

ARBITRATION CHAMBER OF PARIS

Award in case no. 9246 of 8 March 1996

Arbitrators: Jean Villette (Chairman); Jacques Chaffy; Alain Lesdos; Jean Mariton; Jacques Salato

Parties: Claimant: Agent (Austria)
Defendant: Principal (Egypte)

Place of arbitration: Paris, France

Published in: Unpublished. Original in French

Subject matters:

- "special mandate" to conclude arbitration agreement under Egyptian Law
- ambiguous reference to arbitral institution'
- applicable law to substance (lex mercatoria)
- public policy
- annulment of contract between principal and buyer does not affect agency commission

Facts

By an Agency Agreement concluded in Egypt on 9 January 1991, the Austrian party became the Egyptian party's exclusive agent. By Annex 1 of 10 March 1991 and a letter of 11 March 1991, the parties further determined that the Agreement applied to four named countries and that the commission fee was 5.5% of the value of each contract. Annex 1 contained an arbitration clause reading [English original]: "The dispute will be settled by the Chamber of Arbitration in Paris".

On 15 August 1991, the Egyptian principal concluded a DM 41,000,000 contract with one of the States covered by the exclusive agency agreement [State X]. The contract provided that 75% of the sale price would be paid in cash and 25% would be compensated by purchases by Egypt in State X. Further financing details were negotiated directly by the Egyptian principal and State X. In mid-May 1992, State X made an advance payment of 10% of the cash payment (DM 3,075,000) to the Egyptian principal. The contract, however, was later annulled by Egypt and State X and no more payments were made under it.

When the Egyptian principal failed to pay the commission fee on the advance payment, the Austrian agent commenced arbitration before the Chamber of Arbitration of Paris on 17 December 1993, seeking payment of DM 169,125, representing 5.5% of the advance payment, and US\$ 100,000 for legal expenses.

The Rules of the Paris Chamber of Arbitration provide for a two-step procedure, under which a party, if he disagrees with the draft award of the first arbitrators, may request that the case be heard by a second panel before an award is given. In the present case, the Egyptian principal made such a request, as the draft award by the first arbitral tribunal found in favour of the Austrian agent.

The second arbitral tribunal also granted the Austrian claimant's request.

Excerpt

I. - INVALIDITY OF THE ARBITRAL CLAUSE AND LACK OF JURISDICTION OF THE CHAMBER OF ARBITRATION

[1] "In support of its first objection, the defendant alleges that the arbitral clause is null and void because the Chairman of the Board did not have the power to enter into an arbitral clause, the clause was not ratified by the company and, in the present case, the principle of presumptive mandate cannot be applied. In particular, it alleges that the Chairman of the Board may not enter into an arbitration clause unless he has been given the special mandate required by Art. 702 of the Egyptian Civil Code for acting in court proceedings or entering into an arbitration clause?"

[2] "In support of its second objection, the defendant argues that the arbitral clause is invalid because 'Chamber of Arbitration in Paris' do not sufficiently indicate the Chamber of Arbitration of Paris.

[3] "According to Art. 4 of the Rules of the Paris Chamber of Arbitration, the objection of lack of jurisdiction, as all procedural objections, must, under penalty of inadmissibility, be raised by the interested party before any defence on the merits. First, it is undisputed that the defendant discussed the merits before the first arbitrators, alleging ... that the claim was void and unfounded, and never objecting to the jurisdiction of the Chamber of Arbitration of Paris. Second, the examination of the dispute by two arbitral tribunals under the auspices of the Paris Chamber of Arbitration, the so-called first and second proceedings, is not a double proceedings of jurisdiction but a duplication of the evidence-gathering phase within one proceedings, leading to one decision only (Cour d'Appel, Paris, 29 November 1985, Répertoire Général no. 2012. Third, the defendant enclosed with his request for a second examination ... a three-page statement in which he objects to the draft award of the first arbitrators and gives reasons therefore, without denying that the Paris Chamber of Arbitration has jurisdiction, and requesting that the chamber, on the contrary, constitute a second tribunal which will re-examine the case.

