FRANCE

ARBITRATION CHAMBER OF PARIS

Award in case no. 3089

Parties: Claimant: Buyer (EU country)
Respondent: Seller (non-EU country)

Place of arbitration: Paris, France

Published in: Unpublished; Original in French

Subject matters:
- United Nations Convention on Contracts for the
- formation of contract by performance
- non-conformity of goods

Summary

A late-filed statement in defense — which was also not accompanied by a French translation but written in Spanish, a language some of the arbitrators understood — was admissible in application of the general (due process) principles of the French Code of Civil Procedure, which apply to arbitrations under the Paris Rules. An arbitration clause added unilaterally by the buyer in its purchase confirmation was a new condition materially altering the seller’s offer and as such invalid under the CISG. It was valid in the present case, however, because the seller performed under the contract. On the merits, the seller was liable for a defective delivery of frozen fish but the buyer, a broker, shared liability toward the final customer because it failed to have the fish inspected before purchasing it and relied on a definition of freshness in an EU Council Regulation that, as it should know as an experienced trader, was inapplicable here.

Buyer negotiated with Seller the purchase of frozen fish for human consumption, which it would sell on to a Final Customer. Buyer was incorporated in an EU country; both Seller’s country, Country X, and Final Customer’s country, Country Z, were non-EU countries. On 25 June 2008, Seller issued a pro-forma invoice; on 27 June 2008, Buyer sent a purchase confirmation for 193.2 metric
tons of frozen “grade B” fish. The agreed price was “FOB City A (Country X), US$ . . . per ton”. The purchase confirmation, though not the pro-forma invoice, contained a clause for arbitration of disputes at the Arbitration Chamber of Paris (Chambre Arbitrale de Paris).

The fish was packed in cardboard boxes in five containers that were loaded onto two vessels in City A (Country X). Three containers were loaded onto a vessel on 13 July 2008; two containers were loaded onto a second vessel on 9 August 2008. When the fish arrived in Country Z, it appeared that it was in poor condition. Expert reports carried out at the request of Buyer and Final Customer showed that part of the fish was unsuitable for human consumption. The loss was assessed at 50 percent in respect of the first delivery and 75 percent in respect of the second delivery.

On 6 April 2009, Buyer commenced arbitration against Seller at the Arbitration Chamber of Paris, seeking damages for the defective delivery. Seller did not appear in the arbitration. Pursuant to the applicable rules (the Paris Rules), the Chamber’s chairman appointed three arbitrators. A hearing was held on 6 October 2009. Seller did not appear in the proceedings.

On the following day, 7 October 2009, the arbitral tribunal authorized Buyer to complete its submissions by filing a post-hearing note together with additional documents before 20 October 2009, with copy to Seller. On 1 December 2009, Seller filed a statement in defense, claiming that it only received Buyer’s request for arbitration after the hearing, through the judicial channels of Country X. It objected to the jurisdiction of the Arbitration Chamber of Paris and claimed that it was not liable for the deterioration of the fish. The arbitral tribunal re-opened the proceedings and asked Buyer to file comments to Seller’s statement. By letter of 29 December 2009, Buyer replied that Seller’s statement was inadmissible because it was filed too late and only in Spanish, whereas the Paris Rules require a French translation; it also discussed the merits of Seller’s arguments.

The arbitral tribunal held first that the statement in defense was admissible. It noted that the Paris Rules provide that the fundamental principles of the French Code of Civil Procedure, including the principle of adversarial proceedings (principe du contradictoire), apply to arbitration proceedings. It was in compliance with this latter principle that the arbitral tribunal requested Buyer to send its post-hearing submission to Seller and accepted Seller’s statement, since some of its members understood Spanish.

The arbitrators then rejected Seller’s objection of lack of jurisdiction. The arbitration clause was indeed not a valid agreement under the United Nations Convention on Contracts for the International Sale of Goods, Vienna 1980, (CISG) because it was a new condition materially altering the conditions of the
ARBITRAL AWARDS

offer, added unilaterally by Buye: to the purchase confirmation. However, Seller accepted it, under the CISG, by performing under the parties’ contract.

