Devaluation and International Contracts, Clunet 1959, 1074 et seq.

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    (In connexion with an arbitration award)

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Considering that in this respect Plaintiff alleges that Art. VIII of the contract guaranteed the parties against all and any losses resulting from devaluations, either of the Franc, or of the Dinar, which might occur before the execution of the prestations mutually agreed upon; that the French Franc having been devaluated between the conclusion of the contract and the payement of the bonds, Plaintiff is basing the pretentions alleged to-day on the actual depreciation of the bonds which resulted therefrom;

Considering that, by the terms of the contract of 1932, Plaintiff undertook to carry out works for the account of Yugoslav and to supply this country with goods for an amount fixed at 160,000,000 French Francs, value of 1932; that in the course of the years 1932 to 1937 the works were completely carried out and the supplies completely delivered to the full satisfaction of the Yugoslav Government, as proved by two certificates dated July 6, 1939; that the totality of said works and supplies acknowledged by the terms of the two above mentioned certificates amounts to more than 165,000,000 French Francs, exclusive of interest; that this estimation was made according to the value of the French Franc not in 1939, but in 1932, at least as concerns the works carried out in Yugoslavia and the supplies invoiced in Dinars (Art. VIII of the contract) ; that the same value was applied for the calculation of the contractual interest; that the bonds issued by the Yugoslav Government, including contractual interest, were honoured only after multiple delays and maturity prorogations; that these payments, spread out over the years 1935 to 1953, and to which were added the moratory interest, attain a total of 266,000,000 French Francs in round figures;

Considering however that the actual value of this prestation does not correspond to the value of the prestations made by Plaintiff; that, as a matter of fact, between the beginning and the end of the payments by installments, occurred in successive stages a devaluation of the French franc which fell from the gold-index 58,95 mg for a franc in 1932 to the index 2,54 mg as early as 1950; that this devaluation reduced in considerable proportions the economic value of the prestations posterior to these various stages; that, converted in economic value, at each of the installments composing same, the sum paid, i. e. 266,000,000 French Francs represents only 76,000,000 French Francs of 1932, so that there exists a difference of 190,000,000 French Francs of 1932 between the value of the prestations of Plaintiff and the value of the prestations made by the Yugoslav Government;
Considering that the arbitrators must decide if this difference (value of 1932) ought to be paid to Plaintiff, according to their claim, or if, on the contrary, Defendant is entitled to profit by it owing to the engagements which are binding the parties, and although latter paid in partly depreciated francs a prestation the economic value of which was full and entire; that, in order to determine this point, the arbitrators are intending to decide as "amiables compositeurs", as provided for in the arbitration clause (Art. XVII of the contract);

Considering that, when expounding the contract, the arbitrators note first of all that, if it does not expressly give a guaranty to Plaintiff as concerns the risks of devaluation of the franc, it has nevertheless attempted, by the terms of Art. VIII, to palliate the damageable consequences which might result for the parties from the variations of the respective value of the dinar and of the franc; that, taken as a whole, the contract of January 3, 1932 is not at all aleatory, but aims to secure, on the one hand, to Defendant certain works and certain supplies and, on the other hand, to Plaintiff the value corresponding to the value of said works and supplies; that the intention of the parties, at the moment they concluded the contract, was manifestly to stipulate economically equivalent prestations; that, besides, it is consistent with equity that the payment having been delayed during a rather great number of years corresponds to the actual value of the prestations by which the Yugoslav Government benefitted; that the flagrant confirmation of the intention of the parties as concerns this point is to be found in the role of "amiables compositeurs" with which the arbitrators have been entrusted in case of disagreement between said parties;

Considering that the attitude of the parties after the conclusion of the contract proves it also; that, as a matter of fact, when a depreciation of the dinar occurred in 1933/1934, the Yugoslav Government requested by letter of October 25, 1934, compensations for the perturbation said fall had given rise to, which compensations were amiably granted by Plaintiff pursuant to clauses of which the arbitrators have besides not to take cognizance; that, furthermore, the parties agreed, at the beginning of the year 1936, that a certain number of the bonds delivered by the Government in French Francs according to the equivalence established by Art. VIII of the contract be converted into dinars, by reason of the difficulty the Yugoslav Government met with to obtain sufficient quantities of currency in order to meet their liabilities concerning the issued bonds; that the reconversion had to be made according to the same parity, being however specified that the amount would be paid in dinars representing the value of the primitive bond made payable in French francs, value calculated in dinars "on the basis of the Stock Exchange rate with the premium of the date of payment";

[...]

Lausanne, July 2, 1956.

The Arbitrators: Georges Ripert; André Panchaud.

Referring Principles:

IV.6.8 - (Re-) Negotiation agreement / clause (<em>pactum de negotiando</em>)