FRANCE

INTERNATIONAL ARBITRATION CHAMBER OF PARIS

Award in case no. 3150

Arbitrators: François Xavier Train (President)

Parties:
Claimant: Buyer (Germany)
Respondent: Seller (France)

Place of arbitration: Paris, France

Published in: Unpublished

Subject matters:
- force majeure
- INCOGRAIN Contract No. 15 FOB RIVER (2009)
- 2009 ENR Directive on the use of energy from renewable sources
- sustainability certificate
- proof of damage

Summary

The contract for the sale of rapeseed required that the seller provide a sustainability certificate in accordance with the German legislation transposing the ENR Directive on the use of energy from renewable sources. The seller did not provide such certificate, claiming force majeure because at the relevant time the ENR Directive had not been transposed in France and there was no French body authorized to issue sustainability certificates. The arbitral tribunal found no force majeure: it appeared from the evidence that two other French operators had obtained certificates complying with German legislation from a German body in the relevant period. However, the probative value of such certificates in respect of French goods in the system of the ENR Directive was "questionable". Hence, the seller breached an accessory, rather than essential, contractual obligation. In any event, though the seller's

1. Original in French; translation provided by the International Arbitration Chamber of Paris.
liability was engaged, the buyer failed to prove damage. The INCOTERM form on which the contract was concluded provides that, in case of default of one party, the other party can terminate the contract, repurchase or resell the goods, or apply the price difference between the contract price and the market price at the day of default. Here, the buyer did not terminate the contract and, as it accepted delivery, could not claim repurchase; nor did it prove that it resold the goods at a loss.

On 30 March 2010, the French Seller entered into two sale and purchase contracts with the German Buyer for the sale of "French rapeseed conventional 00". Both contracts required that the rapeseed meet the requirements of German law on the production of sustainable biofuels (Bioeinsteadstoff- Nachhaltigkeitsverordnung (Bioskraft-NachV)) and bioliquids ((Biomassestrom- Nachhaltigkeitsverordnung (BioSt-NachV)). Both contracts were concluded on INCOTERM Contract No. 15 FOB RIVER 2009 edition, which provides for the application of French law. The INCOTERM standard form also contains a clause for arbitration of disputes at the International Arbitration Chamber of Paris (Chambre Arbitrale Internationale de Paris – CAIP).

On 7 January 2011, Seller shipped a first delivery of 2,800 metric tons of rapeseed under the first contract (the Contract); the bill of lading specified that the destination port/country was Germany. On 14 January 2011, Buyer sent Seller a Notice of Request for Arbitration, claiming that Seller was in breach of contract by failing to provide a certificate of sustainability of the goods as required under the Bioskraft-NachV.

In the meantime, on 10 January 2011, Buyer had concluded a contract with Company A for the purchase of 2,000 metric tons of rapeseed; this contract too required that the goods meet the requirements of Bioskraft-NachV and BioSt-NachV. Company A shipped the rapeseed on 1 February 2011 and provided the necessary documentation under Bioskraft NachV and BioSt NachV.

Buyer commenced arbitration against Seller at the Paris Chamber, seeking damages for breach of contract.

The arbitral tribunal held that, by not providing a certificate of sustainability for the goods, Seller was in breach of an accessory (rather than essential) contractual obligation; and that Buyer failed to prove damage.

The arbitral tribunal first excluded from the proceedings Buyer’s last statement, which was submitted eight days before the hearing, as the CAIP Arbitration Rules allow defendants a period of at least eight days before a hearing to reply to statements filed by claimants.

The arbitrators then held that Buyer’s request for arbitration was admissible. Contrary to Seller’s opinion, Buyer’s letter to Seller of 14 January 2011 did specify Buyer’s grievance in respect of the goods, and it did so in accordance with
the time limit set by the INCOGRAIN standard form ("at the latest seven working days after inspection of the goods"); hence, the letter constituted a valid notice of arbitration.

The arbitral tribunal applied French law to the merits of the dispute, as required under the INCOGRAIN standard form and confirmed by the parties in the proceedings. The tribunal noted that the reference to the German legislation on biofuels and bioliquids only concerned the manner in which the sustainability of the goods was to be proved, and did not contradict the choice for French law.

Under French law, the contractual liability of a party is engaged if this party has breached its obligations and if such breach has caused a direct and certain loss to the other party. The tribunal concluded that while Seller had breached an accessory obligation, Buyer failed to prove that it sustained any damage.

