FRANCE

INTERNATIONAL ARBITRATION CHAMBER OF PARIS

Final award in case no. 3193, 19 September 2013

Arbitrators: Mr. Philippe Cavalieros (chairman);
Mr. Henri Petit;
Mr. Claude Witz

Parties: Claimant: X (Germany)
Defendant: Cooperative Y (Germany)

Place of arbitration: Paris, France

Published in: Unpublished

Subject matters:
- apparent capacity to agree to arbitration
- apparent capacity to conclude contract
- confirmation letter between merchants
- applicable law to substance
- Council Regulation no. 593/2008 (Rome I)
- rate of interest

Summary

The CALP arbitral tribunal found that it had jurisdiction, dismissing the argument that the person who signed the contracts on behalf of the defendant, and the arbitration clauses therein, lacked the necessary power to enter into arbitration agreements. The signatory had already entered into similar contracts with the claimant, also containing arbitration clauses, without any objection on the part of the defendant. Applying German law to the issue of representation, as agreed by the parties, the tribunal found that the claimant could justifiably assume that the signatory was authorized by an apparent (implicit) mandate of representation. The limitations contained in the signatory’s contract with the defendant or its salaried manager could not be invoked against the claimant, a third party. The same was
true of the arbitration agreements concluded by the signatory when he later became a member of the defendant's board of directors. Although German law provides that a member of the board of directors who has the general power of joint management may not be granted a general power of individual management, in the present case the signatory had at least an implicit management power before being appointed to the board, and the claimant could still legitimately believe, in the silence of the defendant, that his powers were unchanged. In any case, the arbitration agreements were validly concluded in application of the theory of the confirmation letter between merchants. The defendant received confirmation letters and broker's transaction notices for all the contracts, including the disputed ones, and never contested the inclusion of an arbitration clause. The defendant's argument that the letters and notices should have been signed by the parties was unpersuasive; there was no proof that this requirement is mandatory under French arbitration law, which applied to procedural matters pursuant to the terms of reference; international arbitration agreements are not subject to formal requirements under French arbitration law; and trade usages—which the tribunal was bound to take into account under the CFA rules—deem that a broker's transaction notices suffice to prove the existence of an arbitration clause in this type of transaction and the parties' knowledge thereof. The objection of lack of the signatory's authority was also raised to dispute the validity of the main contracts, and was dismissed on the same grounds. Further, the defendant's contention that the contracts were invalid because they exceeded its statutory purpose and were not ratified by its board also failed: the defendant never objected to earlier contracts on this ground. Nor were the debt confirmations issued by the defendant and its bank transfers in partial payment of the disputed amounts irrelevant because the board had not been aware thereof; such defect would only be of internal concern to the defendant. On the merits, the arbitrators first determined the applicable substantive law. The terms of reference mandated the application of the rules of French private international law to determine the substantive law. These rules indicated the 1955 Hague Convention, which in turn indicated German law as the law of the habitual residence of the seller (and in fact also of the purchaser). The tribunal then calculated the amount owed by the defendant to the claimant. The tribunal held that it was not bound to apply German law to the issue of the applicable rate of interest, and concluded that a rate of 3 percent on a yearly basis was reasonable and appropriate. The defendant was to bear 80 percent of the costs of the arbitration and of the claimant's legal costs.

Cooperative Y (Defendant) and X (Claimant) had business relations over several years selling and purchasing grains. The present proceedings concerned contracts concluded between 2010 and 2012 through a broker by the parties acting alternatively as purchaser and seller of certain quantities of wheat and colza. Some of the contracts were futures contracts referring to the daily prices of MATIF/EURONEXT, a European futures market; the wheat contracts were based on the INCGRAIN standard contract. Each contract contained a clause reading 'Arbitral Tribunal: Paris'.

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The disputed contracts were signed on Defendant's behalf by Mr. Smith. Mr. Smith had been appointed salaried manager (gérant salarié) of Defendant on 9 May 2006; on 1 June 2006, Mr. Smith and the Defendant's Board of Directors and Supervisory Board concluded a company representative contract (contrat de mandataire social) that came into force on 1 July 2006. By a decision of the Supervisory Board of 24 May 2011, Mr. Smith was appointed to the Board of Directors of Defendant per 1 June 2011.

Between 2009 and November 2011, the balance of the contracts concluded by the parties alternatively as seller and purchaser was in favor of Defendant; starting in November 2011, the balance was in Claimant's favor.

A dispute arose between the parties when Defendant failed to pay several of Claimant's invoices, even after it was granted a postponement of the time limit to pay until 1 May 2012. On 11 November 2011, the parties reached an agreement in respect of two of these invoices, for the sale and purchase of wheat; the agreement established a three-installment schedule for payment, and stated that Defendant owed Claimant a certain amount, from which a certain sum should be deducted for compensation with two credits. Defendant paid only the first two instalments. Other unpaid invoices referred to several contracts for the sale and purchase of wheat and colza. The total amount of the unpaid invoices was later reduced by compensation through a delivery of malting barley by Defendant to Claimant.

On 25 July 2012, Claimant filed a request for arbitration with the International Arbitration Chamber of Paris (Chambre Arbitrale Internationale de Paris — CAIP), seeking payment of the outstanding amounts. A three-member arbitral tribunal was appointed. Terms of Reference were signed on 17 June 2013; the Terms determined that the seat of the arbitration shall be Paris; that the rules of procedure shall be the CAIP Rules 2011 together with the procedural rules of French arbitration law; and that the arbitrators shall decide according to the law, in accordance with the applicable substantive rules as determined by French private international law.

Defendant claimed in the arbitration that Mr. Smith lacked the necessary power to enter into arbitration agreements on Defendant's behalf, both as a salaried manager and a member of the Board of Directors. As a consequence, the CAIP arbitral tribunal lacked jurisdiction. For the same reason, the contracts themselves had not been validly concluded.

