Date: 00.00.2001
Country: Arbitral Award
Number: 117/1999
Court: Arbitration Institute of the Stockholm Chamber of Commerce
Parties: Unknown
Citation: http://www.unilex.info/case.cfm?id=793

Parties:
Claimant: [A Luxembourg] Company A
Respondent: [A Chinese] Corporation Y

Place or arbitration: Stockholm, Sweden

Language or the proceedings: English

Nationality or arbitrators:
Chairman: Swedish
Arbitrator: Swedish
Arbitrator: Chinese

[...]

SUMMARY

In 1980, a Chinese international trade corporation and the [...] Corporation X, also a Chinese company, on the one hand, and the [Luxembourg] Company A, on the other, entered into an agreement on technology exchange and technical co-operation ("the 1980 Agreement"). Under the 1980 Agreement the parties exchanged licenses to parts of their respective industrial technology.
The 1980 Agreement was valid for ten years but was later extended until 1995 trough a Supplement Agreement. It was thereafter terminated as per the date agreed between the parties.
In 1997 a discussion arose between the Company A and the [Chinese] Corporation Y, as successor to Corporation X, on certain alleged infractions by Corporation Y on a secrecy undertaking in the 1980 Agreement.
In February 1998, the discussions resulted in a settlement agreement ("the Settlement Agreement") between the parties. According to the Settlement Agreement, the secrecy obligation under the 1980 Agreement was extended until December 31, 2002.
According to Company A, additional breaches of the secrecy undertaking was thereafter committed by Corporation Y. In November 1999, Company A filed a request for arbitration with the Arbitration Institute of the Stockholm Chamber of Commerce, claiming damages from Corporation Y on this ground.
On 7 July 2000, the Institute referred the case to the arbitral tribunal.
On 24 October, 2000, Company A filed a partial Statement of Claim, in which it requested that the issue of applicable law should be determined in the form of a partial award. The respondent agreed to the request.

APPLICABLE LAW TO THE DISPUTE

Claimant's Position

Claimant held that Swedish law should apply to the dispute or, alternatively, the UNIDROIT Principles of International Commercial Contracts, or Luxembourg law.
"The relevant contract is the 1980 Agreement. There was hardly any relevant statutory law in existence in the People's Republic of China in 1980. In these circumstances, the parties cannot possibly have intended Chinese law to apply. The only evidence as to the parties' joint intention as regards applicable law can be found in the dispute resolution clause of the 1980 Agreement, in which the parties chose Sweden as the place of arbitration. It is clear that neither party wished the other party's law to apply.´´
"The parties chose the Rules of the [Arbitration Institute of the] Stockholm Chamber of Commerce from time to time in force. The current Rules permit the arbitrators to employ the voie directe method and applies [to] arbitrations which commenced on 1 April 1999 or later, unless that the parties have decided otherwise. Under the voie directe method, it is appropriate in the circumstances for Swedish law to be chosen by the arbitrators as a neutral applicable law; alternatively, the UNIDROIT Principles of international Commercial Contracts should be applied.´´
"If choice of law rules were to be applied, Swedish international private law rules and those of the Rome Convention both lead to the conclusion that Swedish law should be applied or, alternatively, that Luxembourg law should be applied to the obligations of Corporation Y which are the subject of this dispute, since the '``characteristic performance´´ to which the

secrecy and non-competition obligations at issue relate - is the license from Company A, domiciled in Luxembourg from where the performance emanates.´´

Respondent's Position

Respondent held that Chinese law should be applicable to the dispute for the following reasons.
"The choice of Sweden as the situs of the arbitration does not suffice as an indication of the parties' intentions with the respect to applicable law. The standard for a finding of an inferred choice of law is, generally speaking, extremely high and on1y proper where it is reasonably clear that there is a genuine choice by the parties. The choice of a certain jurisdiction for the arbitration proceedings does not indicate an intentional choice of applicable law but can be made for several different reasons. Under Swedish arbitration law at the time of the signing of the 1980 Agreement the conflict of laws system to be applied in an international commercial arbitration is the Swedish one. According to Swedish conflict of laws principles the law with the closest connection to the contract will be applied in matters of commercial contracts.´´
"It was common practice in China at the time of the signing of the 1980 Agreement that no provision on applicable law was included in the agreement. However, Chinese parties naturally favoured Chinese law as the applicable law, and this was reason for the preference by Chinese parties to international contracts of negotiating and signing agreements in China, thereby increasing the possibility of subsequent application of Chinese law. In this case, the 1980 Agreement and the subsequent agreements were negotiated and signed in China and the 1980 Agreement was also to be largely performed in China. In addition, the only portion of the Agreement in dispute and the entirety of the Settlement Agreement relate to performance that also take place principally in China. There is no connection to Sweden in the negotiation, execution or performance of any of the contracts relevant in the dispute. Consequently, the Tribunal should apply Chine se substantive law to the dispute.´´