Seller had undisputedly failed to provide a certificate of sustainability as required in the Contracts. Seller argued, however, that it was exempt from liability because of a force majeure event: at the time of delivery, on 7 January 2011, no body was authorized to issue such certificate for French goods.

The arbitral tribunal noted that the German legislation referred to in the Contracts is the transposition of the 2009 European Directive on the promotion of the use of energy from renewable sources (the ENR Directive) in Germany; the ENR Directive had not been transposed in France at the relevant time. In the system of the ENR Directive, farmland must be classified as land that can produce sustainable products and land that cannot; this "zoning" scheme may be carried out either by the public authorities or by the operators themselves, in which case it must be approved by a national or European authority. It was undisputed that at the time of the disputed delivery there was in France neither a national state scheme nor a recognized voluntary scheme classifying French farmland according to the sustainability criteria set by the Directive.

This circumstance, however, did not constitute an event of force majeure. In French law, there is force majeure exempting the debtor from liability when the event is, inter alia, "inévitable". Here, although no sustainability certificate could be issued in France, it appeared from evidence supplied by Buyer that two other French operators in the biofuel industry did obtain sustainability certificates from a German body in the same period, according to both the certification systems invoked by Buyer.

Sustainability certificates aim to prove that the criteria set by the ENR Directive are respected by producers, collectors and transformers. The certificates issued to the other French operators by German private certification bodies recognized only by the German authorities, not by the
ARBITRAL AWARDS

European authorities, were valid for the German market only; in the tribunal’s opinion, their probative value in respect of French rapeseed was doubtful.

The arbitral tribunal concluded that while on the relevant date it was not absolutely impossible for Seller to provide a certificate of sustainability for the goods — so that there was no case of force majeure exempting Seller from its liability — the failure to provide a certificate such as the one issued to other French operators, whose probative value was questionable, did not affect the essential qualities of the goods but rather concerned an accessory, administrative obligation relating to the goods.

The arbitrators last examined Buyer’s claim that it suffered a loss because of Seller’s breach. The INCOGRAIN form provides that, in case of default of one party, the other party can either terminate the contract, repurchase or resell the goods or apply the price difference between the contract price and the market price at the day of default. In the present case, Buyer did not terminate the relevant Contract; did not refuse delivery, which is a pre-condition for repurchase; and failed to prove that it resold the rapeseed at a loss.

Excerpt

[1] “The validity of the arbitration clause, the arbitral tribunal’s jurisdiction and the Arbitration Chamber of Paris’ jurisdiction for all disputes arising in connection with the case are not disputed, nor is the international nature of the dispute.”

(...)

I. ADMISSIBILITY OF BUYER’S STATEMENT NO. 3

[2] “Seller requests the arbitral tribunal to exclude from the proceedings [Buyer’s] statement no. 3 in support of the request for arbitration, dated 23 August 2011, as well as the documents produced [with it], because of its late submission, in application of Art. 24 of the Arbitration Rules [2010].

[3] “Buyer argues that the Arbitration Rules contain no provision on the time limit within which the applicant can submit his reply to the defendant, and that the adversarial proceedings principle was respected, Seller having had ample time to take cognizance of and to respond to the statement, which only contains arguments already made.

INTERNATIONAL ARBITRATION CHAMBER OF PARIS NO. 3150

[5] "On the one hand, the procedural schedule set at the end of the hearing on 8 July 2011, and approved by the parties, did not provide for the exchange of new statements or documents, the record being ready to be adjudged. Nevertheless, parties exchanged new statements, Buyer on 29 July 2011 and Seller’s reply on 16 August 2011. Consequently, these statements and the attached documents are admissible.

[6] "On the other hand, Art. 24(3) of the CAIP Rules of Arbitration [2010] requires the defendant to submit a statement at the latest on the eighth day before the date of the arbitration hearing. Seller was not able to do so because the last statement of Buyer was notified eight days before the hearing.

[7] "Consequently, as provided by Art. 24(3) of the CAIP Rules of Arbitration, and in order to ensure the equality between parties with respect to the principle of adversarial proceedings [principe de la contradiction], Buyer’s statement no. 3 dated 23 August 2011 and the attached documents are excluded from the proceedings.

[8] "In any case, Seller’s statement dated 16 August 2011 contained no new elements but at most details on arguments already amply developed by the parties, particularly with regard to the value of copies of the sustainability certificates produced by Buyer.”

(....)

