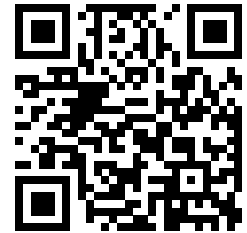


Title:

ICC Award No. 1110 of 1963 by Gunnar Lagergren, YCA 1996, at 47 et seq. (also published in: Arb.Int'l 1994, at 282 et seq.).



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Table of Contents:

ICC CASE No 1110 – AWARD
OPINION
FOR THESE REASONS

Content:

Page: 282

ICC CASE No 1110 – AWARD

between

Mr [X], Buenos Aires, Claimant, ["Claimant"] and [Company A], Respondent, ['Respondent'].

I, the undersigned, Gunnar Lagergren, Vice President of the Arbitral Commission on Property, Rights and Interests in Germany, Koblenz, duly appointed Sole Arbitrator in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce, in conformity with my terms of reference signed by the parties on 8 March 1961 and subsequently approved by the Court of Arbitration of the International Chamber of Commerce and having regard to the Court's extension of the time limit for making the award to ____ 1963, render the following award.

Mr [X], the Claimant, is an engineer of Argentine nationality and since the middle of the 1930's an active business man in Buenos Aires with large commercial and industrial interests. The Respondent is a wholly owned daughter company of [Company B], the shares of which are held by [Company C] —

The parties to this dispute first got in touch with each other in 1950 in Buenos Aires. The Argentine authorities, among them [Argentine Company D] were then contemplating increasing the production of electrical power in the region of Buenos Aires, and [the Respondent], which maintained an office in Buenos Aires, became interested in this undertaking as a potential supplier of electrical equipment.

At that time an increase in the capacity of the electrical station in [place] ____ was under consideration as an actual project.

Officials from [the Respondent] asked Mr [X], who had considerable influence in governmental as well as in commercial and industrial circles, to promote the placing of an order (or orders) for electrical equipment with [the Respondent].

An oral agreement was concluded between the parties and reduced in writing by the letters quoted below, addressed to Mr [X] by Mr [Y], who was at that time Manager of [the Respondent's] Buenos Aires office:

Senor [X]
BUENOS AIRES

3rd November, 1950

Dear Sir,

We confirm that on the placing of an order with us and after the confirmation that the corresponding irrevocable credit has been opened in our favour and when the payment of the first instalment has been made in accordance with the terms and conditions of payment for the said order and subject to and when the necessary

consent from the British Foreign Exchange Control has been obtained, we will place at your entire disposal five per cent of the total F.O.B. sterling value of the said order, in pounds sterling, without charge or obligation on your part.

Yours faithfully,
[The Respondent]
(sgd.) [Mr Y]
MANAGER

I hereby transfer all rights accruing to me by virtue of the above letter to

(sgd.) [Mr X]

Senor [X]
BUENOS AIRES

3rd November 1950

Dear Sir,

We confirm that six months after the payment of the first instalment and after the following six instalments have been paid to us in accordance with the terms and conditions of payment for the said order, and subject to and when necessary consent from the British Foreign Exchange Control has been obtained, we will place at your entire disposal two and one half per cent of the total F.O.B sterling value of the said order in pounds sterling without charge or obligation on your part.

Yours faithfully,
[The Respondent]
(sgd.) [Mr Y]
MANAGER

I hereby transfer all rights accruing to me by virtue of the above letter to

(sgd.) [Mr X]

Senor [X]
BUENOS AIRES

3rd November 1950

Dear Sir,

We confirm that twelve months after the payment of the first instalment and after the following twelve instalments have been paid to us in accordance with the terms and conditions of payment for the said order, and subject to and when necessary consent from the British Foreign Exchange Control has been obtained, we will place at your entire disposal two and one half per cent of the total F.O.B. sterling value of the said order in pounds sterling without charge or obligation on your part.

Yours faithfully,
[The Respondent]
(Sgd.) [Mr Y]
MANAGER

I hereby transfer all rights accruing to me by virtue of the above letter to

(sgd.) [Mr X]

Senor [X] 3rd November 1950
BUENOS AIRES

Dear Sir,

We confirm our letters of 3rd November 1950 and hereby authorize you to transfer the benefits specified in said letters to the person or persons selected by you.