Findings of the Arbitral Tribunal

The arbitral tribunal took note of the fact that the 1980 Agreement was signed in Beijing and contained no provision on applicable law to the dispute. The Supplement and the Settlement Agreement were a1so signed in Beijing without any provisions on applicable law. No evidence had been submitted in respect of the intentions of the parties on applicable law at the signing of the various agreements.
The present arbitration is governed by the Swedish Act on Arbitration which entered into force on April 1, 1999 and the present rules of the Arbitration Institute of the Stockholm Chamber of Commerce that entered into force on the same day. The Swedish Arbitration Act does not contain any provision on applicable law to a dispute under an international contract in Swedish arbitrations. The Rules of the Arbitration Institute, however, stipulate in Article 24 (1) that the tribunal, in the absence of an agreement between the parties, shall apply the law or rules of law which the tribunal considers to be most appropriate, a principle often referred to as voie directe. This rule, like the other Rules in force since April 1, 1999, applies to all arbitrations commenced thereafter, irrespective of the date of the agreement in dispute. Thus, this Tribunal is free to determine the applicable law on an assessment generally of the appropriateness of the chosen law or rules of law.
However, this does not mean that the Swedish conflict rules - which in the case of an international arbitration that, according to the parties wishes, takes place in Sweden are, in dubio, applicable - can be disregarded out of hand. Therefore, the Tribunal will first investigate whether there are Swedish conflicts rules that will effectively designate the applicable law for the present dispute.
Sweden has ratified the Rome Convention on the Law Applicable on Contractual Obligations which since July 1, 1998 has the status of law in Sweden. The governing principle under the Convention, as by and large was also the case under Swedish law before Sweden's ratification of the Convention, is that the applicable law shall be the law of the country to which the agreement has the closest connection. The Convention contains rules on certain contracts where the closest connection can be inferred from the nature of the contract, none of which, however, is relevant in the present case. There are also references to such circumstances that traditionally have been assumed to indicate a special connection to a certain jurisdiction, such as the nationality or residence of the respective parties, the place where the contract was entered into, the place of performance, agreed currency, the language of the contract etc. In the present case, only the place of negotiating and signing the Agreement is indicative of a certain jurisdiction among these various circumstances. This could, in the absence of other circumstances, indicate that the Agreement (as well as the subsequent Supplement and Settlement Agreement) has its closest connection with the People's Republic of China.
However, this can, in the opinion of the Tribunal, in itself not be decisive in the present case. The 1980 Agreement is of special character in that it is, as it were, a form of barter agreement. The parties to the 1980 Agreement agreed to exchange technology and know how without any simultaneous arrangement for payments by either side to the other. Although the terms of the licenses are slightly different, the Agreement is a contract on a cross licence arrangement where performance and obligations are, on the face of it, evenly distributed and symmetrical in nature. As a consequence, the Agreement lacks the distinctive element of an unilateral, characteristic performance by one of the parties that sometimes can lend itself to conclusions or presumptions on the closest connection to any particular jurisdiction.
This conclusion in its turn leads the Tribunal to exclude the general application of Chinese law to the Agreement. The location where the Agreement was negotiated and signed can in the present case not reasonably be assumed to be in itself decisive for the law that should govern both the licence granted by [Company A] and the licence received by [Company A]. Nor can such conclusion be drawn from the fact that the subsequent Supplement and the Settlement Agreement were signed in the People's Republic of China. The fact that the last mentioned agreements are unilateral in the sense that they deal only with matters relating to the licence granted by [Company A] to [Corporation Y] does not alter this, since they still concern performance and obligations arising out of the cross licence in the 1980 Agreement, which contains the arbitration clause that both parties also find applicable to the present dispute. Therefore and although the Settlement Agreement is a separate agreement in the sense that it could be separately governed by a law or rules of