On the merits, the arbitrators found that Seller was liable, as it appeared from the quality appraisals that the fish had not been very fresh at loading and had been incorrectly frozen. However, as an experienced trader Buye also committed gross negligence in its role as an intermediary for Final Customer by failing to have the fish inspected before shipment and relying on the definition of “grade B” freshness in a Council Regulation that was inapplicable here because the contract was not solely between EU parties, a fact of which Buyer should have been aware. Without Buyer’s negligence, Final Customer would not have suffered any damage. The arbitral tribunal therefore concluded that Seller and Buyer shared 50 percent each of the liability for the assessed damages.

Excerpt

[1] “Buyer’s arguments, as contained in its request for arbitration, may be summarized as follows:

(i) On 27 June 2008, Buyer signed a purchase contract for 193.2 tons of ‘grade B’ frozen fish, on the basis of pictures. Fish quality depends on the degree of freshness, as provided for in Arts. 4, 5 and 6 of Point B of Council Regulation (EC) no. 2406/96 of 26 November 1996, laying down common marketing standards for certain fishery products;
(ii) The goods delivered in City B (Country Z) did not comply with the purchase order’s specifications, since the 138 tons delivered were damaged and were only made up of hake and hoki whereas the contract provided for the delivery of different species;
(iii) According to the appraisals carried out upon arrival of the goods at the request of Buyer and Final Customer, the fish did not comply with the contractual provisions and the sea carrier’s liability could be excluded. The damages suffered by Final Customer were assessed at 50 percent in respect of the first delivery and 75 percent in respect of the second delivery.
(iv) Buyer, alleging that it made no mistake, reproaches Seller of having sold fish in a state of advanced deterioration.

[2] “Buyer was authorized by the Arbitral Tribunal to send, with copy to the other party, a post-hearing note together with additional documents before 20 October 2009, in order to complete its file. The Arbitration Chamber of Paris
confirmed such authorization by letter dated 9 October 2009. Buyer sent its post-hearing note and additional documents on 19 October 2009.

[3] "By letter of 1 December 2009, received by the Arbitration Chamber of Paris on 7 December 2009, Seller submitted a statement in defense, in which it objected to the jurisdiction of the Arbitration Chamber of Paris and claimed that it was not liable for the deterioration of the fish delivered in City B (Country Z).

[4] "By letter of 15 December 2009, the Arbitration Chamber of Paris forwarded this document to Buyer, informing it that the arbitral tribunal had decided to reopen the proceedings in order to receive [Buyer's] comments.

[5] "Buyer replied by letter of 29 December 2009, arguing that Seller's statement was inadmissible and replying to the arguments made by Seller. Buyer also proved that it duly transmitted its objections to Seller."

I. ANALYSIS

1. PROCEDURAL ASPECTS

a. INADMISSIBILITY OF SELLER'S STATEMENT

[6] "Buyer relies on the fact that Seller's statement in defense was not submitted to the Secretariat at the latest on the eighth day before the date of the arbitration hearing — but rather after the closing order was issued and the judgment deferred, following the hearing held on 6 October 2009 — in order to argue that Seller's statement is inadmissible because it was filed too late under Arts. 24 and 28 of the Rules of Arbitration of the Arbitration Chamber of Paris [the Paris Rules]. In support of its request that [the statement] be rejected, Buyer adds that Seller's statement, drafted in Spanish, was not accompanied by a French translation, as required by Art. 25 of the Paris Rules.

[7] "The Arbitral Tribunal observes in this respect that Seller received the request for arbitration of Buyer on 11 November 2009 — that is, after the hearing — through the judicial channels of Country X.

