ICC Award No. 4131, YCA 1984, at 131 et seq. (also published in: Clunet 1983, at 899 et seq.)

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131

Interim Award of September 23, 1982 in No. 4131

(ORIGINAL IN FRENCH)

Arbitrators: Prof. Pieter Sanders (Pres.), Prof. Berthold Goldman, Prof. Michel Vasseur

Parties: Claimants: 1. Dow Chemical France (France)

2. The Dow Chemical Company (USA)

3. Dow Chemical A.G. (Swiss)

4. Dow Chemical Europe (Swiss)

Defendant: ISOVER SAINT GOBAIN (France)

Published in: 110 *Journal du droit international (Clunet)* 1983, pp. 899-905, with note Y. Derains, pp. 905-907.

Subject matters: - group of companies

- is arbitration clause in a contract binding upon other companies of the group which did not sign

the contract but participated in its formation, performance and termination?

- competence of arbitrators to decide upon their jurisdiction

- law applicable to the arbitration agreement

Note General Editor

This interim award was the subject of an action for setting aside (*recours en annulation*) under Article 1502 of the French CCP instituted by the Defendant. The

132 *Court of Appeal* in Paris rejected the plea of lack of jurisdiction of the arbitrators by its judgment of October 21, 1983. The Court considered *inter alia*:
"The arbitrators for good reasons have observed that the law applicable to determine the scope and effects of an arbitral clause providing for international arbitration does not necessarily coincide with the law applicable to the merits of the dispute" (see Extract of Award under I).

"Following an autonomous interpretation of the agreement and the documents exchanged at the time of their negotiation and termination, the arbitrators have, for pertinent and non-contradicted reasons, decided, in accordance with the intention common to all companies involved, that DOW CHEMICAL FRANCE and DOW CHEMICAL COMPANY have been parties to these agreements although they did not actually sign them and that therefore the arbitration clause was applicable to them as well;

"The arbitrators have also, subsidiarily, referred to the notice of 'group of companies', the existence of which according to the customs of the international trade has not been seriously contested by the defendant;

"The arbitrators thus have justified their competence and the objection that they have decided in the absence of an arbitration agreement is, therefore, like the previous one (not reported here) without foundation."

FACTS

In 1965, DOW CHEMICAL (Venezuela) entered into a contract with the French Company Boussois-Isolation, whose rights and obligations were subsequently assigned to ISOVER SAINT GOBAIN, for the distribution in France of thermal isolation equipment. DOW CHEMICAL (Venezuela) itself subsequently assigned the contract to DOW CHEMICAL A.G. (Claimant no. 3), a subsidiary of DOW CHEMICAL COMPANY (Claimant no. 1).

In 1968, a second distribution agreement was entered into by DOW CHEMICAL EUROPE (Claimant no. 4), a subsidiary of DOW CHEMICAL A.G., with three other companies (including Boussois-Isolation) whose rights and obligations were later

assigned to ISOVER SAINT GOBAIN (Defendant) for the distribution of essentially the same products in France.

Both the 1965 and the 1968 agreements, which contained ICC arbitration clauses, provided that deliveries could be made by DOW CHEMICAL FRANCE or any other subsidiary of the DOW CHEMICAL COMPANY. DOW CHEMICAL FRANCE did in fact effectuate the deliveries contemplated in the contracts.

Several actions (not described in the interim award) were brought before French courts against companies of the DOW CHEMICAL Group relating to difficulties in connection with one of the products ("Roofmate").

On the basis of the arbitration clause contained in the contracts with DOW CHEMICAL A.G. and DOW CHEMICAL EUROPE (Claimants no. 3 and 4) the Claimants instituted arbitral proceedings against Defendant alleging that Defendant alone was liable for damages resulting from the use of Roofmate in France.

Defendant raised two preliminary objections, formulated as follows in the Terms of Reference signed by the parties.

133
(1)

Does the arbitral tribunal have competence to render an award between DOW CHEMICAL FRANCE and DOW CHEMICAL COMPANY on the one hand and ISOVER SAINT GOBAIN on the other?

(2)

In case the arbitral tribunal has no jurisdiction in respect of DOW CHEMICAL FRANCE and DOW CHEMICAL COMPANY (the first two Claimants), should it then not reject the claim of DOW CHEMICAL A.G. and DOW CHEMICAL EUROPE (the Claimants under 3 and 4) for reasons of lack of direct interest in the cause of action? (In French: à raison de ce qu'elles invoquent un préjudice qui ne serait qu'éventuel?)

It was decided at a preparatory hearing that the arbitral tribunal would first of all render an interim award on these two questions.

EXTRACT

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[...]

"II. On the Objection to Jurisdiction

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135
[...]

"C. The Termination of the Contracts

. . . .

"That it thus appears, as was the case with respect to the conclusion and performance of the distribution agreements, that DOW CHEMICAL FRANCE played an essential role in the termination of the 1968 contract, which had been substituted for the 1965 contract; that all of these factors permit the conclusion that DOW CHEMICAL FRANCE was a party to each of these contracts and, consequently, to the arbitration clauses they contained;

"That the same conclusion should be reached with respect to DOW CHEMICAL COMPANY (USA) by reason of its ownership of the trademarks under which the products were marketed, and its absolute control over those of its subsidiaries that were directly involved, or could under the contracts have become involved in the conclusion, performance, or termination of the litigious distribution agreements.