By the present Award, the CAIP arbitral tribunal denied Defendant's objection of lack of jurisdiction; held that German substantive law applied to the dispute;

1. Note General Editor. All names are fictitious.
declared that the contracts at issue had been validly entered into; directed Defendant to pay Claimant a certain amount, together with interest at the rate of 3 percent; and directed Defendant to bear 80 percent of the costs of the arbitration and of Claimant's legal fees and costs.

The arbitral tribunal first dealt with the objection that it lacked jurisdiction because Mr. Smith was allegedly not authorized to enter into arbitration agreements on behalf of Defendant. The parties agreed in the Terms of Reference that German law applied to the issue of the existence and scope of the representation powers of Mr. Smith.

Defendant argued that it appeared from the 2006 company representative contract that Mr. Smith, when acting as a salaried manager, could only represent Defendant if acting jointly with a member of the Board of Directors, though the Board could grant the manager the power of sole representation, such power was never granted to Mr. Smith.

The Arbitral Tribunal dismissed this argument, reasoning that several contracts of the same nature were concluded before the disputed contracts by Mr. Smith acting as Defendant's salaried manager, without Defendant objecting; Defendant could not ignore that these contracts had been concluded as they led to significant payments that must have appeared in Defendant's books. In any event, the company representative contract regulating Mr. Smith's powers had an internal effect only and could not be relied on against Claimant, which was not bound to be aware of its terms. Hence, there was in Claimant's eyes an apparent (implicit) mandate of representation, and Claimant could legitimately assume that the signatory had the necessary power to bind Defendant and particularly to conclude the arbitration agreements.

The same conclusion could be reached for the period in which Mr. Smith was a member of Defendant's Board of Directors. Mr. Smith continued to enter into contracts on behalf of Defendant after being appointed to the Board on 1 June 2011, and that it did not appear that Defendant objected, until it disputed the conclusion of the contracts at issue. The arbitral tribunal therefore held that Claimant could legitimately believe that Mr. Smith still had full power to enter into the arbitration agreements contained in those contracts. The arbitrators noted that although under German law a member of the board of directors having a general power of joint management may not be granted a general power of individual management, in the present case Mr. Smith had at least an implicit management power before being appointed to Defendant's Board of Directors; his appointment could not result in a reduction of his powers. Rather, his appointment contributed to confirming in Claimant's eyes that he could bind
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Defendant, particularly in light of the fact that Defendant did not inform Claimant that Mr. Smith's powers had changed. The arbitral tribunal also held that the arbitration agreements would have been validly concluded, in any case, pursuant to the theory of the confirmation letter between merchants, as argued by Claimant. According to this theory, the terms of a letter addressed by a merchant to another merchant in order to confirm the terms of a contract concluded orally may be relied on against the addressee, unless the addressee of the confirmation letter objects, or the terms of the letter diverge from the oral agreement to such extent that it would be unreasonable to request the addressee to express its disagreement explicitly.

Claimant noted that Defendant received confirmation letters for all the contracts, as well as notices of the broker's transactions, and that Defendant never contested the inclusion of an arbitration clause. Defendant replied that pursuant to German law confirmation letters and transaction notices in respect of futures contracts such as some of the disputed contracts must be signed by both parties; since they were not, they must be deemed to have been refused by Defendant. Defendant also argued that the confirmation letter theory does not apply when one of the parties acts in a fraudulent manner — in this case, the broker, who knew that Mr. Smith lacked the power to represent Defendant on his own.

The arbitral tribunal found the argument that the letters and notices should have been signed by the parties unpersuasive: first, Defendant did not show that this requirement is mandatory; second, it is fully recognized that international arbitration agreements are not subject to formal requirements under French arbitration law, which applied pursuant to the Terms of Reference. Furthermore, trade usages, which the tribunal was bound to take into account in accordance with the CAIP Arbitration Rules, deem that the a broker's transaction notices are sufficient proof of the existence and of the parties' knowledge of an arbitration clause in this type of transactions. Third, Defendant failed to prove that the broker acted in a fraudulent manner.

The arbitrators then dealt with Defendant's contention that the contracts themselves were invalid because Mr. Smith lacked the power to conclude them on Defendant's behalf on his own, both as a salaried manager and, later, as a member of the Board of Directors. Defendant relied on the same arguments it had raised in the respect of the alleged invalidity of the arbitration clauses; the tribunal rejected them on the same grounds.

Defendant also argued that the contracts were invalid because they exceeded Defendant's statutory purpose; also, the contracts were not ratified by Defendant's Board. The tribunal noted that it was undisputed that the parties had
a business relation since 2009 and had concluded contracts in respect of similar operations. Defendant never objected thereto, particularly not on the ground that they exceeded its statutory purpose.

Nor did Defendant succeed with its claim that the debt confirmations it had issued in respect of the disputed amounts and the bank transfers it had made in partial payment thereof were irrelevant because they had been issued and made without consulting the Board of Directors. The arbitral tribunal disagreed, finding that the effect of these balance confirmations and bank transfers could not be annihilated by Defendant’s mere statement that the Board of Directors was not consulted. In any case, such defect would only be of internal concern to Defendant, which failed to put in place appropriate control measures.

The CAIP arbitral tribunal then dealt with the quantification of the balance owed by Defendant to Claimant under the disputed contracts.

The arbitrators first determined the law applicable to the merits. Although the parties agreed that German law applied in respect of the issue of the power of representation of Mr. Smith, they made no choice as to the law applicable to the merits of the dispute. The parties’ exchanges prior to signing the Terms of Reference indicated that they disagreed as to the applicable substantive law. However, the parties did subsequently agree in the Terms of Reference that the arbitrators were to decide according to the law and in accordance with the rules indicated by French private international law.

French private international law designated in this case the 1955 Hague Convention on the Law Applicable to International Sales of Goods. Regulation (EC) No. 593/2008 on the law applicable to contractual obligations (Rome I) did not prevent the Convention’s application, since the Rome I Regulation expressly provides that it shall not prejudice the application of international conventions laying down conflict-of-law rules relating to contractual obligations, to which one or more Member States were parties when the Regulation was adopted.

