FRANCE

INTERNATIONAL ARBITRATION CHAMBER OF PARIS

Final award in case no. 31741

Parties: Claimant: Buyer (Greece)
Response: Seller (France)

Place of arbitration: Paris, France

Published in: Unpublished

Subject matters: 
- time limit to file claim
- CIF sale contract
- obligations of CIF seller and buyer

Summary

The last day allowed for fulfillment of the obligations — the starting point of the six-month time period to notify and bring a claim in respect of a dispute not concerning the quality or condition of the goods under INCOTERMS Formula 12 — refers to the last day for delivering the goods. However, this starting point did not apply in the present case as the dispute concerned the lack of seaworthiness of the ship chartered by the CIF seller to transport the goods rather than the goods themselves. The starting date here was when the party became or should have become aware of the facts giving rise to its claim. The tribunal then determined the obligations of a CIF seller and buyer: the former must principally exercise all possible care in arranging for freight, while the latter must protect the goods and minimize damage. As the chosen ship at issue was undisputably seaworthy, the seller breached its obligations as a CIF seller. In turn, the buyer sought to minimize its loss and protect the goods but did not do so in the most professional and economical way. Hence, the tribunal assessed the parties' responsibilities at 60 percent for Seller and 40 percent for Buyer. The sum Buyer paid to the ship's crew to unload the goods was not taken into account when quantifying Buyer's

1. Translation of the award from the French original provided by the International Arbitration Chamber of Paris.

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damages, as such payment could be justified only if the crew had a legitimate right to retention of the goods, which it had not.

The French Seller and the Greek Buyer entered into a contract for the delivery of 3,000 metric tons of wheat. The contract was concluded on the INCOGRAIN Formula No. 12 Maritime CIF (2002 edition), which contains a clause referring disputes to arbitration at the International Arbitration Chamber of Paris.

Seller then concluded a SYNACOMEX charterparty with a shipowner in respect of a Georgian-flagged ship to transport the goods from France to Greece. The SYNACOMEX charterparty provides for arbitration of disputes at the Chambre Arbitrale Maritime de Paris (CAMP). Following the issuance of the bill of lading, 2,700 metric tonnes of the wheat were loaded onto the ship. On the same day, Seller sent Buyer an invoice for the total contract price, which was paid by Buyer. The ship cast off but returned to port for fuel two days later. The pilot who had the task of piloting the ship out of port after refueling found that the waterline was below the water surface and alerted Maritime Affairs, which carried out an inspection and detained the ship.

Subsequently, the ship’s crew, which had been laid off by the shipowner, obtained an interim order from the President of the competent French Commercial Court, authorizing the crew to seize the ship as a conservatory measure as a security for its claim for unpaid wages and authorizing the departure of the ship only against an irrevocable bank guarantee in the amount of the unpaid wages.

While the ship was under arrest, Buyer paid part of the crew’s wages in exchange for the unloading of the goods; it then obtained an interim order from the Commercial Court, allowing it to unload the wheat and transship it to a substitute ship. By a later decision, the Commercial Court directed the shipowner to reimburse Buyer for the costs incurred.

Buyer also sought payment of damages and costs from Seller, arguing that it had failed to charter a seaworthy ship. When Seller did not reply, Buyer commenced arbitration at the International Arbitration Chamber of Paris.

By the present award, the arbitral tribunal – president, Professor Philippe Delebecque – held that Buyer’s request for arbitration was admissible and found partly in its favor on the merits. The tribunal applied French law, as agreed by the parties, taking also into account the international usages of the relevant trade.