"Considering that the Defendant adopted the same position in its brief of 1 July 1980 before the Court of Appeal of Paris, in support of its motion for the compulsory joinder of inter alia DOW CHEMICAL COMPANY (USA)

136
"That the Defendant there in fact wrote as follows:

'Whereas DOW CHEMICAL COMPANY, owner of the patents and organizer of the manufacturing and distribution of Roofmate, decided and conceived the modalities of the manufacturing and distribution of said product, thus engaging its direct liability.'
(Translated from French — Gen. Ed.)

"Considering that in the circumstances of this case, the application of the arbitration clauses to DOW CHEMICAL COMPANY (USA) may also be justified, as we shall now show, by the fact that the contracts containing these clauses concern, in the context of a group of companies, a parent company and certain of its subsidiaries. The same fact could justify, if necessary, the application of the arbitration clause to DOW CHEMICAL FRANCE.

"D. The Group of Companies

"Considering that it is indisputable — and in fact not disputed — that DOW CHEMICAL COMPANY (USA) has and exercises absolute control over its subsidiaries having either signed the relevant contracts or, like DOW CHEMICAL FRANCE, effectively and individually participated in their conclusion, their performance, and their termination;

"Considering that irrespective of the distinct juridical identity of each of its members, a group of companies constitutes one and the same economic reality (*une realité économique unique*) of which the arbitral tribunal should take account when it rules on its

own jurisdiction subject to Article 13 (1955 version) or Article 8 (1975 version) of the ICC Rules .

"Considering, in particular, that the arbitration clause expressly accepted by certain of the companies of the group should bind the other companies which, by virtue of their role in the conclusion, performance, or termination of the contracts containing said clauses, and in accordance with the mutual intention of all parties to the proceedings, appear to have been veritable parties to these contracts or to have been principally concerned by them and the disputes to which they may give rise.

"Considering that ICC arbitral tribunals have already pronounced themselves to this effect (see the awards in Case No. 2375 of 1975, *Journal du droit international* 1976.973 ; and in Case No. 1434 of 1975, id at 978). The decisions of these tribunals progressively create caselaw which should be taken into account, because it draws conclusions from economic reality and conforms to the needs of international commerce, to which rules specific to international arbitration, themselves successively elaborated should respond.

"Considering that it is true that in another award (Case No. 2138 of 1974, *Journal du droit international* 1975.934) the arbitral tribunal refused to extend an arbitration clause signed by one company to another company of the same group. However, in so doing it based itself on the factor 'that it was not established that Company X' (which the tribunal had determined was neither a signatory nor a party to the contract) 'would have accepted the arbitration clause if it had signed the contract directly.'

"Considering that in the absence of such a showing, the tribunal did not allow application of the arbitration clause; but that in the present case, the circum-

137 stances and the documents analyzed above show that such application conforms to the mutual intent of the parties.
"That it is not without interest to recall that an American arbitral tribunal recently reached a similar result, referring to U.S. national court decisions and observing that 'it is neither sensible nor practical to exclude (from the arbitral jurisdiction) the claims of companies who have an interest in the venture and who are members of the same corporate family.' (Society of Maritime Arbitrators, Inc., New York, Partial Final Award No. 1510, 28 November 1980, VII *Yearbook Commercial Arbitration*, American Awards, p. 151 (1982).)

"Considering finally that in a matter directly connected with the issues litigated in the present arbitration, the Court of Appeal of Paris on 5 February 1982 held that it lacked jurisdiction to hear ISOVER SAINT GOBAIN's motion for the compulsory joinder of not only DOW CHEMICAL EUROPE (which signed the 1968 distribution contract), but also DOW CHEMICAL COMPANY (USA) and '(referred) ISOVER SAINT GOBAIN to the proper jurisdiction of the arbitral tribunal of the ICC in Paris.' In order to justify this decision, the Court of Appeal stated 'that ISOVER SAINT GOBAIN cannot dispute the fact that the litigation is pending and that its claims against DOW COMPANY and DOW EUROPE in their relations *inter se* flow directly from the two contracts (of 1965 and 1968);

"It is true that by the same decision the Court reached a decision on the merits as regards DOW CHEMICAL FRANCE. However, in that case, the said company had been sued on the grounds of quasitortious liability, and did not invoke the arbitration clauses and did not contest jurisdiction.

"In conclusion it is appropriate for the tribunal to assume jurisdiction over the claim brought not only by DOW CHEMICAL AG (Zürich) and DOW CHEMICAL EUROPE, but also by DOW CHEMICAL COMPANY (USA) and DOW CHEMICAL FRANCE.

"In so doing, the tribunal contradicts no principle nor any rule of international 'public policy' in particular, that of the French legal system. The latter is not based on any principle, nor does it contain any rule of such a stature, that would prohibit giving to an arbitration clause implicating companies that are legally distinct but form part of a group of companies, the scope attributed to it by the present award. To the contrary, by taking into account, in reaching this result, the needs of international commerce to which the rules of international arbitration should be responsive, the tribunal follows the example of French caselaw to which express reference was made in the report to the Prime Minister explaining the purposes of the Decree of May 12, 1981.1

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