Yours faithfully,
[The Respondent]
(sgd.) [Mr Y]
MANAGER

As to the scope and consequences of the above-mentioned agreement, the parties are of different opinions. They do agree, however, that the promise of [the Respondent] to pay a commission to Mr [X] was to cover any contract obtained on the basis of an offer made by [the Respondent] on 30 October 1950 for the supply of a number of turboalternator sets at a total price of £3,245,000 and additional equipment (transformers, circuit breakers etc.) at a total price of £276,000 and that it also would have covered any contract awarded to [the Respondent] pursuant to its further offers during the first five months of 1951. All these offers related mainly to the [place] project

On 30 October 1951, however, the contract for the [place] station was awarded not to [the Respondent] but to a competing German consortium. Shortly thereafter Mr [X] directed his efforts to obtaining for [the Respondent] a contract for the construction and installation of a thermo-electric power station for Greater Buenos Aires, which was to be situated on [river]; at first a site on the left bank at a place called [first location] was contemplated, later a location at [second location] on the opposite bank of the same river was decided upon.

After a series of events, which need not be stated here, a contract for the supply and installation of the electrical equipment for a thermo-electric power station at [the second location] with a capacity of 600,000 KW was awarded in October 1957 to an *ad hoc* partnership between [Company E and Company G]. This contract had an F.O.B. value of £23,087,833, whereas [the Respondent] at the same time was awarded only a contract for a ring of substations and interconnections with an F.O.B. value of £3,874,301. The contracts were signed in 1958. The British [Company E] is a wholly owned subsidiary of the British [Company F], the shares of which are held by [Company C], the same company which hold the shares of [Company B] and indirectly those of [the Respondent] also. [Company G] is a wholly owned daughter company of [Company H], a company in the boiler and combustion equipment industry.

Referring to the commission letters quoted above, which, according to his opinion also covered the 1958 contracts, Mr [X] in a letter of 9 July 1958 to [the Respondent] demanded that the commission agreed upon be placed at his disposal. After [the Respondent's] refusal to pay any such commission the parties agreed to submit their dispute to arbitration as laid down in the following document, signed in London and Paris:

Les soussignés: 6th July 1959

M [X], ressortissant argentin, demeurant____BUENOS AIRES,
et [the Respondent], société de droit anglais ayant son siège____, LONDON,
sont d'accord pour faire trancher définitivement toutes les réclamations de M [X] envers la [the Respondent], et notamment sa demande de commission, qui ont fait l'objet en dernier lieu d'un échange de correspondance entre les soussignés depuis le 9 juillet 1958, suivant le Règlement d'Arbitrage de la Chambre de Commerce Internationale par un arbitre nommé conformément à ce règlement.

Les soussignés désirent que l'arbitrage ait lieu à PARIS.

(sgd.) [M X] (sgd.) illegible
SECRETARY

In my terms of reference, which were drawn up in Paris in the presence of the parties, the crucial point at issue was

stated to be as follows:

What was the extent of the agreement between the parties which became expressed in the commission notes, and particularly whether or not it entitles the Claimant to any commission in respect of all or any of the 1958 contracts which were awarded to the Respondents and to the partnership formed by [Company E].

Page: 285

In the written pleadings and at the oral hearings of the case in Paris on 17, 18, 19 and 22 September 1962, the parties made statements to the following effect:

The Claimant:

Before the intervention of the Claimant, [the Respondent] held a completely secondary position in the Argentine. Anxious to improve that position [the Respondent] approached the Claimant who was to open the doors for [the Respondent] to the Argentine market. For such purpose the Claimant was engaged to act as [the Respondent's] commercial and financial agent. The Claimant's activities in such capacity were not to be confined to a special project such as the [place] station but were to embrace the general project entertained by the authorities for the supply of electric power in the Argentine. His activity, finally, resulted in the 1958 contracts.

The Claimant agreed in 1950 to act as the Respondent's agent in the Argentine and did so until June 1955, when he was forced to go to Germany for serious medical reasons, remaining immobilized there until July 1958. Prior to his departure in June 1955 he devoted considerable efforts and activity towards influencing the placing of orders for the construction and installation of power stations with the Respondent, and the 1958 contracts related to plans which were the mere development of the previous projects to which the Claimant had devoted his efforts.

