Title:
ICC Award No. 9771, YCA 2004, at 46 et seq.

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Facts

A commodities trading company, claimant in these proceedings, negotiated a contract with shipping company A, second defendant in these proceedings, for the supply of 3,000 tons of a raw material. The commodities trading company faxed the contract bearing its signature to the Moscow office of shipping company A which signed the contract and faxed it back to the commodities trading company. The following day, the same document bearing the same contract number and date was faxed again to the commodities trading company, but with the signature of shipping company D, first defendant in these proceedings. The contents of the contract were unchanged except that shipping company A's name and address had been substituted by that of shipping company D. In addition, a change had been made in the article of the contract regulating the consequences of exceeding one of the quality specifications increasing the allowable content of a component from 14.20% to 14.70%. The signature on behalf of the shipping company on both documents was the same. The commodities trading company only signed the version of the contract faxed to it by shipping company A.

The contract contained an arbitration clause which read:

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"Any contingency or claim arising out of or relating to this Contract or any alleged breach thereof shall be settled by arbitration in Stockholm, Sweden, in accordance with the rules of International Chamber of Commerce. If the validity of the arbitration clauses or the jurisdiction of the arbitration court is contested by one or the other Party, the arbitration court shall be competent to make a final decision on said issue."

Pursuant to the contract, on 7 June the commodities trading company paid 90% of the purchase price in advance, as invoiced by shipping company D. On the same day, shipping company D invoiced the commodities trading company for the remaining 10% of the purchase price. Both invoices were based on a cargo of 2,828.09 metric tons of the goods which shipping company D delivered to the agreed-upon port on 17 June. Tests were carried out by the commodities trading company and by a surveyor S, which found that the goods contained a higher content of the component than the contractually agreed specifications. The commodities trading company refused to accept delivery of the goods and informed both shipping company D and A of the defect. On 11 July, the commodities trading company confirmed its rejection of the goods by a telefax to shipping company D. The commodities trading company informed the shipping companies that it considered the non-compliance of the goods with the quality specifications to be a breach of contract and claimed reimbursement of the advance payment as well as compensation for all other costs and damages. The commodities trading company resold the goods at a lower price in order to limit the damage.
Various attempts were made to reach an agreement on compensation, but when these proved unsuccessful, the commodities trading company instituted arbitration against both shipping companies and a sole arbitrator was appointed. The arbitration was conducted on documents only and no hearings were held.

The sole arbitrator first examined his jurisdiction with respect to the two defendants. First and second defendant argued that only shipping company D, which had performed the obligations of the seller under the contract, should be a party to the contract. The sole arbitrator found that there was no indication of an express assignment of the contract, as argued by defendants. Although the commodities trading company accepted shipping company D also as a contractual party, this did not mean that it released shipping company A from its obligations. The contract had been signed by shipping company D and confirmed by shipping company A; thus they were both bound by the arbitration clause in the contract.

After finding that the conflict of law rules of the place of arbitration, Sweden, applied to the determination of the applicable law to the substance of the dispute, the sole arbitrator applied the 1955 Hague Convention which is embodied in the Swedish 1964 Act on the Applicable Law on the International Sale of Movables. The 1955 Hague Convention states that the contract will be governed by the law of the place where the seller was domiciled at the time of receiving the order, or if the order is received at a permanent establishment which belongs to the seller, the law of that place. The sole arbitrator found that the order had been received at the representative office of the defendant which was located in Moscow and that Russian law should apply.

The sole arbitrator found that the shipping company D and shipping company A were jointly and severally liable under the contract and that the delivery was not in conformity with the contractual terms and specifications. The commodities trading company, which had already paid 90% of the amount due was awarded the full amount of its claim with deductions for amounts already refunded or not yet paid. Because the claimant essentially succeeded entirely in its claims, the sole arbitrator held that the defendants should bear all costs.

Excerpt

[...]

III. Disposition of Issues

(...) 1. Number of Contracts and Parties

(...) 2. Joint Several Liability of Defendants

[36] "The claimant has stated that both shipping company A and shipping company D are liable under the contract. The defendants have maintained that there only could be one contract and therefore only one seller as clearly there was only one performance.

[37] "As confirmed above, the defendants are correct in there only being one contract but the liabilities thereunder are shared jointly and severally between both of the defendants. As the contract and the arbitration clause contains both rights and obligations of the seller, such assignment may not be done unilaterally but also requires the consent of the creditor, i.e., the claimant. There is no evidence that the claimant gave such consent, either implicitly or expressly. In fact, the claimant in these proceedings has stated that it denies that such assignment has occurred. The fact that the claimant did not object immediately to the new party and that it performed its obligations such as the payment, to shipping company D, does not in the opinion of the sole arbitrator constitute evidence that the claimant accepted to exonerate A
from its obligations under the contract. In fact the correspondence subsequently between the parties indicate[s] that the claimant made no difference between shipping company A and shipping company D and considered them as one and the same party, and thus, to the contract and to which none of these parties objected to either. Nor does it appear as if shipping company A or shipping company D made any difference between themselves. It seems that they have acted in cooperation and jointly vis-à-vis the claimant in the course of the performance of the contract.