II. ADMISSIBILITY OF BUYER’S REQUEST FOR ARBITRATION

[9] "Buyer bases its request on Seller’s failure to provide a document certifying that the commodities delivered were ‘sustainable’ within the meaning of the German legislation on biofuels, as stipulated in the Contract.

[10] "Seller argues that Buyer’s letter dated 14 January 2011 does not contain any reservation as to the quality of the commodities, but merely a notification of [Buyer’s] intention to resort to arbitration within the meaning of Art. XVII of the INCOTOGRAIN Formula, which provides: ‘a request for arbitration shall be


"Once the date of the hearing is set in compliance with Article 14, the defendant is under the obligation to file his dossier with the Secretariat at the latest on the eighth day preceding the date of the arbitration hearing of which he has been notified. All evidence after this date may if challenged be declared to have been filed too late and therefore to be inadmissible by the Arbitral Tribunal.”

Yearbook Comm. Arb’n XXXIX (2014) 69
notified to the other party at the latest seven working days after inspection of the goods’.

[11] “However, Buyer wrote in its letter:

‘Under the contracts referred to above, it was expressly stipulated that rapeseed provided by the Seller should be certified sustainable in accordance with European regulations on the sustainable production of biofuels applicable in Germany – “Biokraftstoff-Nachhaltigkeitsverordnung – Biokraftstoff-NachV” – as well as with ECE Regulations No. 178/2002, CEEN No. 1829/2003 (GMOs) and No. 1830/2003 (GMO Traceability).

It appears to the buyer that rapeseed delivered by the seller on [7] January 2011 was not certified sustainable and therefore, non compliant to the referred legislation in the contracts referred to above.’

[12] “The arbitral tribunal considers that this declaration constitutes an accurate and valid notice of arbitration with regard to specific grievance raised by Buyer against Seller, and that it was issued within a time limit in accordance with Art. XVII of the INCOGRAIN Formula.

[13] “Consequently, the arbitral tribunal decides that Buyer’s request is admissible.”

III. MERITS

1. Seller’s Liability

[14] “According to French law, which is applicable to this case, the contractual liability of a party is engaged if this party has breached its obligations and if such breach has caused a direct and certain loss to the other party. It is to the arbitral tribunal to ascertain successively (1) the existence, in this case, of a breach by Seller of its contractual obligations, and (2) the existence and the amount of the loss claimed by Buyer.”

2. Seller’s Breach of Contract

a. Lack of sustainability certificate

[15] “It appears from the case that the German legislation referred to by the parties follows an ordinance dated 30 September 2009 transposing Directive

[16] "Art. 27 of the ENR Directive provides for transposition in the Member States at the latest on 5 December 2010; the national legislation should enter into force on 1 January 2011. Germany is the first European country to have transposed [the ENR Directive], and it is undisputed that at the delivery date, on 7 January 2011, the European Directive had not been transposed in France, and no national scheme or voluntary scheme recognized by the European Commission existed — as it appears from a letter of the Minister of budget François Baroin dated 21 January 2011 addressed to the President of the National Union of agricultural producers of alcohols.

[17] The benefit attached to the certification of sustainable biofuels and bioliquids is a privileged tax regime.

[18] "Under the German ordinance dated 30 September 2009, the ‘sustainable’ character of bioliquids has to be established by proof of their compliance with certain sustainability criteria, and results from a ‘sustainability certificate’ issued according to a certification system approved by the German authorities or by the European Commission.

[19] "Seller has not provided any certificate of sustainability — which is undisputed — and consequently, Seller has failed to fulfill this specific obligation prescribed by the Contract.

[20] "However, Seller invokes an absolute impossibility of performing this specific obligation. The lack of transposition of the European Directive into French law and the absence of a national scheme established by the French government or of a voluntary scheme recognized by the European Commission classifying French farmland according to the sustainability criteria set by the Directive made it impossible to provide a certificate of sustainability for rapeseed of French origin. Consequently, Seller invokes the existence of an event of force majeure within the meaning of Art. 1148 Civil Code (CC), such as to exempt it from its liability."