Admittedly a part of the business was awarded to the *ad hoc* partnership constituted by [Company E] and [Company G]. The former company and [the Respondent], however, were both integral parts of the same organisation, [Company C], and therefore, for the purpose of the payment of the commission, the orders in their entirety must be deemed to have been awarded to [the Respondent].

Moreover, the competition between the *ad hoc* partnership and [the Respondent] had been in appearance only, and [the Respondent] which voluntarily and deliberately had passed over a part of the orders to the said partnership, could not thereby deprive the Claimant of any commission attributable to such part of the orders.

The Claimant based his claim on the contractual relationship in its totality as it had developed between the parties since 1950, and in respect of which the commission notes only constituted the most important piece of evidence. The contractual relationship between the parties, guaranteeing the Claimant a commission of 10 per cent on all contracts awarded to the Respondent in relation to public electric power stations in the Argentine was also orally confirmed in July 1953 by [Witness 1], the then Manager for South America of [the Respondent]. However, should it be considered that the agreement of 1950 would by that time have run out, and that [Witness 1's] promise constituted a new undertaking on the part of [the Respondent], separate and distinct from that of 1950, the Claimant would then be entitled to base his claim on this new agreement, which covered not only a never realised project of 1953 for a power station of 300,000 KW, but likewise the power station of 1958 with a capacity of 600,000 KW.

The Claimant therefore has asked me to condemn the Respondent to pay to him a commission of 10 per cent on the aggregate amount of the two above mentioned contract sums, £3,874,301 and £23,087,833. If the Claimant should not be entitled to commission on the part of the orders attributed to [Company G], being a

Page: 286

company independent of the [Company C] concern, he asks for 10% commission on the order awarded to [the Respondent], £3,874,301, and on that part of the *ad hoc* partnership's order which appertained to [Company E], that is £15,087,833. Should the Claimant be denied any commission on the contract awarded to the *ad hoc* partnership constituted by [Company E] and [Company G], his claim would then be reduced to a 10 per cent commission on the order

awarded to [the Respondent] itself.

The Respondent:

To describe the Respondent's position in the Argentine market as completely secondary before the advent of Mr [X] would not be in accord with the true facts. The activities of [the Respondent] in the Argentine, trading there since 1914, were considerable already before the intervention of Mr [X].

Mr [X] was at no time the financial or commercial agent of the Respondent, his connexion with [the Respondent] being limited to the use of his admittedly considerable influence with the political appointees of the Peron regime for promoting [the Respondent's] interests in relation to specific matters: the [place] project in 1950-1951 and another project in 1953 which never was realised.

The text of the commission notes expressly and by necessary implication limits them to the 1950 [place] project. Each of the notes uses the definite article in referring to 'the order'. On 3 November 1950 the only relevant order which could be meant was the [place] order for which [the Respondent] had submitted a provisional offer just four days previously. It would lead to commercial absurdities to apply the notes for an unlimited time to all future electric power station in the Argentine. The limited scope of the 1950 agreement is also shown by the fact that the parties found it necessary to conclude a new agreement in July 1953. Under this agreement the Claimant was promised a commission at a rate of 10 per cent of the F.O.B. value of any contract concluded as a result of a visit which [Witness 1], accompanied by Mr [X], was about to pay to President Peron. In fact, had the Claimant succeeded through his efforts in obtaining for [the Respondent] a contract for the project, envisaged in 1953, the Respondent would of course have paid him a commission of 10 per cent as [Witness 1] had arranged with him. But this would have nothing to do with the commission notes on which Mr [X] now bases his claim.

The contracts finally awarded to the *ad hoc* partnership and [the Respondent] related to a project totally different from that which was in the parties' minds when the commission notes were written or at the time when the agreement of July 1953 was made. The new project was double the size of the 1953 project and differently planned. Mr [X] was not even present in the Argentine when the new project was first announced in 1956, and while part of this project was awarded to [the Respondent] this result can in no way be attributed to any efforts or activities carried on by the Claimant. Had Mr [X] remained in the Argentine after the revolution in September 1955, he would certainly not have been *persona grata* with the new regime.