The arbitrators first dismissed Seller’s argument that Buyer’s claim was untimely. The tribunal reasoned that the dispute at hand, which concerned the liability of the CIF seller and possibly the CIF buyer in respect of issues relating to the ship carrying the goods sold, concerned neither the quality nor the condition of the goods; thus, it clearly fell under the “other disputes” category.
provided for in the INCOGRAIN Formula, for which a six-month time limit to bring a claim is provided, starting after the last day allowed for fulfillment of the obligations. “Fulfillment of the obligations” means delivery of the goods, that is, the issuance of the bill of lading once the goods are loaded on board the ship. However, this starting point was irrelevant in the present case, because the dispute concerned the transport rather than the goods and Buyer’s claim — if held to be founded — arose when Seller failed to meet its obligation to charter a seaworthy ship but became due only from the moment Buyer was aware or should have been aware of this failure.

That moment, reasoned the tribunal, occurred at some point between the summons issued against the shipowner to appear before the French Commercial Court and the day of the hearing; it was only then that Buyer could realize the extent of the damage and its need to bring an action against Seller as well as the shipowner. Hence, the claim against Seller was notified and brought within the time limits set by the INCOGRAIN standard contract.

The arbitral tribunal then examined the question of the extent of the obligations of a CIF seller with respect to maritime transportation or freight.

Although a CIF contract is a sale at departure (rente au départ), it nevertheless imposes certain post-sale obligations on the seller. According to French law, the CIF seller is responsible for concluding a contract for the carriage of the goods to the buyer; the INCOGRAIN formula adds that shipment is to be made by seaworthy first class ships. A CIF seller must exercise all possible care in arranging for freight, make every effort to reserve freight in accordance with the contract and guarantee the seaworthiness of the ship. The CIF seller is also responsible for restrictive measures affecting the goods or the ship immediately after the ship’s departure.

In the present case, it was undisputed that the ship was not seaworthy. Hence, Seller breached its obligations as a CIF seller.

The tribunal added, however, that a CIF buyer also has the (implicit) obligation under a CIF sale to protect its goods and minimize its loss. Here, Buyer did make efforts to minimize damage by paying part of the crew’s wages to unload and transship the wheat, but it did not do so in “the most professional and economical way”: Buyer did not submit the bills of lading, which would have allowed it to remove the goods from the ship; it did not seek the arrest of the ship, which would have allowed it to obtain guarantees from its Protection and Indemnity Club [P&I]; it did not inform the P&I Club or the insurers of the situation. Also, Buyer did not commence arbitration from the start, although arbitration would have been the best forum in which to decide the entirety of the dispute. It is true — considered the tribunal — that Buyer was not a party to the
charterparty concluded by Seller and shipowner, but Buyer could have relied on the arbitration clause therein, based on the bills of lading specifically referring to the charterparty's clauses. The tribunal noted that arbitrators may decide on their own jurisdiction and that arbitration clauses concluded by reference are widely accepted in the grain trade.

Nor did Buyer summon Seller to the Commercial Court in which it was suing the shipowner. By failing to do so, Buyer deprived Seller of a chance to defend itself and/or have the case referred to arbitration as provided for in the sale contract and the charterparty.

The arbitral tribunal concluded that the commercial and procedural choices of Buyer, which it found to be questionable for a CIF buyer, could be taken into account in determining the liability of parties, and assessed these responsibilities at 60 percent for Seller and 40 percent for Buyer.

The arbitrators then held that the amount paid by Buyer to the ship's crew in exchange for the unloading of the goods could not be included among the damages to be refunded by Seller to Buyer. Although Buyer's need to resolve the matter quickly was understandable, this payment could be justified only if the crew had a legitimate right to retention of the goods, which it had not.

Finally, the arbitral tribunal held that the parties should bear the arbitration costs and fees in the 60/40 percent proportion previously determined, and directed Seller to reimburse Buyer for part of its legal costs.

Excerpt

[1] "After an exchange on the admissibility of Buyer’s last statement, which Seller considered untimely, the parties agreed at the hearing to accept all the statements and documents submitted. Seller renounced its objections and the Tribunal was able to pronounce on all documents, including the documents sent after the hearing such as the documents communicated by Buyer at the request of the Tribunal.