3. Art. 1148 of the French Civil Code reads:

"No damages and interests are owed when the debtor was prevented from [performing] under his obligation, or did what was prohibited, because of force majeure or an unforeseeable event [cas fortuit]."
b. Applicable law

[21] *Before discussing the question of the existence, in this case, of an impossibility to perform constituting a case of force majeure, the tribunal observes that the reference made in the Contract to the German legislation transposing the European Directive is not a submission of the Contract to German law and therefore does not contradict the choice of the parties in favor of French law, which results from Art. XIX of the INCOGRAIN Formula and has moreover been confirmed by parties during the proceedings. Such a reference constitutes a taking into account [prise en considération] of the terms and conditions laid down by the German legislation, including the means of evidence of the 'sustainable' character of the goods, that is to say, the provision of a certificate of sustainability in a certification system approved by the European Commission or by the competent national authorities of the various countries of the European Union, Germany in the present case.

[22] *Even if the explanations of the parties did not allow the arbitral tribunal to ascertain the reasons which led them to refer to the German legislation for the needs of their transaction, although the rapeseed was of French origin, this reference can be explained by the fact that the merchandise was, in the words of Buyer, not disputed by Seller, destined for the German market — the bill of lading specifying 'destination port/country: Germany'. In this respect, the arbitral tribunal notes that Buyer, in an FOB contract, was free in the choice of the destination of the goods and that a German destination was therefore based on its sole discretion."

c. Force majeure

[23] *Under Art. 1148 of the French Civil Code, an event constitutes a case of force majeure apt to exempt the debtor from its liability if it is external to the parties, unforeseeable and irresistible.

[24] *It is the irresistible criterion which is in discussion in the present case. The arbitral tribunal must consider whether the non-transposition of the European Directive into French law and the absence of a national French scheme established by authorities or of a voluntary scheme, established by French operators in the sector and recognized by the European Commission or by a national authority, at the date of delivery made impossible, within the meaning of Art. 1148 CC, the provision of a certificate of sustainability by Seller meeting the contractual specifications.

[25] *The ENR European Directive defines a certain number of sustainability criteria for raw materials, for their use in the production of biofuels. They
concern the biomass producers themselves, but mainly collectors or transformers through a delegation of responsibility.

(....)

[26] "It thus follows from these sustainability criteria that a ‘scheme’ established by the public authorities or by the operators themselves — before it is approved by a national or European authority — is a technical standard based on a ‘zoning’ of the territory making a distinction between, on the one hand, lands which can be used to produce products called ‘sustainable’ and, on the other hand, lands which cannot be, based on criteria of environmental protection. Such zoning of the Member States’ territories can only be achieved, country by country, region by region, plot by plot by the authorities of the Member State concerned or under their control.

[27] "Under these conditions, the arbitral tribunal considers that a certificate of sustainability aims to establish the proof that the criteria set by the European Directive are respected by a producer, collector or transformer.

[28] "It follows, logically, that a certification body, whatever it is, should not be able to issue a certificate of sustainability (establishing compliance with the sustainability criteria) where there is no national or voluntary scheme classifying the agricultural land on a given territory.

[29] "In addition, as noted by Seller, the two certification systems invoked by Buyer as likely to allow Seller to issue the sustainable certification were not recognized by the European Commission at the date of delivery of the goods. They were [recognized] only by German authorities.

[30] "It follows from the foregoing elements that under a strict application of the law, no certificate of sustainability establishing with certainty the criteria of sustainability could, in principle, be issued for goods produced on French soil, since no classification of the French territory, either in the form of a national scheme, or in the form of a voluntary scheme recognized by the European Commission or by the French authorities, had been made at the delivery date.

[31] "However, it appears from the documents produced by Buyer that two other French operators in the biofuel industry obtained sustainability certificates in this period. Thus, on 22 December 2010 a certificate of sustainability was issued to an international merchant by a German body according to one of the certification systems invoked by Buyer. On 28 January 2011, a certificate of sustainability was also issued to another company (collector) — from which Buyer bought 2,000 tons of rapeseed in February 2011 — by another German body according to the other certification system invoked [by Buyer].

[32] "These certificates were issued by German private certification bodies recognized by German authorities (but not by European authorities) in
conformity with the German ordinance dated 30 September 2009 mentioned by the parties in their Contract and, consequently, valid for the German market, a possible market for the purchased rapeseed.

(...) [33] "Consequently, it appears that on 7 January 2011 the impossibility invoked by Seller to provide a certificate of sustainability was not ‘absolute’, since two other operators in the French market were able to supply such a certificate, one at the end of December 2010, the other at the end of January 2011.

[34] "Moreover, it should be noted that Seller, a knowledgeable professional, agreed to contractual specifications referring to the German legislation already in force at the time of conclusion of the Contract in March 2010. The arbitral tribunal holds that both parties intended to assume the risk of non-transposition of the European Directive in France.