law on issues relating to its binding nature or suchlike, the unilateral nature and the place of signing of the Settlement Agreement is not, in the tribunal's opinion, a valid reason for applying a different law to the Settlement Agreement than that which is found applicable to the 1980 Agreement. In fact, the very nature of a settlement agreement relating to a contractual obligation will, in the absence of a separate governing law clause, in dubio make it fail under the applicabIe law according to the contract in dispute.
For the same reasons as stated in the foregoing Luxembourg law cannot be considered to be the exclusive governing law for the 1980 Agreement.
In exceptional cases it may be possible to separate one part of a contract with a particular connection to a certain jurisdiction and apply the 1aw of that jurisdiction to such part while at the same time applying another law to other parts of the contract with the closest connection to another jurisdiction (so called deçepage). In the Tribunals opinion this is not possible in the present case. In a contract where the parties exchange licences it cannot be a reasonable assumption that the alleged breaches of one party should be treated differently than the breaches of the other party, as a result of different 1aws or rules of 1aw being applicable to each party's obligations.
The only relevant indication of any jurisdiction other than the People's Republic of China or Luxembourg is Sweden, chosen by the parties as the situs for arbitration. This is not of relevance for a finding of the closest connection of the Agreement to any particular jurisdiction, but goes rather to the issue of the parties' intentions or implied choice of governing 1aw on the merits. But even in a case where all other relevant elements for identifying the governing law are missing, it is highly debatable whether a preferred choice of the situs of the arbitration is sufficient to indicate a choice of governing 1aw. There has for several years been a distinct tendency in international arbitration to disregard this element, chiefly on the ground that the choice of the place of arbitration may be influenced by a number of practical considerations that have no bearing whatsoever on the issue of applicable law. The Tribunal agrees in principle with that approach, and notes, in addition, that the choice of location and rules for the arbitration in this case conforms to a fairly long and well-established practice in contracts between Western parties, on the one hand, and East European or Chinese parties, on the other. This practice is mainly based on perceptions of Sweden and the Arbitration Institute as a neutral and adequately regulated ground for arbitration proceedings and not on a preference for Swedish substantive law.
It seems obvious to the Tribunal that the parties in this case deliberately refrained from agreeing on the applicable law to the 1980 Agreement, which otherwise bears the mark of a well prepared and qualified approach to contract drafting. It may well be that either or both of the parties had hopes or expectations on the application of a law, in case of a dispute between them, with which they would feel comfortable. But there is no indication that they at the time contemplated the actual effects of any particular law on hypothetical instances of breaches under the contract; nor have any such effects so far been presented by the parties in the arbitration. In the Tribunals view, it is reasonable to assume that the contracting parties expected that the eventual law chosen to be applicable would protect their interest in a way that any normal business man would consider adequate and reasonable, given the nature of the contract and any breach thereof, and without any surprises that cou1d result from the application of domestic laws of which they had no deeper knowledge.
This leads the Tribunal to conclude that the issues in dispute between the parties should primarily be based not on the law of any particular jurisdiction, but on such rules of law that have found their way into international codifications or such1ike that enjoy a widespread recognition among countries involved in international trade. Apart from international conventions such as the Convention on International Sales of Goods (CISG) and other conventions that are not directly applicable on a licence agreement, the only codification that can be considered to have this status is the UNIDROIT Principles of International Commercial Contracts. The UNIDROIT rules have wide recognition and set out principles that in the Tribunals opinion offers a protection for contracting parties that adequately reflects the basic principles of commercial relations in most if not all developed countries. The Tribunal determines that the rules contained therein shall be the first source employed in reaching a decision on the issues in dispute in the present arbitration.
If and to the extent the UNIDROIT rules do not provide an answer to any question of substantive nature raised in the arbitration, the Tribunal bas to resort to domestic laws. Since none of the parties has yet presented its case or its arguments in a way that enables the Tribunal to identify any such questions the Tribunal does not know in which areas such secondary sources of law will be required. It follows from the foregoing that the Tribunal does not find it appropriate to chose the domestic law of either party. Instead, the Tribunal will, in view of the lack of distinctive elements for a choice of any other law and in spite of the arguments in foregoing, apply Swedish substantive law, unless both parties then agree otherwise.

SEPARATE AWARD

The Tribunal determines that the appropriate rules of law on the merits of the issues in dispute between the parties are those contained in UNIDROIT Principles of international Commercial Contracts (1994) supplemented by Swedish law if and to the extent the UNIDROIT rules do not give any guidance on a particular issue.