Title:
Zurich Chamber of Commerce, Preliminary Award of 25 November 1994, YCA 1997, at 211 et seq.

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SWITZERLAND

ZURICH CHAMBER OF COMMERCE

Preliminary award of 25 November 1994

Arbitrators: Marc Blessing (Chairman); other names not indicated

Parties: Claimant: Seller (Europe); Respondent: Buyer (Canada/China)

Place of arbitration: Zürich, Switzerland

Published in: Bulletin of the Swiss Arbitration Association (1996, no. 2) pp. 303-318

Subject matters:
- ambiguous reference to arbitration institution¹ [not included in Translex]
- requirements for valid arbitration clause [not included in Translex]
- interpretation of contract according to intention of parties [not included in Translex]
- interpretation rules in UNIDROIT principles [not included in Translex]
- effect of possible mistake on validity of arbitration agreement

Facts

In 1993, the parties signed a Contract for the sale by claimant of a quantity of reinforcing steel bars. The Contract contains the following arbitration clause:

"All disputes arising from the execution of, or in connection with this Contract, shall be settled amicably through friendly negotiation. In case no settlement can be reached through negotiation, the dispute will be submitted to international trade arbitration organization in Zürich, Switzerland. The arbitration award will be final and binding upon both parties. The fees for arbitration shall be borne by the losing party unless otherwise awarded by the arbitration organization."
A problem arose in respect of the Letter of Credit to be opened by respondent and on 9 February 1994 claimant initiated arbitral proceedings with the Zürich Chamber of Commerce. The President of the Zürich Chamber of Commerce, after a summary investigation as per Art. 2(2) of its International Arbitration Rules (IAR), ruled that the arbitration clause was valid and that the prerequisites for arbitration proceedings under its rules were fulfilled, with express reservation, however, as to the decision of the Arbitral Tribunal on its own jurisdiction (with reference to Art. 2(3) IAR).

The respondent contested the jurisdiction of the Zürich Chamber of Commerce as this institution was not specifically named in the arbitration clause. The claimant argued that it could rightfully assume that the arbitration clause, which had been drafted by the respondent, referred to the only existing international trade arbitration organization in Zürich, namely, the Zürich Chamber of Commerce.

The arbitrators, in their Preliminary Award on jurisdiction, found that reference in the arbitration clause must be understood as a reference to institutional arbitration and the Zürich Chamber of Commerce being the only institution administering international arbitration in Zürich, it must be considered as the arbitration institution referred to in the arbitration clause.

Excerpt

[...]

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[...]

"While, in the sense of the above reasons, the contract interpretation (i.e. the interpretation of the arbitration clause) leads to a clear answer in the sense that the parties' designation of the arbitral institution in fact meant the designation of the Zürich Chamber of Commerce, the rather academic question may remain whether respondent could invoke a material or relevant mistake and thereby invalidate the agreement to arbitrate.

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"In this respect, Art. 24(1) of the Swiss Code of Obligations contains a narrow definition of what may constitute a material mistake:

Article 24 CO

‘An error is, in particular, deemed to be material in the following cases:

...

4. If the error related to certain facts which the party in error, in accordance with the rules of good faith in the course of business, considered to be a necessary basis of the contract.’

"Art. 24(2) CO specifically excludes the invalidation of a contract if the error only refers to motives for entering into the particular contract, or if the error cannot be considered as being material in the sense of Art. 24(1) CO.

Quite in the same sense, the 1994 UNIDROIT Principles contain by way of comparison, a similar concept:

Article - Relevant mistake

e 3.5

‘(1) A party may only avoid the contract for mistake if, when the contract was concluded, the mistake was of such importance that a reasonable person in the same situation as the party in error would only have concluded the contract on materially different terms or would not have concluded it at all if the true state of affairs had been..."
known, and
(a) the other party made the same mistake, or caused the mistake, or knew or ought to have known of the mistake and
(b) it was contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error; or
(2) However, a party may not avoid the contract if
(a) it was grossly negligent in committing the mistake; or
(b) the mistake relates to a matter in regard to which the risk of mistake was assumed, or, having regard to the
circumstances, should be borne by the mistaken party.'
30 "In the instant case, the Arbitral Tribunal is not aware of any facts or circumstances which could justify the assumption of a relevant mistake or error which would be of a nature so as to invalidate the agreement to arbitrate. Indeed, it must be assumed that, if the parties had known that the correct designation of the Zürich arbitral institution is the reference to the Zürich Chamber of Commerce, the parties would have inserted the name of the Zürich Chamber of Commerce as being the arbitral institution designated to administer the dispute resolution procedure.

31 Moreover, it does seem that neither party was particularly concerned to study the services of such arbitral institution, or to study the appropriateness of its rules. It rather seems that both parties were prepared to refer disputes to an administering body not otherwise familiar to them, and they seem to have expressed a mutual confidence that an arbitral institution established in Zürich for the purpose of administering international disputes will be quite suitable for them.

32 "For all these reasons the Arbitral Tribunal does not see a basis on which the agreement to arbitrate could be invalidated by either party. Based on the facts and reasons discussed herein above the Arbitral Tribunal has rendered the following decision:

(1) The Contract contains, in its Clause 14, a valid arbitration clause for the settlement of 'all disputes' arising thereunder by arbitration in Zürich, Switzerland.

(2) The reference in Clause 14 to the 'international trade arbitration organization in Zürich' must be understood as an election in favour of an institutional arbitration.

(3) The Zürich Chamber of Commerce, being the only institution administering international arbitrations must be considered as the institution referred to in Clause 14 (therein referred to as the 'international trade arbitration organization')."

1 Note General Editor. See also the awards of the Paris Chamber of Arbitration of 8 March 1996, pp. 28-34 and the Italian Arbitration Association of 1993, pp. 178-181, which also deal with this subject matter.

2 Art. 2 of the International Arbitration Rules of the Zürich Chamber of Commerce reads: "The Arbitral Tribunal has jurisdiction over arbitrable disputes between the parties. The management of the Zürich Chamber of Commerce investigates summarily whether there is a valid arbitration agreement between all parties that provides for Zürich Chamber of Commerce arbitration; when such an agreement is lacking it notifies the claimant that the arbitration cannot be conducted. In all other respects the Arbitral Tribunal decides on its own jurisdiction."

Referring Principles:
IV.7.3 - Right to avoid the contract for mistake in fact or law