[2] "The debate was conducted in conformity with the principle of adversarial proceedings and the parties did not make any observations in this respect.

[3] "The jurisdiction of the Chamber results from the arbitration clause in Art. XIX of INCOROGRAIN Formula No. 12 CIF Maritime (2002 edition), agreed upon by the parties, in accordance with [their] commercial contract. Moreover, this jurisdiction was not disputed at any time.

[4] "Regarding the applicable law, the parties have expressly referred to French law and French jurisprudence. Therefore, the Tribunal will apply French law and
jurisprudence and will take into account the international customs of trade, as this is an international arbitration.

5. "The Tribunal must decide on two questions: one concerning the admissibility of Buyer's application and the other, provided the application is admissible, the merits of the claim."

1. ADMISSIBILITY OF CLAIM

6. "The INCOGRAIN Formula agreed upon by the parties provides in Art. XVII:

'XVII. Arbitration
Under penalty of being time barred:
A. Notification
(....)
(2) Other disputes:
[For all other disputes not involving quality and condition,] the party willing to exercise his right of arbitration shall notify his claim to the other party within the six months following the last day allowed for fulfillment of the obligations.
B. Referring of the disputes
(....)
(2) Other disputes
The claimant shall refer the dispute to the Chambre Arbitrale de Paris within six months following the last day allowed for fulfillment of the obligations.'

Art. XVII adds that 'Where a financial settlement is involved there is no time-barring limit for lodging a claim.'

(....)
7. "According to Seller, the request for arbitration and the seizing of the Chamber were not made within the time limits allowed [in the INCOGRAIN Formula] and Buyer's application is therefore inadmissible.
8. "According to Buyer, the application is perfectly admissible for the three following reasons:

(i) the dispute is of a financial nature and therefore is exempt from the time limit allowed;"
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(ii) the clause allows for a six-month time limit; this is contrary to the provisions of the Civil Code on the management of limitation periods (Art. 2254 CC);²
(iii) the six-month period is incompatible with the nature of the application, since the claim on which the request is based is a claim for total lack of performance of the contract and Buyer could not realize, at the moment of loading, the non-conformity of the ship with the concluded contract.

[9] "The Tribunal begins by noting that the dispute does not involve a financial settlement because it is not about payment between the parties.
[10] "In contrast, the dispute is not a quality dispute leading the Tribunal to evaluate the characteristics of the merchandise sold, nor is it a dispute on the conditioning of the merchandise.
[11] "Above all, the dispute concerns the liability of the CIF seller and, possibly, that of the CIF buyer, when the CIF sale raises some difficulties related to the ship by which the transport of the goods sold is to be carried out.
[12] "The dispute falls under 'Other disputes' and refers to the clause requiring the claimant to seize the Arbitration Chamber within six months following the last day allowed for the performance of the obligation.
[13] "The parties discussed this stipulation at length. Claimant considered that since the entry into force of the French time-limit [prescription] law reform, if time limits can be managed, this can be done only between the limits of one and ten years in accordance with Art. 2254 CC. Respondent pointed out in turn that Art. 2254 is not applicable to limitation periods [délais de forclusion], which are excluded from the time-limit law reform (see Art. 2220 CC).³
[14] "The tribunal holds that this discussion does not have to be dealt with because the issue is above all the nature of the action and the starting point of the period in which to start an action [délai pour agir].

2. Art. 2254 of the French Civil Code reads in relevant part:

"The time limit [prescription] can be shortened or prolonged by agreement of the parties. However, it cannot be reduced to less than one year or extended to more than ten years. The parties can also by mutual agreement add [grounds] to the grounds for suspension or interruption provided for by the law...."