On the basis of Art. 3(1) of the 1955 Hague Convention, the arbitrators determined that, lacking a choice by the parties, the applicable substantive law was German law, being the law of the country of habitual residence of the seller at the time of receiving the order. Since both parties were German residents, it was unnecessary to consider under Art. 3(2) whether the order had been received instead by the purchaser. The tribunal added that the application of the Rome I Regulation would lead to the same result, since the Regulation provides that in the absence of a choice of law by the parties, a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence.

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The arbitral tribunal then examined the evidence in respect of the balance owed and concluded that Defendant owed Claimant a certain amount under the disputed contracts, after deduction of certain compensation deliveries.

Interest was also to be awarded. The parties disagreed as to the applicable rate of delay interest: Claimant argued that the German legal rate of interest applied because the disputed contracts were concluded in Germany and the parties referred to German law provisions in their statements. Although the disputed wheat contracts referred to the INCOGRAIN forms, which provide for the application of French law, the same forms state that French law applies unless the parties agree otherwise. Defendant in turn claimed that the arbitrators should apply the French legal rate of interest, because by referring to the INCOGRAIN standard contract the parties chose French law as the applicable substantive law.

The arbitral tribunal reasoned that although it had found that German law applied to the merits of the dispute, it was not bound to apply that law to the issue of the rate of interest — traditionally, arbitral tribunals have discretionary power in this respect. An overview showed that there was disparity between the German and French legal rates in the relevant period, the German rate being much higher and the French rate very low.

The tribunal concluded that, taking into account all the circumstances of the case, both rates would be disproportionate. It therefore decided to apply neither and to determine, as was allowed to do by arbitral practice, a rate that it deemed to be reasonable and appropriate. This rate was 3 percent on a yearly basis, starting on 1 May 2012, the date on which the postponement of payment granted by Claimant to Defendant expired.

The arbitral tribunal finally directed Defendant to bear 80 percent of the costs of the arbitration and 80 percent of Claimant's legal costs and fees.

Excerpt

1. VALIDITY OF THE ARBITRATION AGREEMENTS

[1] “Defendant objects to the jurisdiction of the Arbitral Tribunal, mainly on the ground that Mr. Smith, the salaried manager [g seas t sa laried] of Defendant and subsequently, after 1 June 2011, a member of its Board of Directors, had no authority to represent Defendant on his own and, relevantly, to conclude an arbitration agreement.

[2] “The Arbitral Tribunal notes preliminarily that according to the Terms of Reference signed by the parties and the Arbitral Tribunal ..., '[t]he parties do not
dispute the reference to the [CAIP] in the contracts at issue ... '. Consequently, the parties do not dispute that the contracts at issue contain an arbitration clause referring directly or by reference to the CAIP arbitration rules. Further, as noted in the Terms of Reference, the parties have agreed on Paris, France, as the seat of the arbitration.

[3] “It also appears from the written statements of the parties that they agree that the issue of the existence and scope of the representation powers of Mr. Smith in respect of the validity of the arbitration clause and the validity of the disputed contracts themselves must be determined in accordance with German law. Thus, this issue must be decided under German law, without prejudice of the Arbitral Tribunal’s determination of the law applicable to the merits.”

1. Power of Mr. Smith to Represent Defendant

[4] "Defendant deems that Mr. Smith never had the power to represent Defendant vis-á-vis third parties on his own, either as a salaried manager or as a member of the Board of Directors. A distinction should be made in this respect taking into account his appointment to member of the Board of Directors on 1 June 2011."

a. As salaried manager before 1 June 2011

[5] "Defendant supplied together with its statements the company representative contract [contrat de mandataire social] concluded on 1 June 2006 by the Board of Directors, the Supervisory Board [Conseil de Surveillance] and Mr. Smith, from which it appears that the manager represents Defendant together with a member of the Board of Directors; the Board can grant the manager the power of sole representation. Defendant claims that no such power of sole representation was ever granted to Mr. Smith. Relying on a decision of the German Federal Supreme Court (Bundesgerichtshof) of 16 November 1987 in support of its claims, Defendant adds that the power of sole representation can be granted only by express decision of the members, and that 'it is not possible to hide behind the theory of apparent mandate to give full effect to an act concluded in disregard of the rules on joint representation’. Thus, the arbitration agreements concluded between 1 July 2006 and 1 June 2011 by Mr. Smith alone may not be relied on against Defendant.

[6] "Claimant stresses in its statement in reply that the company representative contract concluded on 1 June 2006, ‘is an unpublished document governing solely the internal relations between Defendant and its salaried manager, which cannot be relied on against a third party that, like Claimant, could not be aware
of its terms'. It adds that in any case the same contract provides that Defendant may grant the power of sole representation without any special formalities. Claimant argues that the exercise of Mr. Smith's functions necessarily implied that he was—at least implicitly—granted the power of sole representation, were it only for the transactions he had to carry out in the day-to-day management of Defendant's business. Claimant thus argues that 'Mr. Smith had de facto the power to represent Defendant'.

[7] "The Arbitral Tribunal notes that Defendant does not dispute that it received the sum of € ..., being the amount owed under transactions — of the same nature as the disputed contracts — concluded between the parties in 2009-2011 in a similar manner and under the commercial management of Mr. Smith. The Arbitral Tribunal finds as a consequence that Defendant could not validly ignore the conclusion of these contracts, as well as of the disputed contracts, which led to several payments of significant amounts that the Arbitral Tribunal finds must have appeared in Defendant's books or, at least, must be known to it.

[8] "Further, in any case, the Arbitral Tribunal holds that the company representative contract regulating the powers within Defendant could not be relied on against Claimant, which as a consequence was not bound to be aware of [the contract's] terms.

