred as a result of these alleged quality problems should be set off against claimant's claim for payment of the purchase price for 90 tons. However, after receipt of defendant's fax dated 22 September, in which defendant claimed, inter alia, that it had to incur re-packing costs ... claimant agreed, in its fax dated 4 November, to bear half of these specific costs alleged by defendant....

33"In view of the above, the arbitral tribunal decides that claimant is entitled to receive payment of the purchase price for 90 tons ... of the product, less half of the re-packing costs claimed by defendant, which claimant agreed to bear....

IV. INTERESTS AND COSTS

34"Claimant requests the payment of delay interest in compensation for the non-payment of the sum ... which remained unpaid by defendant, from 27 August. Claimant bases its request on the interest rates in force in seller's country at the corresponding time and produces a certificate issued by the Bank concerning the applicable interest rates during the relevant period.

35"The following questions must be answered by the arbitral tribunal:

i. Is claimant entitled to receive delay interest as a compensation for the nonpayment of the purchase price of 90 tons of the product?
ii. In the affirmative is interest to be paid on the basic sum ... or on this sum diminished as calculated above...?
iii. Is the date selected by claimant as starting point of the delay interest appropriate?
iv. Must the interest rates be calculated, as requested by claimant, on the basis of its local interest rates?

V. In the negative, on which other basis should the interest be calculated and what is consequently the amount of interest to be awarded to claimant?

36"[Ad i], according to the Vienna Convention (Art. 78): ‘If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it, without prejudice to any claim for damages, recoverable under Article 74.’ Therefore, since the arbitral tribunal has recognized that defendant has wrongfully withheld the price due for the delivery of 90 tons of the product ... claimant is entitled to receive delay interest.

37"[Ad ii], since the arbitral tribunal decided that claimant was entitled to claim the payment by defendant of the principal amount of the purchase price of 90 tons minus 50% of the repacking costs, delay interest must be calculated on the basis of this sum.

38"[Ad iii], it was justified on the part of the claimant to select the period starting from the date where it got confirmation that defendant had withheld the payment... i.e., 27 August, as the date when delay interest should start running. Claimant is entitled to request the payment of delay interest till it receives full payment of the principal amount awarded.

39"[Ad iv], since the currency of the contract is the US dollar, there is no reason to base the calculation of delay interest rates on the rates applied by the Bank during this period of time. Moreover, the contract stipulated (Art. 1(2)) that in exchange of delivery of the product, defendant would buy certain specific goods listed in Annex 1 to the contract. These goods were not to be bought in seller's country and had to be paid in US$.

40"For these reasons the arbitral tribunal rejects claimant's request that the interest rate should be based on the rates of seller's country and decides that interest should be calculated on the basis of the average rate of the LIBOR 3 months over the period from 27 August of the year in which the default occurred until 1 November 2000, i.e., on the basis of an annual interest rate of 3.887%.

41"Claimant argues that defendant is responsible for the dispute and should therefore bear all costs arising from the arbitration. Defendant argues that, since there is no evidence of a valid arbitration agreement, all costs must be paid by claimant. Defendant's conduct as noted above left claimant no choice but to initiate these proceedings in order to assert its legitimate claim. Moreover, defendant's long abstention from any significant participation in the arbitration led to costly and time-consuming difficulties. For these reasons, the arbitral tribunal considers it appropriate to order that the costs be borne by defendant.

42"Claimant has however never specified the amount and nature of the legal costs it incurred in relation to its party representation in the arbitration. This leaves the arbitration fees and administrative expenses fixed by the ICC... All of this amount has been paid by claimant. The arbitral tribunal considered that this amount is to be borne by defendant.

1Note General Editor. See [10] where reference is made to "Arbitration in Stockholm"

2Art. 67(1) of the United Nations Convention on Contracts for the International Sale of Goods (CISG) reads:"(1) If the contract of sale involves carriage of the goods and the seller is not bound to hand them over at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract of sale. If the seller is bound to hand the goods over to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of the risk."

3Incoterm 1990 FCA A.4 reads in relevant part: "The buyer must bear all risks of loss or damage to the goods from the time they have been delivered in accordance with A.4. (...)" Incoterm 1990 FCA A.4 reads in relevant part: " The seller must deliver the goods into the custody of the carrier or another person ... at the named place or point on the date or within the period agreed for delivery and in the manner agreed or customary at such period ... Delivery to the carrier is completed: (...) ii) In the case of road transport when loading takes place at the seller's premises, delivery is completed when the goods have been loaded on the vehicle provided by the buyer. When the goods are delivered to the carrier's premises, delivery is completed when they have been handed over to the road carrier or to another person acting on his behalf. (...)"

4A.6 and A.9 of Incoterm 1990 FCA read:"A.6 Division of costs The seller must subject to the provisions of B.6 - pay all costs relating to the goods until such time as they have been delivered to the carrier in accordance with A.4; - pay the costs of customs formalities as well as all duties, taxes, and other official charges payable upon exportation."A.9 Checking - packaging - marking The seller much pay the costs of those checking operations (such as checking quality,
measuring, weighing, counting) which are necessary for the purpose of delivering the goods to the carrier. The seller must provide at his own expense packaging (unless it is usual for the particular trade to send the goods of the contract description unpacked) which is required for the transport of the goods, to the extent that the circumstances relating to the transport (e.g., modalities, destination) are made known to the seller before the contract of sale is concluded. Packaging is to be marked appropriately.”

5 Art. S3 of the CISG reads: "The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention." Incoterm 1990 FCA B.1 reads: "The buyer must pay the price as provided in the contract of sale."

6 Incoterm 1990 FCA B.9 reads "The buyer must pay, unless otherwise agreed, the costs of pre-shipment inspection except when mandated by the authorities of the country of exportation."

Referring Principles:

VI.3 - Force majeure