3. Art. 2220 CC reads:

"Limitation periods [délais de forclusion] are not governed by this Title unless otherwise provided by the law."
[15] "The INCORRAIN Formula sets the starting point for the six-month period at the 'fulfillment of the obligations'. This refers to the delivery of the goods, that is, from the issuance of the bill of lading and the contractual application [pursuant to Art. VI(1) INCORRAIN] once the goods are loaded on board the ship. In this case, however, this starting point is irrelevant, and therefore is not applicable, because the dispute does not concern the goods. [Rather,] it concerns, as noted several times, the transport or freight in respect of the CIF sale. Buyer's application aims at finding that the CIF Seller is liable for not having freighted a seaworthy ship, and at obtaining as a consequence compensation for the damage resulting from the improper performance of the CIF contract.

[16] "At the time of delivery of the goods, that is, at the time of the establishment of the bill of lading and the application, Buyer's claim (for liability) against Seller was not yet due. This claim — if founded, as will be seen later — arose when Seller failed to meet its obligation to charter a seaworthy ship, but became due only from the moment Buyer was aware or should have been aware [of this failure].

[17] "This moment can only be the time when Buyer could realize the significance of its damage and its need to bring an action not only against the shipowner, but also and especially against Seller. This period lies between the summons issued against the shipowner to compel appearance before the Commercial Court and the day of the hearing. It can be said that during this period, Buyer either became aware or at least could have become aware of its rights vis-à-vis Seller and, more precisely, became aware or must be deemed to have become aware of the facts allowing it to exercise its rights in an action. It was during this period that the court record was made and that Buyer's knowledge of its rights was or should have been achieved.

[18] "In these circumstances, the tribunal deems that the time limit allowed for seizing the Chamber of Arbitration has been complied with, subject to the two following additional comments.

[19] "It would be undoubtedly excessive to have the time limit at issue start running from the day of the judgment of the Commercial Court directing the shipowner to indemnify Buyer. It is true that it is on the date of this judgment that Buyer was able to measure the precise extent of its damage. However, the Tribunal cannot accept that Buyer's claim against Seller is a simple warranty claim because it is almost certain that the shipowner is insolvent and a significant part of the price generated by the possible sale of the ship at an auction must serve to pay off better rank creditors. In other words, we cannot accept that,
given the insolvency of the shipowner, Buyer can make Seller the shipowner’s guarantor.

[20] “It is further recalled that jurisprudence sets the starting date for the time limit to bring an action for contractual liability on the day when the liability claim becomes due, being specified that this becoming due is linked to the actual or presumed knowledge of the damage. The time limit to bring a liability action starts running only from the occurrence of the damage or on the date on which [the damage] is made known to the affected party, when [the affected party] proves that it had no previous full knowledge thereof.

[21] “This is exactly the situation [here], since Buyer proves that on the day of loading it could not be aware that the ship was not seaworthy and the circumstances demonstrate that [Buyer] could be aware of the extent of its damage only at the time of its action against the shipowner.”

II. MERITS

[22] “In order to ascertain whether Buyer’s application against Seller is well founded, the Tribunal will ask the question it deems essential: What are the obligations of a CIF seller with respect to maritime transportation or freight? Once these obligations have been specified, and to the extent that one or the other breach of these obligations is established, it will be necessary to assess the damage for which compensation is claimed. Hence the following two questions.”

1. Liability

[23] “The law (see Transport Code, Art. L. 5424-9; old Art. 39 of the Law of 3 January 1969) provides that ‘the CIF seller must conclude the contract of carriage’; this includes both transport and freight.

[24] “The contract applicable between the parties specifies this obligation – Art. V INCOGRAIN Formula: ‘Shipment is to be made by seaworthy first class steamer/s...’

[25] “Although a CIF sale is a sale at departure [vente au départ], this type of sale nevertheless imposes certain specific obligations on the seller, precisely because it is a sale including cost, insurance and freight. There is no doubt that a CIF seller must conclude the contract of carriage or freight which will make the goods available to the buyer. The CIF seller must therefore exercise all possible care in respect of the freight and make every effort to reserve freight in accordance with the contract. If the goods are affected by a restrictive measure
a few hours after the ship’s departure, the seller is liable for the consequences of this situation. This is also true when the difficulties concern the ship which is the object of the freight contract, rather than the goods.