[38] "For the above reasons the sole arbitrator finds that there is only one contract, the contract, and that the liability of the defendants as sellers under the contract is joint and several."

[39]

4. No Breach of Contract for Non-Payment

[47] "According to the contract the buyer had to make an advance payment corresponding to 90% of the purchase price prior to any goods being shipped and delivered. The defendants therefore sent the claimant an invoice dated 4 June for the total amount due for the goods being delivered. The contract in Art. 9 also specified that the remaining amount, corresponding to 10% of the balance cargo value, was to be paid 'at thirty (30) days from B/L date, after Buyer's original shipping documents and analyse [sic] results at discharging port'. The defendants sent a corresponding invoice dated 7 June to the claimant.

[48] "It is undisputed in these proceedings that the claimant also effected such payment to shipping company D as requested by the defendants, on the same day as it received the invoice, dated 4 June with a value date of 7 June. This is also evidenced in the invoice sent by the defendants for the remaining 10% balance where the amount paid by the claimant is deducted. The claimant therefore did not breach its obligation to pay the amount due as advance payment.

[49] "As the goods were found to be defective, however, no further payment was due for the goods. Instead the claimant was entitled to claim the reimbursement of the advance payment made. In addition, the defendants in a fax letter dated 2 August, expressly relieved the claimant from paying the remaining outstanding balance for 10% of the price for the goods. The claimant therefore has not either breached the contract by not paying the remaining 10% of the original contract value as invoiced by the defendants through D."

5. Breach of Contract Due to Failure to Deliver Goods in Conformity with Contract

[50] "As established above, the delivery of the goods under the contract was not conforming to the contractual terms and specifications. The sole arbitrator therefore finds that the defendants have breached their contractual obligations by not delivering goods of the agreed quality. The parties also had agreed that the weight (Art. 6) and quality (Art. 7) should be determined at the port of destination by S, a well-recognized surveying company acting world-wide. The defendants have not disputed the authenticity of the S's report but have confined themselves to submitting an analysis made by Z dated 7 June, which does not state the day on which the sampling was made but certainly is dated prior to the time of arrival in the port of destination, which was on 17 June. This report does therefore not fall within the scope of the language of the contract which specifies not only that the test should be made by S, but also that such a test should be made at the port of destination.....

[51] "The sole arbitrator concludes that the wording of the contract is clear and explicit on this point. The contract clearly states the precise properties which the goods were to have when delivered. The parties also expressly agreed that the analysis by S should be conclusive and should decide whether the goods were in conformity with the contractual specification or not. On the basis of the copy of the analysis by S submitted in these proceedings one notes that in fact the [contents] contrast with the specification of the allowed maxima and minima, respectively, of such properties provided for in the contract. The S report also states the testing method used, the analysis made and the date of the analysis. It also makes reference to the name of the ship delivering the goods. The defendant has neither disputed the quality nor the correctness of the report by S."
There is therefore no doubt in the mind of the sole arbitrator that the S report properly reflects the results of its analysis of the goods delivered by the defendant and that such an analysis actually was performed. The report is precise and specific and clearly indicates the cargo to which it relates, the ship, the port of shipment and the destination, etc. It may therefore safely be determined that the delivered goods did not comply with the contractual specifications. As a consequence, the claimant in accordance with Art. 7 of the contract was entitled to reject the goods delivered. In such case the defendants should have repaid the advance payment received but did not. Therefore, the sole arbitrator also finds that the defendants have breached the agreement between the parties also in this respect.

The defendant has not made any argument, which would even give the slightest suspicion that there was any acceptable excuse herefor, such as, e.g.,

force majeure. Nor did the defendant object to the claim of the claimant immediately subsequent to the delivery. This has only been done in these proceedings. On the contrary, the defendant agreed to repay (and in fact it did) as much as approximately one-third of the advance payment before the present arbitration proceedings were initiated. It is noted that according to the evidence in the case the defendants have not objected to the defective delivery as such nor to being obligated to repay the amount it received from the claimant other than referring to its discussion with the supplier, and its impossibility to repay as it had forwarded the payment of the claimant to supplier.

In fact, the defendants did not object to their liability at the time of the claimant's rejection. In effect the defendants may be considered, at least indirectly, to have accepted responsibility for the lack of quality of the goods as it only referred to their discussions with its supplier when the claimant raised its claim concerning the defective delivery and by repaying a certain amount and being prepared to compensate the claimant with a non-specified amount on future deliveries.

According to the claimant, shipping company D undertook to pay the balance also during verbal contacts between the parties. This has not been commented on by the defendants in these proceedings. The sole arbitrator, against the denial of the defendants of any liability, does therefore not give any particular weight to such statements; also in the view that there has been no oral hearing and testimony in this case and no such oral undertaking is therefore considered proven."

6. Entitlement to Damages

As has been concluded ... above, the goods delivered were not in conformity with the contractual specification and the sole arbitrator therefore finds that defendants thereby did breach their obligation under the contract to deliver goods of a specific quality. Under such circumstances the claimant is entitled to compensation for the damages suffered..... The sole arbitrator holds ... that Russian law is applicable.

Referring Principles:
- IV.6.11 - Plurality of debtors
- VII.1 - Damages in case of non-performance