[9] "Finally, the Arbitral Tribunal notes that Defendant does not prove that it ever forbade Mr. Smith to conclude such contracts, either for the period before the disputed contracts or in respect of the disputed contracts themselves.

[10] "The decision of the German Federal Supreme Court of 16 November 1987 concerns the powers of the joint managers of a limited liability company, in their quality as the body that can bind the company. According to the Supreme Court, the power of joint management of the managers of a limited liability company cannot be transformed in the power of individual management through a tacit mandate (stillschweigende Vollmacht) or a mandate by tolerance [mandat de tolérance] (Duldungsvollmacht). This solution cannot be applied here, since the management body of a cooperative is its board of directors, of which Mr. Smith was not a member in the relevant period.

[11] "Consequently, the Arbitral Tribunal deems that Claimant could legitimately assume that the signatory of the contracts at issue and of the arbitration clauses had the necessary power to bind Defendant and particularly to conclude the arbitration agreements. Hence, there was in Claimant's eyes an apparent mandate of representation, at least implicit, authorizing Mr. Smith to conclude [the arbitration agreements]."

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b. As member of the Board of Directors after 1 June 2011

[12] Defendant relies in its statement in reply on the German law on cooperatives and its own by-laws, as well as the excerpt of the Register supplied by Claimant, according to which [Defendant] can be bound only through the joint representation of the members of its Board of Directors, in the absence of a statutory derogation that was lacking here. Defendant adds that Claimant cannot argue that Mr. Smith was implicitly granted the power of representation, when a contrary decision was published and registered in the register of cooperatives. Defendant refers again to the decision of the German Federal Supreme Court of 16 November 1987, according to which the power of sole representation can be granted only by express decision of the members and 'it is not possible to hide behind the theory of apparent mandate (Anschetenvollmacht) or the theory of implicit mandate [mandat implicite] (Duldungsvollmacht) to give full effect to an act concluded in disregard of the rules on joint representation'. Defendant deduces from this that the arbitration agreements concluded between Mr. Smith and Claimant may not be relied on against Defendant because of lack of power, and that the Arbitral Tribunal therefore lack jurisdiction.

[13] Claimant notes that the German law on cooperatives referred to by Defendant in support of its argument establishes, along with the possibility of a statutory derogation to the rule of joint representation, the power of the members of the board of directors to grant some among them the power to represent, on their own, the cooperative. Claimant argues that since this legal norm, which has been copied in its by-laws, does not require any specific form it again confirms that the Board of Directors could grant Mr. Smith implicitly the power to enter into an arbitration agreement. Claimant concludes therefore that the Arbitral Tribunal has jurisdiction to decide the dispute.

[14] The Arbitral Tribunal notes that in the present case Mr. Smith continued to enter into contracts on behalf of Defendant after 1 June 2011, and that it does not appear that Defendant, until it contested the amount at issue here, opposed the signing of these contracts.

[15] Hence, the Arbitral Tribunal deems that Claimant could legitimately believe that Mr. Smith had full power to enter into arbitration agreements. It is true that German law does not permit that a member of the board of directors having a general power of joint management be granted a general power of individual management. However, in the present case Mr. Smith had, before his appointment to member of the Board of Directors, at least an implicit management power. The Arbitral Tribunal deems that the appointment of Mr. Smith to member of the Board of Directors cannot be seen as a reduction of the powers which Mr. Smith had before, in his quality as salaried manager; on the
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contrary, it contributed in reality to confirm in Claimant’s eyes his capacity to bind Defendant and thus to enter into arbitration agreements.

[16] “The publication of the appointment of Mr. Smith to member of the Board of Directors on the register of cooperatives cannot put an end to Claimant’s belief in the reality of Mr. Smith’s powers to act on behalf of Defendant. In fact, it is perfectly admissible, in German law, that a member of the board of directors is granted a power of representation for the conclusion of determined legal acts (Sect. 25(3) Genossenschaftsgesetz, the Law on Cooperatives). Furthermore, the Arbitral Tribunal deems that the principles governing apparent mandate (Ansehensvollmacht) and mandate by tolerance [mandat de tolérance] (Duldungsvollmacht) apply to the individual actions of the members of the board of directors.

[17] “In this context, it would have been easy for Defendant to inform Claimant that Mr. Smith was no longer authorized, since his appointment to member of the Board of Directors, to act on his own. This silence only reinforced Claimant’s belief that Mr. Smith continued to have the power of individual representation. The decision of the German Federal Supreme Court of 16 November 1987, which concerned a different situation, is no obstacle to this analysis.

[18] “Hence, the Arbitral Tribunal again deems that Claimant could legitimately assume that Mr. Smith had full power to bind Defendant and particularly the power to enter into arbitration agreements. Again, nor can we rule out the possibility that a mandate of representation authorizing Mr. Smith to represent Defendant on his own could be granted, even implicitly, in accordance with the German law on cooperatives.

[19] “As a consequence of the considerations above, the Arbitral Tribunal holds that Mr. Smith had the necessary powers to enter into arbitration agreements on behalf of Defendant, and thus dismisses the objection of lack of jurisdiction, both in respect of the contracts at issue, both concluded before 1 June 2011 and after.

[20] “Hence, the Arbitral Tribunal declares that it has jurisdiction to hear the present dispute.”

2. Confirmation Letter Between Merchants

[21] “Subsidiarily, Claimant argues that the arbitration agreements at issue have in any case been validly concluded in application of the theory of the confirmation letter between merchants [courrier de confirmation entre commerçants]. According to this theory, the terms of a letter addressed by a merchant to another merchant to confirm the terms of a contract concluded orally between them may be relied on against the addressee, unless the addressee of the
confirmation letter objects, or the terms of the letter diverge from the oral agreement to such extent that it would be unreasonable to request the addressee to express its disagreement explicitly.

