



Final award in case no. 9392/9426 of the 16th January 1998

Arbitrators: J.-C. Petit (President); R. Bertin Lehmann; P. Caillau
Parties: Claimant: Buyer (Netherlands)
Respondent: Seller (Asian country)
Place of arbitration: Paris, France
Published in: Unpublished
Subject matters: - customs of international trade
- calculation of damages

Facts

The claimant entered into two similar contracts for the purchase of a quantity of rice from the Seller to be delivered in April and May, respectively. The contracts provided for payment by the opening of an irrevocable letter of credit payable on demand upon presentation of the embarkation documents. Demurrage was to be deducted from the costs of the charter. Both contracts provided for disputes to be settled at the Arbitration Chamber of Paris.

The April contract was performed with a delay of several days and the vessels chartered to transport the rice both incurred demurrage. The Buyer requested the Seller to reimburse the demurrage, but did not receive a reply.

Regarding the May contract, the Buyer opened the letter of credit and the Seller confirmed that it would deliver on the agreed-upon date. Shortly before the delivery date, the Seller informed the Buyer that he would only be able to deliver half of the amount stipulated in the contract. The Seller subsequently asked the Buyer not to send the ship to collect the cargo and to annul the contract. Relying on directives issued by his Ministry of Commerce, the Seller proposed an increase in the purchase price and then subsequently informed the Buyer that he could only deliver when authorized by the Ministry of Commerce, and in this case, it would be necessary to renegotiate the contract.

The Seller proposed a draft contract which allowed for delivery several months later along with an offer to increase the price. When the seller did not reply, the Buyer initiated arbitration claiming losses for the demurrage regarding the April contract and losses incurred as a result of having to purchase the rice elsewhere regarding the May contract. The Buyer did not participate in the arbitration.

The arbitral tribunal concluded that the parties intended the customs of international trade to be applicable to the contract. Applying the right of the Buyer to damages for non-performance of the sales contract equal to the *difference* in the market cost for buying substitute goods and the contractual price, the Arbitral Tribunal awarded a comparable amount in favour of the claimant.

Excerpt

I. DEFAULT

[1] "In light of the attitude of the Seller and his default, Art. 27 of the Rules of the Arbitration Chamber of Paris is to be applied: This article reads:

'If the defendant has been properly notified and fails to appear or to be represented and submits neither arguments nor documents, the Arbitral Tribunal shall proceed with the arbitration, basing its decisions on the documents which have been submitted.'

[2] "Consequently the President of the Tribunal has decided to examine the case at hand, to verify the allegations and claims of the claimant and to make an award which will be deemed to be an award made in contentious proceedings."

II. IDENTITY OF DEFENDANT

[3] "According to the explanations supplied by the claimant, and not contested by the defendant, it follows that the Seller, a public company of the Asian country, acted both under his own name and as an agent for the governmental authorities of

the Asian country; thus, the defendant shall be treated in *these proceedings* in his double quality as both a public company and as an agent of the governmental authorities of the Asian country. The defendant did not object to this conclusion."

III. APPLICABLE LAW

[4] "Neither of the two contracts stipulates the law applicable to the merits of the dispute. Failing such a choice, the Tribunal shall decide the dispute in accordance with the rules of law which it considers appropriate, taking account of trade usages (Art. 1496 NCCP)."

[5] "The two contracts refer to international trade usages: in Art. 6 of the contract, providing for the application of INCOTERMS 1990, as well as in Art. 13 of the contract which refers to the ICC standard clause on force majeure (Publications no. 421).

[6] "It is certain that the intention of the parties was that the contract be governed by international rules and usages. Thus, it is appropriate to decide the dispute on the basis of these rules and usages generally accepted in international commerce."

IV. MERITS

[7] The Arbitral Tribunal first determined that the claims relating to demurrage arising from the April contract were proven and justified and condemned the defendant to pay the amount of demurrage claimed. Regarding the May contract the Arbitral Tribunal decided as follows:

[8] "... [I]t was similarly established regarding the purchase contract that the Seller did not deliver the agreed amount of rice on the stipulated date, despite Art. 7 of the contract which provided for embarkment in May (the vessel being allowed to present itself up until the 31st of May at the latest). The defendant has not contested these facts and is thus held to have failed to perform his contractual obligations on the 31st of May.

[9] "According to the rules and usages of international trade, the Buyer who suffers from the failure to deliver is entitled to calculate his loss based on the difference between the price in the unexecuted contract and the market price on the date of the default (compare various types of contracts such as the standard conditions INCOGRAIN no. 13 FOB Maritime or the GAFTA Contract no. 120 FOB terms ..., various national laws such as Sect. 2712 of the United States Uniform Commercial Code,² or international conventions, like Arts. 75 and 76 of the Vienna Convention on the International Sale of Goods.³

[10] "Contrary to the allegations of the claimant who relies on the absence of a rice market in the Asian country at the end of May, in order to rely on the price for the rice in a second Asian country, on the 31st of May a quotation is available for (rice of the same quality) in a circular of the 31st of May of the London Rice Broker's Association whose price, moreover, is identical to that of rice of a comparable quality from a third Asian country."

[11] The Arbitral Tribunal awarded damages based on the difference between the contract price and the market price communicated in the circular.

1. *Art. 1496 of the French New Code of Civil Procedure reads:*

"The arbitrator shall decide the dispute in accordance with the rules of the law chosen by the parties or, in the absence of such choice, in accordance with the rules of the law he considers appropriate.

In all cases he shall take the usages of the trade into consideration."

2. *Art. 2-712 of the United States Uniform Commercial Code reads:*

"1. After a breach within the preceding section the buyer may 'cover' by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller.

2. The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (Section 2-715), but less expenses saved in consequence of the seller's breach.

3. Failure of the buyer to effect cover within this section does not bar him from any other remedy."

3. *Arts. 75 and 76 of the United Nations Convention on Contracts for the International Sale of Goods 1980 (Vienna Convention) read:*

Article 75

"If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74.

Article 76

"1. If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 75, recover the difference between the price fixed by the contract and the current price at the time of avoidance as well as any further damages recoverable under article 74. If, however, the party claiming damages has avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time of avoidance.

2. For the purposes of the preceding paragraph, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods."