FRANCE

ARBITRATION CHAMBER OF PARIS

Final award, 1 September 2009

Parties: Plaintiff: Seller (France)
Respondent: Buyer (France)

Place of arbitration: Paris, France

Published in: No information available at time of publication;
Original in French

Subject matters: – FOB sale and transfer of risks
– EC Regulation no. 178 of 2002 on food law and safety
– breach of contract by failure to comply with food safety regulations

Facts

Seller bought a certain quantity of a soya product to be used as feed for poultry from original seller X and resold it to Buyer. The contract of sale between Seller and Buyer referred to INCORAM Contract no. 13, was Free-On-Board at a French port and contained a reservation of property clause providing that Seller remained the owner of the goods until full payment. It also provided for the application of French law and contained a clause for arbitration of disputes at the Chambre Arbitrale de Paris (Paris Arbitration Chamber).

Loading of various cargo onto the designated vessel Y commenced on 7 February at a French port; the soya product was loaded as last in the afternoon of 8 February and loading operations were terminated that day around 21:00. At 20:42 in the evening of 7 February, original seller X issued an alert in accordance with the rapid alert system established by EC Regulation no. 178 of 2002 on food law and safety by informing Seller in a fax indicated as “urgent” that part of the goods might be contaminated by salmonella. By a second fax sent at 19:37 on 8 February, original seller X informed Seller that new tests did not indicate contamination; however, it insisted that the goods
should not be used until the competent authorities withdrew the alert. Vessel Y left the French port late in the evening on 8 February, heading for a French Overseas Department (FOD).

Seller did not forward the information regarding the salmonella alert to Buyer until 13 February, when it also informed Buyer that tests had proved negative; more results disproving contamination of the goods were transmitted to Buyer on 16 and 19 February. Seller advised Buyer, however, to have new tests carried out on new samples upon arrival at destination and to isolate the goods awaiting the outcome of the tests and the decision of the competent authorities.

On 23 February, the FOD’s Prefect (Préfet) issued an order forbidding the marketing of the goods and ordering their destruction on board the vessel. Vessel Y arrived at destination on 26 February and was forbidden to unload the suspect goods. Buyer sought to unload at a port in nearby State A by seeking and obtaining an order from a local court directing the competent authorities to allow the goods to be unloaded in order to be tested. Notwithstanding the court order, the authorities denied permission to unload and vessel Y eventually headed back to the French port of departure. The goods were unloaded there on 17 April and again tested; the Directorate General for Competition, Consumers and the Suppression of Fraud (Direction générale de la concurrence, de la consommation et de la répression des fraudes) eventually authorized their use for the feeding of animals other than poultry and the goods were later sold at a lower price.

Seller commenced arbitration at the Paris Arbitration Chamber, seeking payment of the sale price. Buyer filed a counterclaim seeking damages.

The arbitral tribunal rendered a draft award (Projet de Sentence) granting both Seller’s claim and Buyer’s counterclaim with a few minor exceptions. Seller sought re-hearing of the case, as provided for in the Rules of the Paris Arbitration Chamber. On 1 September 2009, a second-degree tribunal affirmed the first-degree decision on essentially the same grounds.

The arbitrators granted Seller’s main claim, holding that under its FOB contract with Seller, Buyer was obliged to pay the price of the goods, as it had assumed all risks relating thereto when they had been loaded onto vessel Y.

As to Buyer’s counterclaim, the arbitral tribunal found that it was admissible and founded almost in its entirety. The arbitrators first refused to apply the time limit to bring a claim in arbitration provided for in INCOTERMS Form no. 13 – six months “following the last day allowed for fulfillment of the obligations”. Though this time limit “can be easily calculated where there is an objectively qualifiable breach, it cannot apply where, as here, non-compliance with a regulation is alleged". As a consequence, the
general statute of limitations applicable to disputes between merchants applied, that is, a time limit of ten years that under French law may not be extended and may be reduced to a minimum of one year. Buyer’s right to file a (counter)claim in arbitration therefore expired one year from the date of delivery of the goods. Here, the counterclaim was filed four months before that date and was admissible.

The arbitral tribunal then held that Buyer’s counterclaim was founded. It reasoned that the precautionary principle in EC Regulation no. 178 of 2002 – which has been incorporated into French law – requires operators to take measures of protection even when the existence or extent of any risk to human health is still uncertain. Seller, a major operator in the sector at issue, could be expected to process the information received by original seller X immediately, even if it was unclear from the original information whether the goods were indeed contaminated by salmonella. By failing to do so, Seller breached its contractual obligation to perform with diligence.