[22] "Claimant argues in its statement in reply that Defendant received confirmation letters for all the MATIF contracts concluded, as well as notices of the broker’s transactions, and that Defendant never contested the systematic presence of an arbitration clause; its silence equates acceptance. Claimant also stresses that even if one assumed that Mr. Smith deliberately intercepted and diverted the letters in order to prevent the other members of the Board of Directors to be aware of the conclusion of the contracts at issue, this would have no impact on the letters’ effect. In fact, such circumstance would only concern Defendant, since Claimant cannot be held responsible for the possible internal breaches of Mr. Smith. Claimant also relies in support of its argumentation on the order rendered on in June 2013 by the Court of Appeal of [a German city] in the context of the recourse filed by Defendant, by which the Court held that ‘the arbitration agreements that are part of the MATIF contracts at issue have been validly concluded; the lack of any objection by Defendant to the confirmation letters sent by Claimant as well as to the notices of the broker’s transactions equates acceptance’.

[23] "Defendant claims that the confirmation letters cannot be invoked against it, because Claimant proves neither their source, nor their sending, nor their reception by the Defendant. Defendant further argues that the theory of the confirmation letter between merchants does not apply. It claims that in accordance with the German Commercial Code, transaction notices in respect of futures contracts must be signed by both parties; if one of the parties refuses to sign, the broker must inform the other party. Defendant deduces from this that since the transaction notices supplied in the proceedings by Claimant are not signed, they were not accepted — on the contrary, they were refused — by Defendant. Defendant adds that the theory of the confirmation letter between merchants also does not apply when one of the parties acts in a fraudulent manner, which is the case here, since the broker knew that Mr. Smith was not empowered to represent Defendant on his own vis-à-vis third parties. Finally, Defendant draws the attention of the Arbitral Tribunal to the fact that it disagrees with the interpretation given by the [German] Court of Appeal and that it has filed an appeal against that decision. Defendant thus requests the Arbitral Tribunal to declare, also on this ground, that it lacks jurisdiction.

[24] "Since the Arbitral Tribunal has held that it has jurisdiction over this case, and Claimant has invoked the theory of the confirmation letter between merchants subsidiarily, the Arbitral Tribunal is not bound to examine this claim.
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in detail. However, since this theory is also invoked in the more general context of the validity of the contracts at issue (see below), the Arbitral Tribunal, mindful of the need of completeness and balance of the present Award, holds as follows.

[25] "The argument of Defendant that the letters should have been signed by the parties does not persuade the Arbitral Tribunal, because on the one hand Defendant does not show that this requirement is mandatory and, on the other hand, it is fully recognized that the arbitration clause is not submitted to any formal condition, in accordance with Art. 1507 NCCP, which applies pursuant to the Terms of Reference, this being an international arbitration.

[26] "Moreover, since the Arbitral Tribunal is bound to take into account trade usages, in accordance with Art. 18 of the CAIP Arbitration Rules, it considers that it is perfectly allowed in this type of transactions that the transaction notices of the broker, as a third party witness, are sufficient proof of the existence and the parties' knowledge of an arbitration clause, the more so when no objection is raised -- here, by Defendant.

[27] "Finally, since these are not direct operations by either party on the futures market, the term ‘transaction notice’ used in the present case is not appropriate to define what are in fact commercial sale and purchase contracts, in which the economic balance is settled by the price difference.

[28] "In respect of the second argument raised by Defendant, according to which this theory must be disregarded when one of the parties acts in a fraudulent manner -- that party being here the broker, because he could not ignore that Mr. Smith had no power to enter into arbitration agreements -- the Arbitral Tribunal finds that Defendant supplies no evidence allowing for the conclusion that the broker acted in a fraudulent manner. The Arbitral Tribunal is supported in its analysis by the decision of the [German] Court of Appeal, though it notes that Defendant appealed from that decision.

[29] "The Arbitral Tribunal holds therefore that the theory of the confirmation letter between merchants applies to the present dispute and holds, although this argument is superfluous, that the arbitration agreements have been validly concluded also in application of this theory."

2. Art. 1507 of the New French Code of Civil Procedure, which is contained in Title II (International Arbitration), Chapter I (International Arbitration Agreements), reads:

"An arbitration agreement shall not be subject to any requirements as to its form."

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II. VALIDITY OF THE CONTRACTS

[30] "Defendant contests, on grounds similar to those mentioned above, the validity of the operations at issue, of which balance Claimant seeks payment. Defendant reiterates the argument that the contracts were not validly concluded between the parties because Mr. Smith did not have the power to represent Defendant vis-à-vis third parties, and seeks to rebut Claimant’s argument that the disputed operations are valid under the theory of the confirmation letter between merchants."

1. Authority of Mr. Smith to Conclude the Contracts

a. Defendant’s position

[31] "In the same manner in which it argued that Mr. Smith did not have the power to enter into arbitration agreements in Defendant’s name, Defendant maintains that the contracts at issue may not be relied on against it because Mr. Smith could not validly conclude a contract in Defendant’s name, since at no time he had the power the represent it on his own.

[32] "First, as to the period in which Mr. Smith acted in his quality as salaried manager, Defendant claims that Mr. Smith did not have the power to represent Defendant on his own, in particular in view of the company representative contract, which provides that '[t]he manager represents Defendant together with a member of the board of directors'. Defendant again cites the abovementioned decision of 12 November 1987 of the German Federal Supreme Court. Further, Defendant notes that the company representative contract provides expressly that ‘[f]or futures contracts, the previous agreement of the board of directors is indispensable’. In this case, however, Mr. Smith neither concluded the contracts together with another person authorized thereto, nor obtained the previous agreement of the Board of Directors. It follows, in Defendant’s opinion, that the futures contracts prior to 1 June 2011 were not validly concluded in its name, and that they may not be relied on against it.

[33] "Defendant also adds that the training courses held by Mr. Smith — which, according to Claimant, contribute toward proving that Defendant was aware of [Mr. Smith’s] activities — are ‘extra-professional’ activities that concern ‘only his private life’ and that Defendant could not prohibit.

