Title:
ICC Award No. 9029, 10 ICC Bull. No. 2, 1999, at 88 et seq.

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Final Award in Case 9029

Date: March 1998
Lang Italian
Usage:
Claim Italian company
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Resp Austrian company
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Place Rome, Italy
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Claimant's search for the capital required to finance an aeronautical manufacturing and marketing project led it to take up relations with a company of which Respondent is the successor. The two parties formalized their partnership through various agreements, including a Shareholders Agreement. The dispute concerns the latter. Claimant requests the Arbitral Tribunal to pronounce the termination of the Agreement owing to breach by Respondent and to award it damages for the harm suffered. In turn, Respondent claims the Agreement was invalid or inapplicable, that it was justified in withdrawing, and that the Agreement was characterized by hardship, entitling it to damages. It bases its claims on the Unidroit Principles, notably Articles 62 (hardship), 3.10 (gross disparity) and 1.7 and 2.15/2 (lack of good faith), as a reflection of international trade usages. The Arbitral Tribunal rejects both the claims and the grounds upon which they are based. It decides that there is no justification for the alleged hardship and that the Agreement and the arbitration clause it contains are valid and applicable. It then considers the question of lack of good faith, raised by Claimant, and that of failure to comply with the undertaking not to compete, raised by Respondent. The Arbitral Tribunal dismisses the former and, whilst recognizing the validity of the undertaking not to compete, declares that it lacks jurisdiction to decide this request, which is not included in the Terms of Reference. It comes to the conclusion that the Agreement should not be terminated on the ground of Respondent's default and that it was unjustified for the latter to withdraw. Its finding is that the Agreement came to an end rather through mutual misunderstanding, with no retrospective effects. The parties are ordered to bear arbitration costs in equal proportions.

[...]

On the question of whether or not the Shareholders Agreement is characterized by hardship:

1Respondent concluded by asking the Arbitral Tribunal to declare that the Shareholders Agreement entered into by the
parties . . . causes grave hardship to the detriment of Respondent. . . . Respondent has attempted to identify the hardship in the unzumutbare Härte of German experience, i.e. in the excessive disparity in the contract or in some of its clauses, with excessive advantage to one of the parties, to which the Unidroit Principles also refer . . . [and to show] that the disparity between the services rendered by the two parties is vast. . . . Respondent therefore maintains that the services rendered by Claimant were no more than abstract "Supports", in part not corresponding to the truth and in part, on the contrary, laying burdens . . . exclusively on Respondent. . . . Respondent insists that the gross disparity between the obligatory services rendered by the parties . . . has repercussions for the validity and efficacy of the partnership agreement . . . 

Furthermore, Claimant, having considered inappropriate Respondent's appeal to the Unidroit Principles on the basis of the general considerations described above, has also pointed out that, in any case, Articles 3.10 and 6.2.2 of the Unidroit Principles referred to in Respondent's concluding plea do not permit a finding of the existence of the alleged grave hardship complained of, i.e. the disparity between the services in the contract, to the detriment of Respondent; that Article 3.10 of the Unidroit Principles, in particular, stipulates that there must exist two presuppositions in order for the grave hardship principle to be applicable, viz. that "there must be a serious disparity between the parties' reciprocal rights and obligations which gives an excessive advantage to one party" and that "the excessive advantage must be unjust, that is to say that one party must have taken excessive advantage of a dependency, a state of economic necessity, urgent needs or lack of foresight, ignorance, inexperience, or the other party's disablement in conducting the negotiations"; that these presuppositions are not present in this case.

The Arbitral Tribunal considers that the abnormal hardship complained of by Respondent does not exist, and that it cannot therefore accept the connected claim aimed at obtaining from the Arbitral Tribunal the finding that the Shareholders Agreement is invalid or void.

[...]

**Referring Principles:**

- **VIII.1 - Definition**