Title:

Permission Text:
Excerpts from this document are included in TransLex by kind permission of the ICCA.

Table of Contents:
Annulment decision of 3 May 1985 (original in French)
FACTS
EXTRACT
VI. OTHER COMPLAINTS
(A) Exceptio non adimpleti contractus

Content:

Annulment decision of 3 May 1985 (original in French)

Ad hoc Committee: Prof. Pierre Lalive (Switz.), chairman; Dr. Ahmed El-Kosheri (Egypt) and Prof. Ignaz Seidl-Hohenveldern (Austria)

Parties: Petitioner: Klöckner Industrie-Anlagen GmbH (F.R. Germany); Respondent: United Republic of Cameroon

Published in: French original text will be published in Journal du Droit International (Clunet) (1986). An English translation (which differs from the one appearing below) will be published in ICSID Review, Foreign Investment Journal (1986).

Subject matters:
- jurisdiction of arbitrators
- conflicting arbitration clauses (ICSID and ICC)
- interpretation of the grounds for annulment listed in Art. 52(1) of Washington Convention of 1965
- excess of power
- violation of fundamental rules of procedure
- lack of reasons

FACTS

The facts of this case, together with that part of the arbitral award of 21 October 1983, dealing with the arbitrators' jurisdiction, are published in Yearbook Vol. X (1985) pp. 71-78.

Pursuant to a number of contracts entered into in the 1970s between Klöckner and Cameroon, Klöckner was to supply and erect a fertilizer plant in Cameroon. The factory was to be operated by a Cameroonian joint venture company (SOCAME), in which Klöckner was to be responsible for technical and commercial management.

The factory was supplied and erected by Klöckner, but after 18 months of unprofitable and technically inadequate operation under Klöckner's management, the factory was shut down in 1978.

Klöckner filed a request for arbitration in April 1981, claiming the outstanding balance of the price for supplying the factory (calculated to be FFr. 207 million in July 1983).

The arbitrators (Judge Eduardo Jiménez de Aréchaga, chairman; William D. Rogers; and Mme. Dominique Schmidt,
dissenting) rendered an award on 21 October 1983, in which they declared the Cameroonian debt to Klöckner to be entirely discharged on the grounds of Klöckner's failure to perform the contract.

Klöckner requested annulment of the award on 10 February 1984, on the basis of Art. 52(1) of the Washington Convention of 1965, which reads:

"(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:

(a) that the Tribunal was not properly constituted;

(b) that the Tribunal has manifestly exceeded its powers;

(c) that there was corruption on the part of a member of the Tribunal;

(d) that there has been a serious departure from a fundamental rule of procedure; or

(e) that the award has failed to state the reasons on which it is based."

Klöckner invoked grounds (b), (d) and (e).

In its decision of 3 May 1985, the ad hoc Committee annulled the arbitral award for the reasons given below.

EXTRACT

[...]

VI. OTHER COMPLAINTS

(A) Exceptio non adimpleti contractus

The ad hoc Committee concluded:

"In short, if the Award contains some reasoning on the conditions of application for the exception of non-performance, it might be asked whether or not this reasoning is sufficient or 'sufficiently relevant'. It is not necessary to answer this, since, in dealing with the question of the effects of the exception of non-performance, the Award does not state reasons of law nor does it identify any rules of civil law (supported by citations of doctrine and of case law comparable to those expounded in the Award in support of the general principle) which might serve to justify its contention. In reality, it looks as if the Arbitral Tribunal considered the exceptio non adimpleti contractus as giving rise to the extinction of obligations under French law, a conclusion which, on any reading of the citations used in the Award itself, does not necessarily follow and, moreover, does not appear consistent with what the ad hoc Committee knows about this area of law. In any case, such a conclusion should have been expressly justified.

"The complaint of failure to state reasons appears thus not only admissible but well-founded.”
The General Editor wishes to express his sincere thanks to Ms. Frances Meadows for her assistance in the translation.

Referring Principles:

V.1.4 - Principle of simultaneous performance; right to withhold performance