[34] "Defendant then notes, this time in respect of the period in which Mr. Smith was a member of the Board of Directors, that the German law on cooperatives, its by-laws, and the decision of 24 May 2011 by which the Supervisory Board appointed Mr. Smith, as well as the excerpt of the register
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requested by Claimant on 21 September 2011, all indicate that Defendant must be represented jointly by two members of the [Board of Directors]. Defendant again quotes, in particular, the decision of the German Federal Supreme Court of 16 November 1987 and concludes that Mr. Smith did not have the power to represent Defendant vis-à-vis third parties on his own, and that as a consequence the contracts were not validly concluded in Defendant’s name.”

b. Claimant’s position

[35] “Claimant argues in turn in its statements that Mr. Smith necessarily had the power to represent Defendant on his own when he acted as salaried manager, and a fortiori as a member of the Board of Directors. Claimant stresses in particular that Defendant knew of the indirect activities of Mr. Smith on the futures market, since these operations had inevitably to be registered in the annual bookkeeping of Defendant since 2010, and since Mr. Smith publicly spoke of his activities at a meeting of the members of Defendant proposing training courses aimed at farmers in respect of these activities. Having obtained a substantial profit from Mr. Smith’s activity, Defendant thus tolerated these activities without ever attempting, before April 2012, to put an end to them. Pursuant to the German law theory of the granting of a power of attorney ‘by tolerance’, this constitutes an implicit granting of the representation powers necessary for the conclusion of contracts.

[36] “Claimant notes that this theory ‘does not require the prior detailed knowledge, by the person who is represented ..., of all the operations concluded or to be concluded by the person acting without an “official” power; it suffices that the person who is represented knows that his “false” representative has already concluded comparable operations and does not intervene to prevent the conclusion of other operations of that type’.

[37] “Claimant thus argues that in respect of the disputed operations concluded between the end of December 2010 and the end of March 2012, Mr. Smith was implicitly granted the power of representation.”

c. Decision

[38] “The Arbitral Tribunal refers to its reasoning in respect of the discussion relating to its own jurisdiction and repeats it mutatis mutandis in this section with no need of repeating it in its entirety.

[39] “The Arbitral Tribunal holds, as noted above, that Defendant’s behavior when concluding the contracts at issue and at the time of their performance contributed to establishing Claimant’s legitimate belief that Mr. Smith did have the necessary powers for concluding the contracts at issue.
[40] “The Arbitral Tribunal has taken into particular account the excerpt of the company representative contract, quoted by Defendant in support of its statements, in virtue of which the conclusion of futures contracts was strictly regulated. However, the Arbitral Tribunal notes that this internal-use employment contract, which regulated the relation between Defendant and Mr. Smith, cannot be relied on against Claimant.

[41] “The Arbitral Tribunal holds that, in any case, several and consistent indications correctly show that Defendant could not validly ignore the existence of the disputed operations; these indications include in particular a reference to the sums already received in the past by Defendant because of the operations conducted by Mr. Smith and the existence of public interventions in which Mr. Smith talked about his activity.

[42] “The Arbitral Tribunal has already noted that Claimant could in good faith legitimately believe that the salaried manager of Defendant with whom it was accustomed to conclude contracts in respect of operations that were never disputed as long as their result was favorable to Defendant, had the power, at least granted implicitly, to conclude those operations.

[43] “Further, also in respect of the limitation of the powers of Mr. Smith in his quality as member of the Board of directors, of which Defendant deems that Claimant could not ignore the existence since Claimant itself supplied the excerpt of the register dated 21 September 2011, the behavior of Mr. Smith as well as Defendant’s passivity until the contracts at issue were contested could lead Claimant to believe that notwithstanding Defendant’s by-laws Mr. Smith did have the powers to bind Defendant (see above ...).

[44] “Hence, the Arbitral Tribunal holds that the contracts at issue are valid.”

2. Authority of Mr. Smith to Conclude the Agreement of 11 November 2011

[45] “In the same manner and on similar grounds to those raised in relation of the power of Mr. Smith to conclude the contracts at issue, Defendant claims that the agreement of 11 November 2011, to which Claimant refers and by which the parties agreed on a schedule for the payment of the balance, was not validly concluded between Defendant and Claimant because of the lack of power of Mr. Smith to represent Defendant vis-à-vis third parties on his own.

[46] “The Arbitral Tribunal, with reference to its decision on the validity of the contracts at issue concluded by Mr. Smith, again decides that Claimant could legitimately believe that the latter did have the power to represent Defendant and concludes therefore, on the same grounds, that this agreement is valid.”
3. **Confirmation Letter Between Merchants**

[47] “Subsidiarily, Claimant argues that the operations at issue are in any case valid in application of the theory of the confirmation letter between merchants, already described in this Award.

[48] “Claimant notes that it received confirmation letters for all the disputed contracts concerning wheat, and that the lack of objections or reservations equals confirmation. Claimant adds that the lack of receipt of the confirmation letters or the contradictions between the confirmation letter issued by Claimant and the transaction notice drafted by the broker only concern the amount of the balance under the contracts at issue and thus do not call their validity into question.

[49] “Defendant also reiterates the arguments already made in respect of the examination of the power of Mr. Smith to conclude arbitration agreements, noting that the confirmation letters may not be relied on against Defendant and that the silence of Defendant equals non-acceptance of the transaction notices and thus of the operations at issue.

[50] “The Arbital Tribunal also reiterates in its entirety its analysis above, and notes, *ad absurdum*, that the operations at issue are equally valid in application of the theory of the confirmation letter between merchants.”