The Claimant's contention that the competition between [the Respondent] and the *ad hoc* partnership consisting of [Company E] and [Company G] was in appearance only does not accord with the facts. Furthermore, [Company H] and its subsidiary [Company G] are companies which have no associations whatever with [the Respondent], [Company B], [Company F], [Company E] or [Company C]

Page: 287

whether financial, technical, managerial or otherwise. Therefore, the Claimant could under no circumstances be entitled to any commission on the part of the orders placed with the *ad hoc* partnership and particularly not on the part placed with [Company G].

The Respondent contests the right of the Claimant now to base his claim subsidiarily on the promise of 1953 thereby presenting a new case against [the Respondent]. Such a new case would neither be covered by the agreement (compromis) of 6 July 1959 to submit to arbitration nor be within the terms of reference of 8 March 1961. This former agreement refers to the previous correspondence between the parties in which no mention is made to any 1953 promise, and the terms of reference are still more exclusively related to the commission notes.

Furthermore, the action in so far as it relies on any voluntary and deliberate passing over of parts of the orders to the *ad hoc* partnership, must be held to be a claim for damages and therefore also a new case outside the arbitration agreement of 6 July 1959 and the terms of reference.

The Respondent does not contest the correctness of the indicated F.O.B. values of the 1958 contracts and the proportions thereof attributed to the different companies.

Both parties have asked me to decide in what manner the costs of the arbitration, including the arbitrator's fees and the administrative costs and the parties' own costs are to be divided between them.

In the course of the oral hearings [Witness 1], [Witness 2] and [Witness 3] were heard as witnesses at the request of the Respondent, and Mr [X] answered questions of the Respondent's counsels.

In this case the Claimant has asked for a commission of 10 per cent on the aggregate amount of the 1958 contracts. He has based his claim primarily on an agreement between the parties of 1950, allegedly confirmed by the Respondent in July 1953. Subsidiarily the Claimant invokes the Respondent's undertaking of July 1953 as an independent ground for his claim. The Respondent submits that the arrangement of July 1953 had nothing to do with the agreement of 1950 and that neither of them extended to the 1958 contracts. The Respondent also contests the right of the Claimant to base his claim subsidiarily on the promise of July 1953, thereby taking up a new case against the Respondent which was not covered by the terms of reference.

For a reason given below I do not have to find out the true meaning of the agreement of July 1953. However, in view of the close connection which exists between the grounds for the Claimant's principal and subsidiary claim, and as the Respondent has had a fair opportunity for defense also in respect of the subsidiary claim, I am of the opinion that the terms of reference by themselves are no bar to my jurisdiction even in the latter case.

The same applies if any part of the Claimant's case would constitute a claim for damages.

It is common ground between the parties that the task of Mr [X] was to consist in a complex of technical, financial and economic activities, all aiming at the promotion of [the Respondent's] business in the Argentine or at least of certain specified projects there.

The Claimant has alleged that his position was to be that of a commercial and financial agent whereas [the Respondent] has emphasised Mr [X's] influence with

Page: 288

political office-holders under the Peron regime and his close associations with them.

The written proceedings in their final stage and the oral hearings have thrown more light upon these words of [the Respondent] and exposed their true meaning as follows.

In its rejoinder of 28 April 1961 the Respondent stated: The main item in Mr X's stock-in-trade, indeed his major asset, upon which he justifiably and frequently prided himself, was the quite remarkable degree of influence which he had with the political appointees of the Peronista Government. The Respondent would not wish it to be thought that it seeks to minimise in any way the degree of this influence or the ability of Mr [X] to negotiate with that particular group of people. The ultimate award of contracts of this type - in the Argentine, at any rate - is a political decision made by politicians and it was for that reason and that reason only that the Respondent retained Mr [X] and was prepared to pay a very high rate of commission, so that it could have the benefit of his influence with precisely these people. And when in July 1953, his commission was fixed at 10 per cent of the F.O.B. value, only 2 per cent was to be for himself the rest being for his collaborators.

These statements were shortly thereafter confirmed by [Witness 1] in a Statutory Declaration of 2 May 1961, where he said, *i.a.*: 'Mr [X's] sole function, as was clearly understood between us, was to make available to [the Respondent] his influence with the Peronista politicians and, should his efforts result in the placing of a contract with [the Respondent] for the project then (July 1953) under discussion, he was to be paid 'commission' at the rate of 10 per cent ... Mr [X] specifically told me that he would be able to retain only about 2 per cent of that commission and that the remainder was intended for distribution amongst his collaborators'.