[26] "The CIF seller’s obligation to exercise all possible care in respect of the freight is a personal obligation of the seller which is inherent to the type of sale concluded; thus, it is not an obligation entered into by the seller as a representative of the buyer. By the CIF contract, the seller undertakes to carry out or make carry out transport by the fastest and safest means. It is therefore up to the seller to make sure directly of the feasibility and effectiveness of the transport to be concluded, if necessary through the intermediation of a broker – which is curiously absent in the present case.

[27] "In addition, the obligation to exercise all possible care in respect of the freight is broad. It concerns the ship which constitutes the object of the freight contract. As it has been stressed (see Rodière and Calais-Auloy, Ventes maritimes, No. 53), the seller must deal with reputable shipowners and find a ship giving the usual guarantees of safety and speed, ready to load within the time limits in the sale contract and sailing for the destination specified therein.

[28] "Moreover, the seaworthiness expected from a commercial ship is broadly defined: it has a nautical, but also a commercial, meaning, which refers to the performance of the ship, but also to the qualities of the crew. All the maritime law texts include under seaworthiness the nautical capabilities of the ship, but also the state of the holds of the ship and the crew skills (see Brussels Convention, Art. 3.1: ‘the owner must properly man, equip and supply the ship’); this stipulation is found also in Art. [22] of the SYNACOMEX charterparty used here, which refers to the Brussels Convention).

[29] "It is established here that the ship was not seaworthy: although it cast off, it (almost) immediately turned around and returned to the port of loading.

[30] "The tribunal therefore holds that in the present case the breach by Seller of its obligation to exercise all possible care in respect of the freight in accordance with the contract is duly established and that its contractual liability toward Buyer is consequently engaged.

[31] "However, the CIF buyer also has obligations, at least implicit, and must protect its goods. It is clear that, from the moment the ship was stopped by maritime authorities, Buyer could submit the bills of lading of which it was the bearer (bills of lading are made out as promissory notes à ordre), but without an

endorsee and must therefore be considered as made out to the bearer [au porteur]) and remove the goods to store them — quickly and at no great cost — in hangars made available to it, before chartering a replacement ship. An immediate arrest of the ship as a precautionary measure (based on French law, as Georgia — the flag state of the ship — is not a State Party to the Brussels Convention on the Arrest of Ships) would also have undoubtedly allowed Buyer to obtain certain effective guarantees from the Protection Club (Navigators).

[32] "Obviously, it cannot be said that Buyer has not made every effort to minimize its loss, but it is not established that Buyer chose the most professional and economical way [to do so]."

[33] "Further and more importantly, it is surprising that when the case came to the Commercial Court Buyer did not seize the competent Arbitration Chamber under the charterparty, which [Chamber] was better able to resolve the dispute with the shipowner in all its aspects.

[34] "Undoubtedly, Buyer is not directly a party to the charterparty concluded by Seller, but it cannot be denied that the arbitration clause in the charterparty may be invoked against Buyer through bills of lading specifically referring to the charterparty's clauses. Indeed, we know that arbitrators are competent to assess their own jurisdiction and that arbitration clauses by reference, including those referring to SYNACOMEX and the Chambre Arbitrale Maritime de Paris, are widely accepted in the grain trade. Moreover, by bringing an action against the shipowner, Buyer recognized that the dispute was primarily a maritime dispute.

[35] "The Tribunal may therefore wonder about the reasons which led Buyer to bring its action against the shipowner in the Commercial Court, even if it obtained good results there. It is legitimate to wonder why Buyer did not bring an action in the same state court, at least in the course of the proceedings, against Seller itself.

[36] "We recall Art. 1458 of the Code of Civil Procedure here:

'If a dispute pending before an arbitral tribunal on the basis of an arbitration agreement is brought before a State court, it shall declare itself incompetent.