4. **Contracts Are Beyond Defendant’s Statutory Purpose**

a. **Defendant’s position**

[51] “Defendant argues that the conclusion of the disputed contracts exceeds the statutory purpose of Defendant, because the joint purchase of agricultural products is not mentioned therein and in any case Defendant’s Board never ratified the contracts at issue. Rather, on the contrary, from the moment it became aware of these futures contracts on 26 March 2012, the Board always contested their validity, removing Mr. Smith from his functions. Claimant therefore does not prove that the disputed operations were ratified.”

b. **Claimant’s position**

[52] “Claimant maintains that the ratification by the legal entity representatives of an act concluded by a person lacking sufficient powers and in excess of the statutory purpose is not devoid of effect, and deems that the argument of the excess of the statutory purpose of Defendant must be dismissed.

[53] “Claimant relies on the fact that Defendant did ratify the disputed operations. MATIF contracts were undisputedly already concluded in the past, and it is inconceivable that Defendant was not aware thereof, since they
generated a global profit of €… Defendant, however, never urged Mr. Smith or his co-contractors to put an end to this type of activities, nor did it dispute the validity of this type of operations; this behavior implies that Mr. Smith was granted the [necessary] powers, and a ratification or implicit confirmation of past and present contracts.

[54] "Claimant points out that in any event the disputed operations were ratified again by the Board of Directors of Defendant at the end of March 2012 when Defendant receive a confirmation of the debit balance of its account in the books of Claimant resulting from the operations at issue. Defendant allegedly requested this information on 26 March 2012, after discovering the disastrous result of the operations at issue for Defendant. Following this, nevertheless, it went through 'wash-out' termination by price difference operations and debt compensation operations, resulting in particular in a delivery of malting barley, and only raised the argument of the invalidity of the contracts 15 days later, in an attempt to avoid the performance of its obligations. Thus, there was at least an implicit ratification by Defendant of the operations at issue."

c. **Decision**

[55] "The Tribunal notes again that it is not disputed that the parties had a business relation since 2009 and had concluded MATIF contracts in respect of similar operations, which generated a profit of € … for Defendant; [these operations] were not objected to by the latter on the ground that they went beyond [Defendant’s] statutory purpose.

[56] "Further, it has not been shown that under German law a company is not bound vis-à-vis third parties when its statutory purpose is exceeded.

[57] "Besides, the Arbitral Tribunal has already found that Defendant could not validly ignore the conclusion of the disputed contracts by Mr. Smith; in any case, whether these contracts were ratified by Defendant only concerns Defendant.

[58] "As a consequence, the Arbitral Tribunal holds that the excess of the statutory purpose has no effect on the conclusion of the contracts at issue."

5. **Effect of Balance Confirmations and Bank Transfers**

[59] "Claimant stresses that although Defendant, once the dispute arose, took the position that it contested the validity of the contracts at issue, bank transfers were made in November 2011 and February 2012; also, on 10 April 2012 Defendant’s administration sent Claimant two requests to confirm account balances, 'per 31 December 2011 for the sum of € … in favor of Claimant, and per 29 March 2012 for a sum of € … in favor of Claimant'.

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[60] "Defendant argues that these account balance confirmations were issued without consulting the members of the Board of Directors, solely at the request of the external auditor, and were drafted and signed solely by secretaries who did not have the power to represent Defendant. Defendant adds that the invoices issued by Claimant on 17 November 2011 and 20 February 2012 are forged invoices, and that the bank transfers subsequently made in Defendant’s name were requested by Mr. Smith only to the bookkeeper and secretary of Defendant, without any of the members of the Board of Directors being aware of this. Hence, they cannot equal a recognition of debt. Defendant thus concludes that the bank transfers and the confirmations have no effect on whether the disputed operations can be relied on.

[61] "The argumentation of Defendant does not persuade the Arbitral Tribunal. The Arbitral Tribunal deems that the effect of the balance confirmations and the bank transfers cannot be annihilated by the mere statement that they were issued and made without consultation with the members of the Board of Directors; in any case, this possible defect concerns the internal responsibility of the enterprise, which did not not take the necessary control measures. The Arbitral Tribunal deems moreover that Defendant does not prove that the invoices were a forgery.

[62] "As a consequence, in light of all the considerations above, the Arbitral Tribunal holds that the disputed contracts are valid."

(…)

III. BALANCE OWED UNDER THE DISPUTED OPERATIONS

1. Applicable Law

[63] "The parties have agreed in their respective statements on the application of German law in respect of the issue of the power of representation of Mr. Smith, but have made no explicit choice as to the law applicable to the merits of the dispute.

[64] "In respect of the issue of the burden of proof, as discussed below, the Arbitral Tribunal must decide on the applicable law.

[65] "The parties agreed in the Terms of Reference on the principle that the arbitrators shall decide according to the law, in accordance with the rules indicated by French private international law. The Arbitral Tribunal notes that the exchanges between the parties, in particular as concerns the question of the applicable legal rate of interest, have brought to light divergences as to the total
or partial application of German of French law, particularly taking into account that the wheat contracts refer to the INCOGRAIN contracts, which provide in Art. 19 that 'unless otherwise provided the applicable law is French law'. However, the Arbitral Tribunal notes that the parties agreed in the Terms of Reference, that is, after the disputed contracts were signed, on a manner to determine the law applicable to the entire dispute. Hence, in accordance with the parties' will, the Arbitral Tribunal shall decide on the basis of French private international law.


'[it] shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to contractual obligations'.

[67] “Since the parties did not exercise their freedom to choose the law applicable to the contract, the Arbitral Tribunal determines the law applicable to the contract in accordance with Art. 3 of the Convention, which provides that ‘a sale shall be governed by the domestic law of the country in which the vendor has his habitual residence at the time when he receives the order’ (para. 1), unless the order has been received in the country where the purchaser has his habitual residence, in which case the ‘sale shall be governed by the domestic law of the country in which the purchaser has his habitual residence’ (para. 2).

[68] “The Arbitral Tribunal notes that the application of the 1955 Hague Convention gives rise to no special difficulty: both seller and purchaser have their residence in Germany, so that it does not need to be ascertained where the order was received. Neither does the fact that Claimant and Defendant alternated as seller or purchaser pose difficulties, since they both have their habitual residence in Germany.