[4] "Last, even if these objections were admissible, they are manifestly unfounded. If the Chairman of the Board of the defendant did not have the power to enter into an arbitration agreement without the 'special mandate' provided for in Art. 702 of the Egyptian Civil Code, the claimant may still rely on the principle of presumptive mandate, according to which the mandator is bound by the acts of the mandatary even if the latter exceeds his powers, since the Chairman of the defendant acted on behalf of his company the claimant concluded a contract in good faith with the official representative of the defendant, and the latter let it be understood that his Chairman may enter into an arbitration agreement.

[5] "Secondly, the objection of lack of jurisdiction based on the alleged ambiguity of the words 'Chamber of Arbitration in Paris' is not founded, as the improper use of the preposition 'in' instead of 'of' obviously causes no doubts as to the institution meant, which can only be the sole (non-specialized) arbitration chamber having its seat in Paris which is known by the name of the Chamber Arbitration of Paris, to the exclusion of any other centre, association, court or specialized chamber of arbitration located in Paris.

[6] "The objection of lack of jurisdiction is not only inadmissible but also unfounded. Hence, the merit of the case must be examined."

II. - LAW APPLICABLE TO THE MERITS OF THE DISPUTE

[7] "The contract between the parties does not indicate the applicable law. The claimant maintains that, as the contract was concluded in Egypt, one of the parties is Egyptian and the contract was partly performed in Egypt, Egyptian law applies. The defendant neither explicitly agrees nor objects.

[8] "The connecting factors suggested by the claimant do not convincingly lead to the

localization of the contract in Egypt and the application of Egyptian law. It is true that the contract was concluded in Egypt by an Austrian agent and its Egyptian principal, but the contract was performed partly in Egypt and partly in State X.

[9] "The arbitrator may apply the rules of law which he deems appropriate. In the matter of agency contracts, the arbitral tribunal could refer to the provisions of the Hague Convention of 14 March 1978 on the Law Applicable to Agency, of which Art. 6 provides for a general principle of applicable law in international matters, based on the main criterion of the habitual residence of the party providing the characteristic performance. However, the arbitral tribunal deems it more proper to refer to the body of rules of international commerce which have been developed by practice and affirmed by the national courts (lex mercatoria)."

III. - INVALIDITY OF THE AGENCY CONTRACT

[10] "The defendant relies on the public policy provisions of State X, under which a foreign company may not act as a representative in State X and, consequently, the claimant may not seek commission fees.

[11] "The agency agreement concluded in Egypt between the Egyptian company and the Austrian company concerns the recruitment of an exclusive agent in Austria, to which the task is entrusted of promoting [the defendant's activities in all countries]. Hence, the law [of State X], even its **public policy** provisions, should not be applied to a representation which does not concern State X specifically, but, rather, several countries and, as of 11 March 1991, only [State X and three other States].

[12] "Also, the defendant may not, without contradicting himself, allege at the same time that the 'commercial' activities of the claimant were marginal or non-existent and that these activities, entrusted to the claimant by the defendant, violated the public policy provisions of State X. Similarly, the defendant may not at the same time entrust the Austrian claimant with the task of representing him in State X, and later argue that that task was null and void, simply in order to escape his obligations towards his agent and refuse to pay him for his efforts, whose existence, by the way, he recognized (see letter by the defendant to the claimant of 4 November 1992, quoted infra [English original]: '...we are not in a position to keep our commitments towards you or others, this have [sic] been cleared to you in faxes before ... we thank you for your efforts...'). Hence, the objection aiming at having the agency contract declared null and void must be denied.

[13] "As to the alleged inefficacy of the claimant's activities, the defendant does not prove it. On the contrary, it appears from the circumstances of the case that, two months after the conclusion of the agency contract, the defendant bid on a tender by State X for [a certain project], that it prolonged the initial duration of the agreement by two years and that it raised the agents commission, for this contract in State X, from 2.5% of the value of [this type of contract] to 5.5%. These elements, together with the conclusion, five months later, of the [contract with State X], prove that the claimant fulfilled his contractual obligations in this case diligently.