If the dispute is not yet before an arbitral tribunal, the State court shall also declare itself incompetent, unless the arbitration agreement is manifestly null and void.

In neither case may the State court declare itself incompetent at its own motion.'
[37] "By not having been brought by Buyer before the Commercial Court, Seller thus missed a chance to defend itself and/or have the case referred to the arbitration court(s) provided for in the commercial contract or the transport contract....

[38] "Moreover, the court is surprised that Buyer alerted neither the 'all risks' insurers nor the P & I to the situation of the ship while it was bringing an action in the state courts.

[39] "In other words, the commercial and procedural choices of Buyer, which are questionable for a CIF buyer, can be taken into account in determining the liability of parties.

[40] "The Tribunal considers that in the assessment of these responsibilities, the proportion is 60 percent for Seller and 40 percent for Buyer. It is on this basis that we must now assess the damage that has been suffered and may be indemnified."

2. Evaluation of Damage

[41] "Buyer submitted a claim for indemnification of €... and further for €... pursuant to Art. 700 CCP. These claims will have to be assessed by the Tribunal.

[42] "It will be recalled that the Commercial Court, in its adversarial decision, ordered the shipowner to pay €... after enumerating the following heads of damage: reimbursement of expenses incurred for unloading, reloading and transporting the goods, as well as for the stay of [Buyer's] representatives in France and for obtaining a judgment against the defendant to indemnify the damage incurred as a consequence of significant breaches.

[43] "The damage that can be indemnified [here] cannot certainly be the same. It belongs to the Arbitral Tribunal to ascertain [the damage] that is solely attributable to Seller. Indeed, Buyer states various heads of damage, in respect of which the Tribunal will tell if they are justified or not.

5. Art. 700 of the French Code of Civil Procedure reads:

"As provided for in Art. 75(1) of Law no. 91-647 of 10 July 1991, the court shall in all degrees direct the party which is to bear the costs [of the proceedings] or, lacking this, the losing party to pay to the other party a sum determined by the court for other expenditures not included in the costs. The court shall take into account equity or the economic situation of the party which has to pay. The court may, even on its own initiative and based on the above considerations, not so direct."

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[44] “In respect of these various claims, the Tribunal must specify that Buyer paid the wages of seamen in exchange for the complete unloading of the goods loaded on board. The question is then whether the amount paid to the crew without any constraint for the release of the goods must be taken into account.

[45] “This could be admitted only if it could be deemed that payment was made to terminate a right of retention legitimately exercised by the crew on the goods. However, nothing allows for this conclusion. The arrest sought by the crew and granted by the Commercial Court concerned only the ship and, indeed, could only concern the ship. In addition, the goods were not apprehended by the crew and if they had been, this apprehension would have been illegal. A right of retention could only arise if the goods were handed over to the crew as part of their mission, which was not the case here. In other words, Buyer, pressed by the circumstances of the situation and acting in good faith in order to resolve the difficulties quickly, can be understood. However, the decision to pay € ... was taken by Buyer alone and was neither based on a detention by the crew nor pursuant to a court order. Consequently, the payment made can only have been done for Buyer’s account and is therefore Buyer’s sole responsibility.

(....)

[46] “Under these circumstances, the Tribunal will direct Seller to pay € ... as damages to Buyer, plus interest from the day of the request for arbitration.”

(....)

III. COSTS

[47] “Claimant requests that the arbitration costs and fees be entirely borne by Respondent; Respondent makes exactly the [opposite] request.

[48] “The Tribunal considers that as the parties have participated loyal in the arbitration proceedings, each party shall pay a share of the arbitration costs and fees in the proportions previously determined: 60 percent for Seller and 40 percent for Buyer.

[49] “As to the claims based on Art. 700 of the Code of Civil Procedure ..., taking into account the requirements of equity, the circumstances of the case and that Buyer partially prevails in its claim, the Tribunal directs Seller to pay Buyer the sum of € ... and denies Seller’s request.”

(....)