[69] “Finally, the Tribunal observes that the application of the Rome I Regulation would lead to the same result, since in the absence of a choice of law, 'a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence' (Art. 4(1)(a)).

[70] “Consequently, German law applies to the present dispute.”
2. Calculation of Balance

[71] The Arbitral Tribunal examined the evidence in respect of the balance owed under the disputed contracts and concluded as follows.

[72] “Summing up, the Arbitral Tribunal finds that the sum owed by Defendant to Claimant under the disputed wheat and colza contracts, and after the ‘wash-out’/termination operations, amounts to a total of €..., from which must be deducted the sum of €... corresponding to the colza futures contracts scheduled for delivery in February 2012 and the sum of €... compensated by the delivery of malting barley, for a total of €...”

IV. INTEREST

[73] “As to the applicable rate of interest, Claimant in its statements requests the application of the legal rate, without specifying of which country. Having been invited together with Defendant by the Arbitral Tribunal to express its opinion on this question after the debate was closed, Claimant asks the Arbitral Tribunal to apply the legal rate of interest under German law, on the ground that (i) the disputed contracts were concluded in Germany and present no extraneous element on the ground of their speculative nature; (ii) the disputed MATIF wheat contracts do contain a reference to the INCOGRAIN forms providing for the application of French law, but with the reservation of a contrary agreement of the parties; and (iii) in any event the parties chose German also by referring to the provisions of that law in their statements.

[74] “Defendant reiterates that it disputes that the contracts are valid and may be relied on against Defendant; as concerns the applicable legal rate of interest, it deems that French law must apply. Defendant argues that parties chose French law in accordance with Art. 3 of Regulation (EC) No. 593/2008, since the


1. A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.
2. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice made under this Article or of other provisions of this Regulation. Any change in the law to be applied that is made after the conclusion of the contract shall not prejudice its formal validity under Article 11 or adversely affect the rights of third parties.

contracts at issue expressly refer to the INCOGRAIN standard contracts. Defendant specifies that Claimant cannot validly contest the existence of an extraneous element, since it seized the Arbitral Tribunal on the basis of dispositions of French law and presently invokes the application of German law; also, it cannot validly declare that the coïts contracts contain no reference to the INCOGRAIN forms, since it submits in the proceeding documents proving the opposite.

[75] "As concerns the date in which interest starts running, Claimant considers that it should be 1 May 2012, the date of the expiry of the postponement of payment granted by Claimant to Defendant in the context of their discussions aiming at finding an amicable solution to their dispute. The Arbitral Tribunal notes that Defendant has not indicated this date; it is acknowledged that Defendant contests the claim in its entirety.

[76] "In light of the above, the Arbitral Tribunal holds that the date of 1 May 2012 is reasonable and appropriate taking into account the circumstances of the case, in particular the date of the request for arbitration.

[77] "The Arbitral Tribunal has decided that German law is applicable to the present dispute. Nevertheless, the Arbitral Tribunal does not deem that it is bound, as concerns the manner to determine the applicable rate of interest, to a strict application of the law governing the contract, since the Arbitral Tribunal has traditionally a certain discretionary power in this respect.

[78] "By way of comparison, however, Sect. 288(2) of the German Civil Code provides that ‘in juridical acts in which no consumer takes part, the interest rate applicable to debts based on a price or a remuneration is the basic legal rate plus eight points’. The German basic rates for the relevant period are: 0,12 percent from 1 January 2012 to 31 December 2012; minus 0,13 percent from 1 January 2013 to 30 June 2013; minus 0,38 percent after 1 July 2013. It follows that the German delay interest rates are the following: 8,12 percent for the amount due after 1 May 2012 until 31 December 2012; 7,87 percent for the amount due

3. Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.

4. Where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties’ choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.

5. The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 10, 11 and 13.”

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after 1 January 2013 until 30 June 2013; 7,62 percent for the amount due after 1 July 2013. On the other hand, the French rates are 0,71 percent for 2012 and 0,04 percent for 2013.

[79] “Taking into account the amounts awarded in the present award, the disparity between the German and French rates, and the circumstances of the case, resulting particularly from the statements of the parties, the Arbitral Tribunal deems that the application of the German rate would be disproportionate. For example, although the parties further clarified this point at the request of the Arbitral Tribunal, it does not appear clearly that Claimant necessarily expressed in its statements a wish for the application of the German rate of interest to the present dispute; the more so, as noted by Defendant, as it made certain references to French law on other matters. On the other hand, the Arbitral Tribunal considers that the application of the French rate would also be inversely disproportionate, taking into account the sums awarded, certain connecting factors to Germany and the legitimate expectation of the parties.

[80] “Consequently, the Arbitral Tribunal decides not to apply the German or French legal rates and to fix itself the rate that it deems reasonable and appropriate in the case at hand.

[81] “By so doing, the Arbitral Tribunal does not make an average of the German and French rates reproduced above by way of illustration, nor does it make an equitable allocation between the parties, but deliberately chooses a rate that it considers reasonable and appropriate in the case at hand, as arbitral practice allows it to do.

[82] “Based on the above considerations, the Arbitral Tribunal decides to apply a general and smoothed yearly interest rate of 3 percent starting on 1 May 2012 on the amount of € ... until full payment.”

V. COSTS

(....)

[83] “The Arbitral Tribunal notes that Art. 56 of the CAIP Rules establishes the principle that unless otherwise decided by the Arbitral Tribunal, the losing party shall bear the costs of the proceeding.

[84] “Taking into account the circumstances of the case, and particularly the amount effectively awarded to Claimant in relation to its main claims, the Arbitral Tribunal decides that the costs of the arbitration shall be paid for 20 percent by Claimant and 80 percent by Defendant, and that Defendant shall bear
the totality of the irrecoverable costs for defending its interests and 80 percent of the costs and fees claimed by Claimant."