[Witness 4/ Mr Y], who had signed the three letters of commission on behalf of [the Respondent] stated in his Statutory Declaration of 4 May 1961 that the letters had to be split so that Mr [X] would be able to pass them on to persons assisting him.

In a confidential letter of 1 April 1955 from [Witness 5], then the Buenos Aires Manager of [the Respondent], to [Witness 6], then the Manager of the American Division of [the Respondent], [Witness 5] said *i.a.*:

some sort of similar title, so that he can prove to the boys to be somebody belonging to the firm and thus issue the commission letters on his own account.

The main reason for Mr Toots thinking of obtaining No. 2 is due to the fact with No. 2 in his possession he will be, to all intents and purposes, one of the boys negotiating for the boys, and on receiving the letter of intent with one hand he can hand over his own commission letters with the other. Therefore, as you will realise, No. 2 is extremely attractive to the boys.

From our point of view No. 2 is also very attractive because instead of having to play with mysterious commission letters we can issue a straight-forward letter to Mr Toots saying that as a reward for bringing us the job, we are reserving him a commission of X per cent ...

Legally, there is no difficulty for a letter like No. 1 to be issued; No. 2 and No. 3 may perhaps be more difficult, but I can confirm that similar letters have been issued in the past in this country.

Thereupon, [Witness 1], who had received a copy of the said letter, wrote strictly confidentially to [Witness 6] on 22 April 1955, stating *i.a.*:

I am afraid that is all very involved, but in South America one needs somebody to handle the delicate side of all large negotiations.

In a Statutory Declaration of 22 March 1961, [Witness 5] said *i.a.*:

Mr [X] told me that he had considerable influence with a number of important political appointees of the Peronista Government, and that in particular the key man in DINIE (Direccion Nacional Industrias del Estado) was a Senor [Z], the Accountant of the Peron family. Mr [X] considered that there was a very good chance of obtaining this order for [the Respondent], provided he could be issued with commission notes in a form satisfactory to Senor [Z]. It was therefore agreed that these notes should be issued to him and he in fact dictated them himself ...

There was never any question whatever but these commission notes related to the [place] project current in 1950 and to nothing else. Mr [X] often told me that he would only be able to keep about 1/2 to 1 per cent of the total commission of 10 per cent provided for by the commission notes, the rest having to be passed on to his "collaborators", which I took to mean Senor [Z] and possibly some others.

[Witness 7], Chairman and Director of _____ and prior Director of [Company E] declared in his Statutory Declaration of 22 August 1962 that the 'Agent' who acted for the *ad hoc* partnership in the same capacity as Mr [X] for [the Respondent] received payments amounting to £961,926.89 for his successful efforts to obtain for the partnership a substantial part of the 1958 contracts. Heard as a witness at the oral hearing [Witness 2], Director and General Manager of the Motor and Control Gear Division of [Company C] added, that this commission was included within the tender-price.

In the course of the oral hearing Mr [X] stated *i.a.* as follows: The commission notes were expressly made payable upon the mere conclusion of the contract and 'without charge or obligation' on Mr [X]'s part. Thus, the holder of the notes was liberated from the obligation, which would otherwise exist, to prove that the achievement of that result had occurred through the intervention of Mr [X]. Mr [X] never did transfer the original notes and he never had the intention to do so. He had made a number of photostat copies of all the notes and the cession of his rights to commission was made through the transfer of such a copy accompanied with written declaration through which Mr [X] ceded a certain proportion of the rights contained in the note in question. By such an operation Mr [X] also showed

Page: 290

to his collaborators the original note and the letter of 3 November 1950 authorising the transfer of the notes. – He had in 1950 given a participation in one of the notes to a person, who was in a position to decide upon the conclusion of the contract, the most important person in the field of industry at that time in Argentine, the President of the DINIE (Mr [Z]), see the above mentioned Statutory Declaration of [Witness 5]). However this participation was returned to him upon the failure of the [place] project. In 1953 and 1954 Mr [X] had ceded other participations to influential personalities, who more or less managed the business in question. He did not believe that [the Respondent] or any other company could have obtained a contract in Argentine which would not have been directed or influenced by this clique of people which had a controlling influence upon the Government's economic policy. – Mr [X] had never offered any commission to President Peron personally and he did not know whether his collaborators had done that. – Mr [X] had received from [the Respondent] some additional commission notes dated 29 January 1953, related to specific traction business. These notes guaranteed him a commission of 17 per cent, and eventually another 2,5 per cent on the top thereof.