[8] "Art. 5 of the Paris Rules provides that the guiding principles established by the French Code of Civil Procedure, among which the principle of adversarial proceedings [principe du contradictoire], apply to arbitration proceedings. It is thus

1. Art. 5(2) of the Rules of the Arbitration Chamber of Paris reads:

"Arbitral Tribunals constituted by the International Arbitration Chamber of Paris are under no obligation during proceedings to observe the procedure, time limits or formalities governing Courts of law. However, the general principles for the conduct of proceedings set out in Arts. 4
in application of Art. 14 FCCP that Buyer was asked on 7 October 2009 to send its post-hearing submission to its opponent and that the Arbitral Tribunal, some of whose members understand Spanish, accepts Seller’s statement, which [was] received by the Arbitration Chamber of Paris within the time-limit prescribed by Art. 643 FCCP.

[9] "Seller’s statement is thus accepted and Buyer’s inadmissibility claim rejected."

b. Jurisdiction of the Arbitration Chamber of Paris

[10] "In support of its objection of lack of jurisdiction, Seller relies on the United Nations Convention on Contracts for the International Sale of Goods dated 11 April 1980 [CISG], which governs the contract concluded between the parties, in order to claim that the arbitration clause is null and void because Seller did not accept it: the clause did not appear in Seller’s offer as laid down in the pro-forma invoice of 25 June 2008 but was unilaterally added by Buyer in its purchase confirmation of 27 June 2008. Also, the clause was printed in minuscule characters.

[11] "The Arbitral Tribunal observes in this respect that the sale at issue concerns goods and was concluded between two companies of Contracting States to the [CISG]. Thus, this international convention does indeed apply to the sale contract at issue.

[12] "The purchase confirmation of 27 June 2008 appears to be an acceptance of the offer in the pro-forma invoice of 25 June 2008. This document repeats in fact all conditions regarding the goods set out in the pro-forma invoice issued on 25 June 2008 by Seller; however, it also contains an arbitration clause which, according to Art. 19 CISG, is deemed to materially alter the conditions of the


"(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.
(2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.
(3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party’s liability to the other or the
offer. Hence, pursuant to Art. 19 CISG this purchase confirmation is not a contract.

[13] "However, pursuant to Art. 18 CISG Seller accepted the additional conditions, in particular the arbitration clause, by shipping the goods. If this is not the case because the purchase confirmation was sent to a certain Mr. Y, acting on behalf of Seller, Seller should then seek redress from Mr. Y.

[14] "The Arbitral Tribunal also considers that the arbitration clause is printed in visible character at the bottom of the document sent by Buyer, in a paragraph whose title is in boldface type and whose size is as big as that of the other sale conditions.

[15] "The arbitration clause is thus deemed to be valid and to have been accepted by Seller. Seller's objection of lack of jurisdiction is rejected."

2. Merits

a. Liability allocation

[16] "Buyer bases its claim on the purchase confirmation of 27 June 2008, which concerns the purchase of 'grade B' frozen fish. Buyer relies on Arts. 4, 5 and 6 of Point B of Council Regulation (EC) no. 2406/96 of 26 November 1996, which defines 'grade B' freshness, for its claim that Seller delivered fish that did not meet contractual specifications, since the fish's quality upon arrival was not grade B quality.

settlement of disputes are considered to alter the terms of the offer materially."

3. Art. 18 CISG reads:

"(1) A statement made by or other conduct of the offerer indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance.

(2) An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed, provided that the act is performed within the period of time laid down in the preceding paragraph."
[17] "On the basis of the appraisals carried out on 28 August 2008 and 7 October 2008 in City B (Country Z), Buyer claims that a large part of the fish bought in City A was neither sound, fair nor merchantable [ni saine, ni loyale, ni marchands] when delivered in City B (Country Z) and thus unfit for human consumption. On the basis of the reports issued by [an Agency and an Office] on 15 September 2008 and 26 October 2008, Buyer claims that Seller is solely responsible for the condition of the fish. Buyer denies having made any mistake.

[18] "Seller in turn maintains that the sale was FOB and that Seller met its obligations by delivering 'class B' goods aboard the vessel. Buyer took delivery of the goods without complaining. From that moment, Buyer bears all risks. Seller also claims that, according to the appraisals carried out in City B (Country Z), the transportation temperature and transhipment conditions were the factors responsible for damaging the fish.