The arbitrators agreed with Seller that Buyer failed to mitigate its damages by not appealing the Prefect’s order; they therefore determined that Seller should bear 60 percent and Buyer 40 percent of the damages sought in the counterclaim.

The arbitrators then quantified these damages, granting almost all of Buyer’s requests but excluding the costs of buying replacement goods, since Buyer would have had to buy replacement goods in any case, even if the goods suspected of being contaminated by salmonella had not been loaded onto the vessel or had been unloaded before departure.

Excerpt

1. Seller’s Claim

[1] "Operations for loading the goods that were the object of the contract between Seller and Buyer onto vessel Y commenced in the afternoon of 8 February and were completed on the same day around 21:00. The vessel then left the French port at around 23:00 heading for a port in a French Overseas Department (FOD).

[2] "First of all, pursuant to the sale contract and the agreements binding the parties, the risks relating to the goods were transferred to Buyer from the moment of their loading onto the vessel bound for the FOD, that is, on 8 February around 21:00. The sale concluded between the parties is a FOB sale, in which the risks relating to the goods are transferred to the buyer from the..."
moment the goods are loaded onto the vessel. This is provided for in Art. 32 of the Law of 3 January 1969 — according to which in a [FOB] sale the buyer bears the risks and expenses relating to the goods from the day they are delivered as contractually agreed — and in clauses VI, VIII and IX of INCOGRAIN Contract no. 13.

[3] "Thus, once the [goods] had been loaded, Buyer bore the risk of their loss, notwithstanding the reservation of ownership made in favor of Seller. It ensures that Buyer may not refuse to pay the price of the goods, which was fully justified by the delivery of goods of sound and fair marketable quality [marchandise saine, loyale et marchande] complying with all contractual specifications, as attested by the documents supplied by Seller. Nor can Buyer rely on the provisions of Art. 1641 et seq. of the [French] Civil Code to avoid its obligation, arguing that the goods were affected by a hidden defect, that is, the ascertained presence of salmonella, since all tests concluded without exception that the goods were safe.

[4] "Further, a FOB buyer bears the risk of the loss of the goods to the extent that this loss occurs after delivery. The application of the provisions of Regulation (CE) No. 178/2002 of 28 January 20021 — specifically laying down procedures in matters of food safety — can lead to cases of legal loss when the goods cannot be returned, in application of the precautionary principle that obliges all operators in the animal feed sector to inform the competent authorities immediately if they deem or have reason to think that the food they are marketing does not meet the provisions for animal feed safety, and [to inform them] of the measures they are taking to prevent risks deriving from its use as animal feed. The salmonella alert raised by the public authorities and transmitted by the various operators must be deemed a risk affecting the goods and thus a chance event extraneous to the parties.

[5] "It results from the considerations below that the damaging and unforeseeable consequences of the alert of ‘suspected presence of salmonella’ in the product at issue, which Buyer received on 13 February, when the goods were on board the vessel heading for the FOD, must be borne by Buyer. Hence, we must direct Buyer to pay to Seller the amount of the invoice at the contractually agreed price, as well as interest running at the legal rate from the request of arbitration, in application of Art. 1153(1) Civil Code.

[6] "Finally, Seller requests the application of clause XIII.C of INCOGRAIN Form no. 13 on penalties for late payment, that is, 0.15% of the price per day

---

CHAMBRE ARBITRALE DE PARIS

of delay after the date of the invoice, on the ground that payment was due on [a certain date] and was never made. However, although Buyer must pay the [sale] price and cannot be exempted from it other than in certain limited cases that are not applicable here, under the specific circumstances of the performance of this contract application of the penalty clause in force between the parties would be manifestly excessive. Seller’s request on this point must therefore be denied.”

II. BUYER’S COUNTERCLAIM

[7] “Buyer filed a counterclaim asking that Seller be directed to pay [a certain sum] for the damage caused by its grave breach [faute] or at least negligence in performing its contractual obligations as a Seller, amounting to gross negligence [faute lourde]. Seller argues that the counterclaim expired on expiry of the contractually agreed time limit of six months and more precisely more than six months after delivery of the goods on 8 February. It argues subsidiarily that the claim is unfounded, alleging that it processed the information diligently, that it complied with European food safety norms and thus was not in breach.”

1. Admissibility

[8] “Art. XVII — sub ‘(2) Other disputes’ of ‘(A) Notification’ — of INCOGRAIN Form no. 13 provides that:

“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.”