[Witness 1] stated as witness, *i.a.* as follows: At one stage of the negotiation in July 1953 Mr [X] wanted to have 15 per cent, then he reduced it to 12 per cent, and finally the rate of the commission was settled at 10 per cent. Thereof 2 per cent was for himself and 8 per cent for 'Peron and his boys'. Our intention was to include the special commission to Mr [X] in the tender for the power station of 300,000 KW. At the time of the award of the contract for the bigger station of 600,000 KW we had no similar commission to pay. We had only to give a little bit of money away to the lower grade of civil servants who had offered to us help. The total amount involved in making motor cars etc. available to people like secretaries was about £20,000. The Argentine officials are used to doing business like that, and they only want to do business when they can find persons, such as Mr [X] to act as intermediaries. [Witness 1] had similar experience in Brazil where sums of 8 per cent were involved. Mr [X] himself referred to commissions of 10-15 per cent on some jobs he was doing for the Air Ministry, so [Witness 1] could understand that he was used to working with large sums, the bulk of which had to be given to the Peronista Party. – [Witness 1] had at the time of the negotiations with Mr [X] never heard of the commission notes of 3 November 1950 and as far as he remembers he had not yet been informed of the notes of 29 January 1953. If anybody had a commission note up to 10 per cent, it would be dangerous because it was obvious that this was "dishonest business". It was a habit, sometimes, if there was a suspicion, that the Ministry of Finance would come and raid the office and looked at every paper you had got, and it would not have been safe to have a document of that description, and [the Respondent] did not want to be associated with such a thing. If the collaborators were put in prison and the name of [the Respondent] was shown as giving a bribe through Mr [X], it would not do the company any good. Therefore, Mr [X] agreed to work on the basis of a verbal gentlemen's agreement.

[Witness 3], heard as witness, stated *i.a.* as follows. He was once the General Manager and a Director of [the Respondent] and was now a Director of [Company C]. One could not get business of any scale in the Argentine, save by using an intermediary who required large commissions to enable him to obtain influence in the Government's Departments. Anybody who had any dealing in the Argentine,

Page: 291

one way or the other, had to face this condition. It was a little so before, but in Peron's time it became very much so. – Mr [X] stood in very good relationship with some of the leading political people. It had been suggested to hand over to Mr [X] commission notes up to 15 per cent. [Witness 3] thought it was too high, but left it to [Witness 6] to fix the rate. However, [Witness 3] refused to let him issue any written commission notes, because if they get into the wrong hands, they would have very unfortunate reflections, upon firstly the agent, and secondly upon the company. In [Witness 3's] opinion the bulk of this money would be required for bribing Government officials. President Peron himself had a vested interest in these things. He had a hand in it and his minions collected. – Peron was the chief shareholder in these big commissions that were going to the party. It was pretty certain the money was not needed for anything else than bribery.

OPINION

1. In view of these statements I raised the question of my jurisdiction to entertain the subject matter of this case.

2. In this respect both parties affirmed the binding effect of their contractual undertakings and my competence to consider and decide their case in accordance with the terms of reference. However, in the presence of a contract in dispute of the nature set out hereafter, condemned by public decency and morality, I cannot in the interest of due administration of justice avoid examining the question of jurisdiction on my own motion (cf. *Oscanyan v. Winchester Arm. Co.*, US

Supreme Court 1880, 103 US 261, and *Finger v. Lamalex SA*, Swiss Federal Supreme Court 1954, RO 80 II 45).

3. It might also be noted that under the New York Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, recognition and enforcement of an award may be refused *ex officio* if the competent authority in the country where recognition and enforcement is sought finds that (a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country, or (b) the recognition or enforcement of the award would be contrary to the public policy of that country.

4. The parties have submitted that I may not refuse to take jurisdiction on the merits since the possible offense would be against foreign (Argentine) public policy and not French public policy. The contract (or contracts) between the parties had its (or their) situs in the Argentine and had no connection whatsoever with France, where the arbitral proceedings take place.