[14] "Further, the modalities for the payment of the commission fees to the agent, laid down in the agency contract of 9 January 1991, which refer to the final order for each product ([English original] 'of each product contracted for') and to the value of that order, void the objections raised by the defendant."

IV. - CLAIM BY THE CLAIMANT IS UNFOUNDED

[15] "The defendant further argues that the contract with State X did not enter into force due to a joint decision by Egypt and State X to end the negotiations before an agreement on the price had been reached ... or that this contract, whether entered into force or not, was either terminated amicably, by common agreement of the parties ... or annulled by the decision of the two governments In reality, the simple fact that the defendant received DM 3,075,000,

representing the 10% advance payment provided for [in the contract with State X], is sufficient proof that the contract of 15 August 1991 with State X entered into force, since this payment accompanies the order to commence work, whose issuance, accord to [the contract], marks the beginning of the duration of the contract.

[16] "The minutes of the meeting of the joint Egyptian-State X commission ... share this interpretation, as they recognise, with respect to the annulment of the contract, the existence of 'the problems which have accompanied the performance of the [contract]' and 'the difficulties which have accompanied the performance of this contract'.

[17] "The entry into force of the contract of 15 August 1991 with State X cannot be seriously contested. Hence, we must examine the reasons for its annulment and determine whether the claimant therefore shares the responsibility.

[18] "It appears that the reason for the annulment of the contract is a change in its economic conditions, which resulted in the defendant losing interest in its performance. On 4 November 1992, the Chairman of the defendant wrote the following letter to the claimant (English original):

'... Dear Sir, I want to inform you that in spite of all the efforts made to enforce this contract during more than one year and half, we feel that no progress has been made, and a price increase of 9% in the package has been achieved, through our suppliers, so, the economical situation of the whole deal has moved against our interest, we already cleared this to State X's side, and accordingly, we are not in a position to keep our commitments towards you or others, this has been made clear to you in faxes before. We are now obliged to close the file of this project and we thank you for your efforts and accept our best regards.'

The annulment of the contract thus ensues from a political decision of the governments of Egypt and State X and not from a cause which can be imputed to the agent. The minutes of the meeting of the [joint commission] also prove that the contract was amicably annulled by agreement of the parties ('In the context of the fraternal relations between the two countries, the two parties have agreed amicably and by mutual agreement to annul [the contract]...').

[19] "Hence, the right of the claimant to a commission fee, which existed as of the conclusion of the contract, independent of the contract's further destiny, cannot be doubted only because the contract was annulled. In fact, according to Art. 3-a of the Agency Agreement of 9 January 1991, in conjunction with Annex 1 of 10 March 1991, the claimant had the right to a commission of 5.5% (English original) 'of the contract value of each product contracted for, to be paid in the currency of the contract and at the same time as instalments are received from Buyer pro rata'. It is established and undisputed that the defendant did receive DM 3,075,000 from State X as a 10% advance payment. Thus, it must pay DM 169,125 to the claimant, being the agreed agency commission fee.

[20] "The claimant requests, in its final statement, that a Libor rate one year interest be added to this sum. The application of this rate to the present credit is unjustified. Taking into account the - DM - currency of the credit, the arbitral tribunal applies a rate of 6% per annum from the date of the request for arbitration until full payment.

[21] "It would be unjust to let the claimant bear the burden of the costs of this case. The defendant shall therefore pay FF 50,000 to the claimant.

[22] "It is also proper that the defendant, who loses this case, bears he costs as well as any costs related to the execution of the award. There is no reason to grant the claimant's request for a higher sum or the defendant's requests, which are neither founded nor justified.

[23] "Lastly, considering the amount of the debt, provisional execution of the award should be ordered ex officio here, notwithstanding any recourse and without guarantee."

178-181, and of the Zurich Chamber of Commerce of 25 November 1994, pp. 211-221, which also deal with this subject matter

2. Art. 702 of the Egyptian Civil Code reads in relevant part:

"A special mandate, in respect of any act which is not an act of management, is required and in particular for a sale, a mortgage, a gift, a compromise, an admission, an arbitration, the tendering of an oath and representation before the Courts.