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CASE NO. 4

Award of 31 December 1989, case no. 14/1989

Arbitrs: Three Arbitrators of Egyptian nationality

Parties: Claimant: A European Company; Respondent: An African Government Authority

Place: CRCICA, Cairo, Egypt

Subject Matter:
- administrative contract of supply
- whether delay amounted to breach of contract
- lack of necessity for performance guarantee extension
- did an award of damages attract interest and if so, from when?

Language: Arabic

Applicable Law: Egyptian law

Held

The amount of damages granted to a claimant include losses suffered and profits of which he has been deprived which were the normal result of the failure to perform the obligation or of delay in such performance. These losses are considered to be a normal result, if the creditor was not able to avoid them after attempting to do so.

Facts

The Claimant entered into a contract with the Respondent for the supply of _thousand (plus or minus ten percent) of live
male cattle. The tender stated that the general conditions attached were complementary to its terms, and where certain provisions were absent, government procurement regulations would apply. The purpose of the contract was to meet the market demand for meat for the period preceding the Korban Bairam (one of the Islamic Feasts) so as to curb the increase of meat prices.

The Claimant accused the Respondent of contractual breaches on three grounds. The first breach was the Respondent's failure to provide foreign currency to open documentary credits as agreed between the parties. According to the Claimant, the Respondent was aware of a problem and should not have entered into the contract with the Claimant. Secondly, the Respondent had instructed its bank to open a documentary credit which could not be drawn upon unless instructed by the Respondent. The Claimant argued that the parties had agreed upon an irrevocable confirmed credit under the UCP and the credit opened by the bank had been, contrary to the 1983 Uniform Customs and Practice of the ICC. Finally, the Claimants argued that when the documentary credit became operative, it was for an amount less than the agreed amount.

The Claimant requested the Respondent to expedite the operation of the documentary credit but the Respondent failed to do so. The Respondent had not objected to the shipping of goods provided that the Claimant submitted an attestation stating that the Claimant would not take any recourse against the Respondent and that the Claimant would agree to payment being made after the receipt of goods, release of goods by Customs and once the bank opened the credit. The Claimant filed a suit against the Respondent and claimed damages for incurred losses and lost profit.

Arbitration proceedings were initiated under Article __ of the contract:

Any dispute, difference or claim arising out of this contract or relating thereto or to any breach, termination or nullity thereof, shall be settled by arbitration according to the UNCITRAL Arbitration Rules as prevailing in the present time provided that arbitration shall be conducted in Cairo Regional Centre For International Commercial Arbitration.

There was no conflict between the parties as to the administrative nature of the contract, the arbitrability of the subject matter and the applicability of Egyptian law and the provisions of Article 33 of the UNCITRAL Arbitration Rules which stipulated:

1. The Arbitral Tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the Arbitral Tribunal shall apply the law determined by the conflict of law rules which it considers applicable.

2. The Arbitral Tribunal shall decide as amiable compositeur or ex aequo et bono only if the parties have expressly authorised the Arbitral Tribunal to do so and if the law applicable to the Arbitral procedure permits such arbitration.

3. In all cases, the Arbitral Tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

Award

The Arbitral Tribunal ruled that the contract was an administrative one and the parties common intention would be interpreted in light of the Civil Code. An administrative contract required the consent of both parties. Article 150(2) of the Egyptian Civil Code provides a guideline in interpreting the parties intention:

. . . by going beyond the literal meaning of words, taking into account the nature of the transaction as well as the loyalty and confidence which should exist between the parties in accordance with commercial usage.
The Tribunal drew a distinction between administrative contracts and civil contracts, in that the former emphasised the requirement of public utility, i.e. public interest prevailed over private interest and to achieve that objective, the government was entitled to amend the contract and to indemnify the other party for any prejudice.

The Tribunal ruled that the contract had resulted in delay on the Respondent's part in opening the documentary credit for which the Claimant was entitled to an equal period of supply. The terms of the contract had provided that the goods would be shipped after the opening of the operative documentary credit within fifteen days from the date of acceptance of the performance bond by the Respondent. The Claimant had not been entitled to a claim for any expenses or damages as a result of delay in opening the documentary credit.

It was an established rule of law that non-performance of contractual obligations by a debtor amounted to a breach of contract. Where the debtor failed to discharge his obligations due to impossibility of circumstances, he would be liable for damages unless he could prove that the failure to perform was due to force majeure or a default on the part of the creditor himself.

The facts leading up to the contract showed that both parties were aware at the time of signing the contract, that opening of a documentary credit was not entirely at the discretion of the Respondent. The credit had been inoperative initially because the Respondent had been waiting for the performance bond to be submitted. Once the bond had been submitted, the credit had become operative. The Respondent could not be held liable for delay in those circumstances.

Moreover, it had not been the Respondent's fault that the credit amount had been less than the amount agreed in the contract as it had to go through the process of authorization by the Prime Minister and Governor of the Central State Bank. The appropriate officials had to approve the provision of foreign currency required for the documentary credit. The Respondent had gone so far as to ask the bank to re-adjust the balance from another transaction in order to finance part of the credit. There was thus, sufficient evidence to show that the Respondent had made sufficient endeavours to implement the terms of the contract in good faith.

Under the contract the goods were to be supplied within one and a half months from the date of signing of the agreement. The Claimant alleged that the Respondent had amended the contract by extending that period unilaterally and thereby prejudiced the Claimant. The period of supply had been from June to the first half of July; the documentary credit had been opened on the 18th of July for three-fifths of the agreed amount. The Respondent's agent then notified the Claimant that unless credit was opened on the rest of the goods, there was no use shipping the goods despite their being credit on the existing balance. The agent stated that credit could not be opened before December of that year. The credit was never opened and the Respondent returned the performance bond to the Claimant. The rest of the goods were not supplied till May of the next year. The Tribunal held that the unilateral amendment caused delay by the Respondent which had exceeded reasonable delay allowed under the parties agreement. The Respondent was not entitled to a unilateral amendment of the terms of the contract except for reasons of public policy.

The Respondent alleged that the amendment had been in accordance with the agreement of the parties and had been used to increase or decrease the quantity by ten percent but the Tribunal rejected the argument. The Tribunal held that the amendment related to two fifths of the quantity, which amounted to 40%.

The Tribunal also rejected part of the Claimant's claim dealing with the costs of maintaining live cattle for the Respondent. The Tribunal ruled that the Claimant had been dealing in fungibles which were easily available from markets and could have easily been obtained when required. The Tribunal applied Article 221 of the Egyptian Civil Code stating that the Claimant could have avoided such costs by reasonable effort. In the circumstances, the Respondent could not be held responsible for unforeseen and unmitigated damages.

The Claimant had suffered loss due to the performance bond being retained by the Respondent for nearly a year during which commission had been paid to the bank. Also a cover for the bond had been retained, equivalent to 25%, to the detriment of the Claimant. Damages did not bear interest whether compensatory or moratory, from the commencement of
the claim. However, the Tribunal awarded interest at a rate of 4% from the date of issuance of the award.

The Tribunal split the costs of the arbitration equally between the parties and ordered each party to bear its own legal costs. All other claims were dismissed by the Tribunal.

[...]

**Referring Principles:**

IX.6 - No restitution in case of knowledge of illegality of performance