AD HOC

ARBIRTRAL AWARD OF JULY 23, 1981 (ORIGINAL IN ENGLISH)

Arbitrators: L.H.W. van Sandick (Chairman), O. Steen-Olsen, J. Collard

Parties: Claimant: Norwegian agent; Defendant: Belgian shipowner

Published in: not (yet) published.

Subject matter:
- agency contract [not included in the TransLex]
- termination: non-observance of period of notice [not included in the TransLex]
- applicable law to procedure and substance [not included in the TransLex]
- damages [partly included in the TransLex]
- equity [not included in the TransLex]

FACTS

By agreement of November 15, 1972, the Belgian shipowner had appointed Claimant as its agent in certain areas. As to the obligations of the parties, the following relevant provisions of the contract may be quoted:

"Article 9. The Agent shall settle with the Company the balance of receipt and expenditures as per instructions. The Agent bears the del credere of freight payment. All charges for ship's account are to be net, any rebates, refunds, or credits of whatever nature to be for ship's account."

"Article 11. The Company shall remunerate the Agent of his service with a Commission as agreed upon. No other commission or overheads on outlays will be allowed, unless mutually agreed upon."

"Article 13. The Agreement may be terminated by either party on the understanding that notice of termination is given by registered letter 180 days before the effective date of termination. The Agent shall not be released or discharged from any obligation which may have arisen during the period of validity of this Agreement after termination of same."
"Article 14. Should the Company enter into any kind of co-operation with other lines serving ..., such arrangement shall not lead to the agency being cancelled with the Agent without economic compensation to be agreed upon."

In view of the establishment of a joint venture between it and two other shipowners, Defendant had cancelled the agreement with immediate effect by a letter dated September 15, 1976.

Thereupon, the agent and the shipowner concluded an agreement for submission to ad hoc arbitration in the Netherlands, requesting arbitrators to fix the compensation as claimed by the agent, and to decide "in equity and in conformity with international standards".

The agent claimed N.kr. 160,000 under Article 13, this amount being commission and "gross terminal earnings" (the Claimant's delivery and other work carried out by it in connection with cargo transported by Defendant) over 6 months, due for non-observance of the 6 months' notice of termination prescribed in Article 13.

The agent also claimed separate and additional compensation under Article 14 of the contract, without, however, specifying an amount. The agent merely indicated figures concerning quantities of cargo shipped during the three full years of the agency (1973-1975) as guideline, and further submitted that Defendant's new joint venture had benefitted from some accounts the agent had brought to it.

In its statement of defense the Belgian shipowner accepted the amount of commission claimed over six months (N.kr. 23,500). It denied the claim for "gross terminal earnings", basing itself on Articles 9 and 11 of the contract, and on the Code Napoléon. It further brought forward that there had been a decline in cargo leaving insufficient quantity; that, as to the unspecified claim under Article 13 of the contract, it had offered Claimant N.kr. 50,000 which offer was rejected, and therefore withdrawn, and finally, that it had offered Claimant "to continue the booking of cargo for this new jointventure", but that the agent had failed to take measures to reduce the damage.

In a further plea, the agent raised his claim to N.kr. 27,449 for commission and N.kr. 148,568 for gross terminal earnings under Article 13, referring, for the calculation of compensation under Article 14, in particular to the relationship with one of its other principals in 1978, plus interest of 10% over both amounts as of the day the contract was terminated.

In a further statement of defense, the shipowner stated that the initial amount for compensation, N.kr. 23,500, had been accepted by it, and could not be modified anymore. It further brought forward several arguments against Claimant's calculation of the compensation:

1. Article 13 of the contract would make it possible that the contract was terminated without further indemnity;
2. Gross terminal earnings would only be due if the shipowner had imposed on the agents specific costs which were or could not be written off in due time;
3. Decrease of the cargo should have lead the agent to reducing expenses and adjusting constant costs, and:
4. would mean that no personnel in permanent service were necessary;
5. No documents were presented to the shipowner in order for him to check the amounts claimed.

EXTRACT

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[...]

6. Finally, the arbitrators gave their decision on the interest, and on the costs of the arbitration:
“Both parties have indicated that interest should start running from September 15, 1976. The rate of interest must reflect neither a bonus nor a punishment, but only commercial loss. The Agent is claiming 10%, the Shipowner is offering 8%. Arbitrators fix the rate at 9% per annum.

“Both parties have claimed that the other party should bear all the costs concerning the arbitration. Arbitrators have accepted the views of the Agent on more points than the views of the Shipowner. They therefore divide the costs of the Arbitration Tribunal as stated hereinafter. Mr. Steen-Olsen felt that the Shipowner should have been ordered to pay a contribution towards legal expenses on the part of the Agent of N.kr. 5,000. The majority of the Tribunal felt that each side should bear its own costs. The majority view prevails.”

Referring Principles:

VII.6 - Duty to pay interest