[35] "It follows that a case of force majeure exempting Seller from its liability cannot be found.

[36] "However, since at the time of delivery there was no national scheme or voluntary scheme recognized by the European Commission or the French authorities classifying French farmland, and since the goods were of French origin, the arbitral tribunal considers that the failure to provide a certificate whose real probative value is questionable cannot be regarded as affecting the essential qualities of the goods and therefore cannot be considered as a breach of an essential contractual obligation, but should rather be regarded as a mere breach of an accessory obligation which consists in providing an administrative accessory of the goods."

3. **Buyer’s Loss**

[37] "Buyer’s statements, as well as the arguments of its counsel at the hearing, rely on Art. XV(b) of INCOGRAIN Formula (‘Default. Determination of damages’) to prove the existence of a loss. In order to determine the quantum, Buyer relies on the amount of the sustainability premium that was paid to the collector company per ton of rapeseed (€ ...), arguing that it was necessarily included in the price charged by Seller; it therefore evaluates the loss at € ... (... x 2,800 tons). Seller argues that this damage is unfounded both in principle and in the amount.

[38] "Under Art. XV(1) of the INCOGRAIN Formula, in case of default of one party, the other party can, without formal notice, (a) terminate the contract purely and simply; (b) repurchase or resell the goods, as appropriate, at the expense and on behalf of the defaulting party; or even (c) apply the price
difference between the contract price and the market price at the day of default. Art. XV also sets out (paras. 2 and 3) conditions for the implementation of these options in favor of the party who is not in default.

[39] "In the present case it is undisputed that Buyer did not refuse the goods upon delivery on 7 January 2011. It did not terminate the Contract. Rather, it is undisputed between the parties that ten deliveries, subsequent to the contested delivery, were made by Seller without provision of any certificate of sustainability. For each of these deliveries, Buyer has filed a request for arbitration while knowingly receiving goods and continuing the Contract for subsequent deliveries.

[40] "With respect to Art. XV(b) cited by Buyer, the arbitral tribunal notes that, having accepted the goods delivered, [Buyer] cannot claim to have ‘repurchased’ from the collector company against Seller: a ‘repurchase’ presupposes that the goods were not delivered (see Art. XV(2)).

[41] "The possibility of the ‘resale’ of goods is available only to a seller when the buyer is in default, not to the buyer itself, even if it has taken delivery of refusible goods.

[42] "In addition, Buyer does not prove that it has sold rapeseed delivered by Seller on 7 January 2011 at a loss, despite the letter dated 27 June 2011 addressed to Buyer’s counsel. At the hearing, answering a question of the arbitral tribunal, a representative of Buyer declared that rapeseed delivered by Seller had been used for the production of oil for food consumption because it could not be used for the production of biofuels in the absence of a certificate of sustainability. However, Buyer does not prove this food use or that such use would have caused a loss or a shortfall.

[43] "Moreover, as pointed out quite rightly by Seller, even if the repurchase was contractual (it is not), the conditions for the implementation of the option offered to the party who is not in default under Art. XV were not met: Buyer did not inform Seller of the right it intended to make use of and did not consult [Seller] before the repurchase of rapeseed from the collector company.

[44] "Consequently, the arbitral tribunal notes that the alleged loss of Buyer is not established in principle, because Buyer fails to prove compliance with the conditions of Art. XV on which it bases that loss and, more generally, to establish the existence of a direct and certain loss caused by the non-provision of a certificate of sustainability by Seller for the goods delivered on 7 January 2011.

[45] "It follows that the liability of Seller is not engaged. Therefore, it is unnecessary to decide the quantum of the loss alleged by Buyer."

(....)
ARBITRAL AWARDS

IV. DECISION

[46] "The arbitral tribunal ...:

(1) Excludes from the proceedings Buyer's statement no. 3 dated 23 August 2011, as well as the documents produced in its support, because of its late submission, in conformity with Art. 24 of the CAIP Arbitration Rules;
(2) Holds that Buyer's request for arbitration is admissible;
(3) Holds that Seller, by not providing a certificate of sustainability for the goods, did not breach an essential contractual obligation but simply breached an accessory obligation;
(4) Holds that Buyer does not prove damage;

Consequently,

(1) Dismisses all Buyer's claims;
(2) Directs Buyer to bear the totality of the costs of the arbitration proceedings;
(3) Directs Buyer to pay € ... under Art. 700 CCP."