[19] "The Arbitral Tribunal observes in this respect that under Art. 36 CISG, the seller is liable for any lack of conformity which exists at the time when the risk passes to buyer, even though the lack of conformity becomes apparent only after that time. The expert reports supplied [here] indicate that the fish were not apparently damaged and the cardboard boxes were not wet at unloading.

[20] "The appraisals made in City B (Country Z) show that the freezing operations carried out in Country X are responsible in part for the deterioration of the fish, which was already not that fresh.

[21] "Seller is thus liable.

[22] "The Arbitral Tribunal also observes that Council Regulation (EC) no. 2406/96 of 26 November 1996, on which Buyer relies, which defines 'grade B' freshness in its Arts. 4, 5 and 6 of Point B, is an EU regulation that exclusively governs commercial sales between EU nationals, and that no contractual document refers to it. As a consequence, this Regulation is not applicable to this contract of sale, which involves a non-EU country company.

[23] "As acknowledged by Seller at the hearing, there is no international definition of 'grade B' quality.

[24] "Buyer, which introduced itself at the hearing as a specialist trader in frozen fish for human consumption, could not ignore both the inapplicability of Council Regulation (EC) no. 2406/96 of 26 November 1996 to its purchase contract with Seller and the absence of an international definition of 'grade B' freshness. Buyer nevertheless decided to buy frozen fish for the first time from Seller, a Country X company, on the sole basis of pictures and without having specified any definition of 'grade B' freshness or having made clear that the fish was meant for human consumption."
[25] "Despite the doubts expressed by the person who saw the fish in Country X—as remarked by the expert in Country Z—no analysis was carried out on the fish before the purchase, either by or on behalf of Buyer. The single pre-purchase examination, at Seller's request in order to obtain customs documents, did not include any quality inspection.

[26] "By behaving in this manner, Buyer has committed at least gross negligence, amounting to personal fault, in its role as an intermediary [for Final Buyer], without which the Final Customer's present loss would not exist.

[27] "Consequently, the Arbitral Tribunal finds that Buyer and Seller share responsibility equally for the defective delivery of the fish to Final Customer."

b. **Damage valuation**

[28] "Buyer seeks an amount of €... and the costs of the arbitration in respect of its buyer Final Customer, which costs already total €..."

[29] "The Arbitral Tribunal notes that the damage was appraised by the Agency's expert at 50 percent of the goods in the first three containers, that is, €... and by the Office's expert at €... for the delivery of the two last containers. As a result, the total economic loss suffered in respect to the goods amounts to €..."

[30] "As the Arbitral Tribunal holds Buyer and Seller equally liable, they shall both bear half of this total amount, that is, €..."

3. **Accessory Claims**

a. **Appraisals fees**

[31] "Buyer supplies a €... invoice for the appraisal issued by its counsel in City B (Country Z) on 26 December 2008.

[32] "Based on the same reasoning as for the principal claim, the Arbitral Tribunal directs Sellers to reimburse [to Buyer] the amount of €..."

b. **Arbitration costs**

[33] "For the same reasons, Buyer shall bear half of the arbitration costs and Seller is directed to reimburse [to Buyer] the other half, that is, €..."

c. **Art. 700 FCCP claim**

[34] "The claim for the costs of legal assistance amounts to the invoice of Buyer's counsel, that is, €..."
ARBITRAL AWARDS

[35] “In the light of its decision, the Arbitral Tribunal holds that it is not inequitable to direct Buyer to bear its own costs for legal assistance before the arbitrators.”

II. DECISION

[36] “The Arbitral Tribunal, deciding in adversarial proceedings:

(1) Accepts Seller’s statement;
(2) Holds that Buyer’s claim for indemnification is admissible and partly well-founded;
(3) Consequently directs Seller to pay Buyer the amount of €... in principal;
(4) Directs Seller to reimburse [to Buyer] the amounts of €... and €... respectively for appraisal fees and arbitration costs;
(5) Other claims presented by Buyer fail and are dismissed.”