[9] “On [a certain date], Buyer reserved its right to seek payment of the price and related costs, which it could not quantify at that moment. These reservations, which are not provided for in the contract and are not the same as a court action [demande en justice], did not validly interrupt the statute of limitations for Buyer’s counterclaim in arbitration.

[10] “However, although the time limit of six months following the ‘fulfillment of the obligations’ can be easily calculated where there is an objectively qualifiable breach, it cannot apply where, as here, non-compliance with a regulation is alleged. Hence, the statute of limitations applicable to
CHAMBRE ARBITRALE DE PARIS

Buyer’s counterclaim must be determined according to the general provisions [droit commun] on disputes between merchants arising in the course of their business: ten years, as provided for by Art. L.110-4 of the Commercial Code as in force at the time. Art. 2254 of the Civil Code specified, following Law no. 2008-561 of 17 June 2008, that:

'The statute of limitations can be reduced or extended by agreement of the parties. However it can neither be reduced to less than one year nor extended to more than ten years.'

[11] "The time limit of six months in INCOGRAIN Form no. 13 excessively reduces the statute of limitations and cannot apply in commercial matters. In the case at issue, Buyer’s right to file a claim expired on [a certain date], that is, one year from the date of delivery of the goods. It ensues that Buyer’s counterclaim, which was filed [four months before], is admissible."

2. Merits

a. Seller’s alleged breaches

[12] "Buyer argues that Seller is at fault on grounds of non-compliance with food safety regulations – being a contractual breach that results in [Seller’s] liability – because it failed to timely take into account the salmonella alert of which it had been informed when the vessel had not yet put to sea – which would have made it possible to withdraw the goods from the market – and because it failed to supply information on this alert within a reasonable time limit.

[13] "Seller maintains that it was not in breach and that it complied with European food safety regulations. It adds that the safety of consumers was never in danger and that the dispute does not concern a public health issue but solely the performance of a sale contract.

[14] "The precautionary principle [introduced into the [French] domestic legal system by Law no. 95-101 of 2 February 1995 On the Reinforcement of the Protection of the Environment, and included in the Constitution through the Environmental Charter [Charte de l’environnement]] requires all institutions to take measures of protection when there are uncertainties as to the existence or extent of risks to human health without necessarily waiting until such risks are fully proved real and serious – to use the words of the Court of Justice of the European Communities. [The precautionary principle] requires those who market goods to keep informed, to transmit any information directly or indirectly received by the health authorities and to adopt adequate measures to

control risks, even when they are uncertain, without waiting until they are confirmed or disproved.

[15] "Regulation (CE) no. 178/2002 of 28 January 2002, laying down the general principles and requirements of food law, further provides that an alert procedure must be launched and followed from the moment a food product is suspected of any contamination. Therefore, both the economic operator who does not take measures to prevent known or foreseeable risks and the operator who in a situation of doubt does not take the most prudent approach — notably, suspending the marketing of a dubious product from the moment he becomes aware of the risks affecting it — must be deemed at fault. Food safety provisions thus pertain to public policy and are mandatory for the professionals concerned, especially the operators of this sector, and contractual parties must comply with them on pain of being held contractually liable.

[16] "In the present case, the information on the risk [of salmonella] was addressed to Seller in the form of an urgent alert on 7 February at 20:42 and was confirmed on the following day 8 February at 19:37. It is undisputed that notwithstanding the urgency and seriousness of this alert, Seller transmitted it to Buyer only on 13 February, that is, six days later. This information ought to have been analyzed and processed on 8 February by a company describing itself as [a leader in the agricultural world]. Even if the raw information [received by Seller] did not permit a direct and clear identification of the goods that were on the point of being loaded onto the vessel as possibly contaminated, still Seller does not prove that it used all diligence to verify that information. On the contrary, Seller admits that an 'underling' in the quality department took cognizance of the message on 8 February and concluded that Seller was not concerned, laying the document on the desk of the department's head, who was away from the company on 8 and 9 February. Thus, the fact that the information was not processed with the promptness the relevant professional community could legitimately expect shows, on the part of Seller as a professional in the food sector, a grave lack of organization in reacting promptly to an alert and suspicion in respect of goods it was marketing. Its failure resulted in the impossibility to carry out the necessary tests, stop the loading of the vessel — which was completed on 8 February at 19:15 and even at 21:15 in respect of other goods — and postpone departure, which only occurred a little before midnight.