5. Of course, there are some good reasons in this case for treating the *compromis* of 6 July 1959 and the terms of reference as agreements separate and distinct from the contractual relationship of the parties on the merits, and to hold these procedural agreements to be governed by French law.

6. Reference to French law might also derive from the following provisions of Article 16 of the Rules of Conciliation and Arbitration of the International Chamber of Commerce:

The rules by which the arbitration proceedings shall be governed shall be these Rules and, in the event of no provision being made in these Rules, those of the law of procedure chosen by the parties or, failing such choice, those of the law of the country in which the arbitrator holds the proceedings.

No provision concerning the present question that is whether the case is arbitrable, is given in these Rules, and no law of procedure has been chosen by the parties; but there can still be doubts whether the question of arbitrability is to be qualified as belonging to the Rules governing the proceedings as laid down in this Article.

7. Admittedly, Article 1004 together with Article 83 of the French Code of Civil procedure reserves for the ordinary courts all cases 'communicable to the Public Prosecutor', as for instance those involving public policy. However, these provisions refer only to French public policy, and the Claimant has rightly cited a number of French cases where the breach of foreign laws did not amount to an offense against French public policy. However, from these and other cases it can only be concluded that while infringements of foreign customs or exchange laws, tax statutes and other similar provisions may be immaterial from the point of view of French public policy, there can hardly be any doubt that French public policy will not ignore more serious violations of foreign laws involving grave offences to good morals. Thus, if a contract contemplating the import of contraband into another country includes corruption of the custom officers or involves violence, and not merely clandestine measures (*ruse*), its enforcement will be refused in France. (See, for instance, Note Niboyet S. 1928.1. 305, and Silz S. 1939. 2.25, and the distinction there drawn between 'contrabande anodine' and 'contrabande majeure' as well as the reference to the Anglo-Saxon distinction between 'malum prohibitum' and 'malum in se').

8. Moreover, under the French law the arbitrators are not merely prevented from entertaining cases reserved for the ordinary courts, but they will also, in a general manner, like the courts, not lend their aid to enforce contracts based on grave offence to *bonos mores*, whether committed in France or abroad (cf. Jean Robert, *Arbitrage Civil et Commercial*, 3rd ed., 1961., p. 36). In this context, it might also be of interest to mention that under articles 1108, 1131 and 1133 of the French Civil Code no effect can be given to contracts prohibited by law or contrary to good morals and public policy.

9. In view of these considerations and with regard to the nature of the adventure in which the parties to this dispute have engaged, as set out hereafter, French law cannot admit this case to be settled by arbitration, regardless of whether the adventure was located in France or elsewhere.

10. However, the problem now under discussion might also be considered from another point of view.

11. In the same way as the Resolutions of the Institut de Droit International guide international tribunals in the field of public international law, they are in the field of private international law of great value to arbitrators who have to decide international disputes. The Institute's Amsterdam Resolution of September 1957 on L' Arbitrage en droit international privé provides in Article 5 as follows:

La validité de la clause compromissoire est régie par la loi du siège du tribunal arbitral. – Sous cette réserve, le pouvoir de compromettre est régi par la loi applicable au fond du litige; cette loi est déterminée par les règles de rattachement de l'Etat où siège le tribunal arbitral.

This provision, which establishes that the law governing the merits of the case is the law which determines whether or not the case is arbitrable, is, in my opinion, a reasonable one.

12.The parties have agreed that Argentine law is the proper law of the commission agreement (or agreements), and should their choice of law, which was only made during the course of the arbitration procedure, not by itself be binding upon me, I have no doubts about the correctness of their conclusion in that respect (cf. Batiffol, *Les Conflits de Lois en Matière de Contrats*, Paris 1938, No. 304.)

13.Therefore, pursuant to Article 5 of the Amsterdam Resolution, the question whether the subject matter of the dispute is capable of settlement by arbitration should be governed by Argentine law.

14.The Argentine Code of Procedure stipulates in Article 768:5 that all questions which affect good morals ('la moral y buenas costumbres') are excluded from arbitration. According to this provision and in view of the nature of the present dispute, as set out hereafter, there is obviously no room for any arbitral jurisdiction in this case – a point of view which seems to be shared by the parties (see also Articles 256 *et seq.* of the Argentine Criminal Law making bribery a criminal offense).

15.It should also be noted that Article 502 of the Argentine Civil Code provides that an obligation contrary to law or public policy can have no effect and Article 1891 of the same Code provides that a mandate concerning an illegal, impossible or unmoral act does not give the principal any cause of action against the mandatory nor the latter any cause of action against the principal.

16.Finally, it cannot be contested that there exists a general principle of law recognised by civilised nations that contracts which seriously violate *bonos mores* or international public policy are invalid or at least unenforceable and that they cannot be sanctioned by courts or arbitrators (cf. *Oscanyan v. Winchester Arm. Co.*, cited above). This principle is especially apt for use before international arbitration tribunals that lack a 'law of the forum' in the ordinary sense of the term.

17.Now, reverting to the facts in this case. – As might be expected the documents drawn up seem on their face to be legal and bear the semblance of ordinary commercial documents. However, it is, in my judgment, plainly established from the evidence taken by me that the agreement between the parties contemplated the bribing of Argentine officials for the purpose of obtaining the hoped-for business.

18.In saying this I do not mean to imply that Mr [X] had no more to do than to hand over a commission to his respective collaborators; on the contrary, I am convinced that Mr [X] had to perform other, important, and quite irreproachable, functions. This has to be taken into consideration, but does not obscure the general image that the major part of the commissions to be paid to him were to be used for bribes.

19.Even so, however, there are other circumstances which should be taken into account before it could be established that the action brought before me seriously affects *bonos mores*. I have to accept [Witness 3's] statement that during the Peron regime everyone wishing to do business in the Argentine was faced with the question of bribes, and that the practice of giving commissions to persons in a position to influence or decide upon public awards of contracts seems to have been more or less accepted or at least tolerated in the Argentine at that time. On the other hand it must be remembered that we have to do here not with a mere favour which could be overlooked, or even with the 'little bit of money' which [Witness 1] with some understatement referred to. Huge amounts are involved: in the [place] project the commission, if earned, would have amounted to £352,100; for the 1953 project, if obtained, the commission figures would have been about £1,300,000; and Mr [X] is now claiming £2,696,213.80.

20.Although these commissions were not to be used exclusively for bribes, a very substantial part of them must have been intended for such use. Whether one is taking the point of view of good government or that of commercial ethics it is impossible to close one's eyes to the probable destination of amounts of this magnitude, and to the destructive effect thereof on the business pattern with consequent impairment of industrial progress. Such corruption is an international evil; it is contrary to good morals and to an international public policy common to the community of nations.

21. However, before invoking good morals and public policy as barring parties from recourse to judicial or arbitral instances in settling their disputes care must be taken to see that one party is not thereby enabled to reap the fruits of his own dishonest conduct by enriching himself at the expense of the other.

22. This, however, cannot happen in the case before me. Mr [X] has not even alleged that he personally has been or will be obliged to pay to anyone any part of the commission notes, nor has he asked for payment of expenses incurred for the benefit of the Respondent.

23. After weighing all the evidence I am convinced that a case such as this, involving such gross violations of good morals and international public policy, can have no countenance in any court either in the Argentine or in France, or, for that matter, in any other civilised country, nor in any arbitral tribunal. Thus, jurisdiction must be declined in this case. It follows from the foregoing, that in concluding that I have no jurisdiction, guidance has been sought from general principles denying arbitrators to entertain disputes of this nature rather than from any national rules on arbitrability. Parties who ally themselves in an enterprise of the present nature must realise that they have forfeited any right to ask for assistance of the machinery of justice (national courts or arbitral tribunals) in settling their disputes.

FOR THESE REASONS

- (1) The Respondent's objection that, if any part of the Claimant's demand would constitute a claim for damages, that part of the demand as well as the Claimant's subsidiary demand do not come within the scope of the terms of reference is rejected;
- (2) The Claimant's principal and subsidiary demands are rejected for lack of jurisdiction.
- (3) Each party shall bear its own costs;
- (4) The arbitrator's fees and expenses and the administrative costs of the arbitration amounting to £2,300, are equally divided between the parties.

Done at Paris, on [date unknown] 1963

Gunnar Lagergren.

Referring Principles:

- IV.7.1 - Invalidity of contract that violates good morals (boni mores)
- IV.7.2 - Invalidity of contract due to bribery