[17] "By letting goods that were suspected under the applicable regulations depart, Seller breached its obligation to perform with all the diligence required of a professional, which Buyer, the purchaser of the goods, had the right to expect. Hence, it committed a contractual breach that is largely the
cause of the damage suffered. It ensues that Seller must be held liable in the following proportion."

b. **Buyer’s damage**

[18] "Buyer claims [a certain amount] from Seller in its counterclaim without distinguishing among the various heads of damage. In turn, Seller argues that Buyer must bear the consequences of its decision to continue the journey toward the FOD, neighboring State A and finally back to Europe and not to appeal the Prefect’s order suspending the marketing of the goods and ordering their withdrawal and destruction, thus failing to attempt to mitigate its damage.

[19] "While it appears from the record that Buyer, once aware of the alert, did not generally fail to take steps and look for the appropriate measures to unload the goods while complying with laws and regulations, it is surprising that it did not file a recourse, either by way of an appeal to the Prefect or by commencing an action (in summary proceedings) in the administrative court, seeking annulment of the administrative decision prohibiting the marketing of the goods and a solution to the main source of its difficulties while, a few days later, it did not hesitate to seize the judicial authorities of neighboring State A. Thus, Buyer can to a certain extent be deemed to have contributed in part to the damage it suffered, by its negligence or at least its failure to assert its rights.

[20] "As to the respective responsibilities, it is determined that Seller shall pay 60 percent, and Buyer 40 percent, of the damages sought in the counterclaim."

c. **Amount of damages**

[21] "Buyer seeks total sum X in damages, with interest at the legal rate starting from the date of the filing of the counterclaim, so divided:

- sum A for costs incurred by Buyer to replace the goods bought from Seller;
- sum B for the costs of the carriage of the goods from the French port to the FOD port and related insurances;
- sum C for the costs of the carriage of the goods from the FOD port to the port of neighboring State A and from this port back to the French port, and their stay there;
- sum D for unloading the goods at the French port;
- sum E for storage at the French port;
- sum F for various costs (tests, sending of documents or samples)."
From sum X above the following sums should be deducted:

- sum G for the price of the goods bought by Buyer from Seller;
- sum H for the amounts obtained from the sale of the goods.

[22] "As certain invoices are in US dollars, we shall apply a conversion rate of 1.307 to the Euro (€). Certain invoices are before taxes and others include taxes. Unless otherwise indicated, the tribunal took into account sums before taxes in its evaluation; the parties shall make the necessary calculations.

[23] "The costs and expenses incurred to replace the goods are a damage that is not directly linked to Seller’s breach: if, because of the alert, the goods suspected of being contaminated by salmonella had not been loaded onto the vessel or had been unloaded before departure to the FOD, Buyer would have had to buy replacement goods in any case. It ensues that this head of damage cannot be taken into account.

[24] "The costs for the carriage of the goods between the French port of departure and the FOD port, and related insurances, are justified and must be borne by Seller.

[25] "In respect of the costs for the carriage of the goods from the FOD port back to the French port, via neighboring State A, and their stay there: (1) the costs for the annulment of the charterparty are not justified; (2) since they are not determined in a [separate] charterparty, the costs for chartering the vessel for the return voyage of the goods must be calculated on the basis of the amounts in the original charter party; (3) the costs of the vessel must be borne by the shipowner. Hence, Buyer shall be indemnified under this heading for [a certain sum].

[26] "The costs for unloading the cargo at the French port of final arrival shall be borne by Seller; the same applies to the storage costs for the months of May and June.

[27] "Buyer shall also be indemnified for various stated and justified costs related to the difficulties in the performance of this contract.

[28] "It follows that Buyer’s damages amount to sum Z. Based on the allocation of responsibility in causing the damage, as determined above, Seller shall pay Buyer 60% percent of that sum. Pursuant to Art. 1153-1 Civil Code, interest at the legal rate shall be added from the day of the counterclaim."

III. COSTS AND FEES

CHAMBRE ARBITRALE DE PARIS

[29] “Seller requests that the costs and fees of the arbitration be borne by Buyer; Buyer makes the opposite request. In consideration of the circumstances of the case, these costs shall be borne by the parties equally.”

IV. AAT. 700 CCP

[30] “Seller requests that Buyer be directed to pay € 40,000; Buyer makes the opposite request. Having considered the respective claims of the parties and their validity, it appears equitable that each party bear its own costs.”

V. PROVISIONAL EXECUTION

[31] “Both Seller and Buyer sought the provisional execution of the future award, notwithstanding any recourse, and the giving of security. They failed, however, to justify their request on grounds of urgency or particular circumstances. These requests do not appear to be justified and shall be denied.”

(....)

2. 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.”