



ARBITRAL AWARDS

Final Award in case no. 9473 of 2 January 1999

Arbitrators: G. Soreau (President); E. Caen; J. Cazard
Parties: Claimant: Buyer (France)
Defendant: Seller (UK)
Place of Arbitral: Paris, France
Published in: Unpublished
Subject matters: - battle of forms
- tacit acceptance of Arbitral clause
- FOB sale and risk relating to goods
- BSE embargo on British beef

Facts

On the 9th of January 1996, 1st of February 1996 and 14th of February 1996, a French Buyer bought frozen English beef from an English Seller. In each case, the Buyer sent an order confirmation (no. 111, no. 222 and no. 333, respectively) containing a clause referring all disputes to Arbitration before the Arbitration Chamber of Paris; the Seller sent an order acknowledgment referring to the Incoterms 1990 and to the Seller's general conditions of contract, which were not annexed and which provide for the application of English law and the jurisdiction of English courts. The Seller only signed confirmations no. 222 and no. 333.

The first two shipments of meat (confirmation no. 111 and no. 222), 30 and 32 tons, respectively, were delivered FOB Felixstowe and loaded on vessel X. The shipments reached the French dependency of Mayotte, an island in the Comoro group, off the coast of Mozambique, on the 12th of March 1996. The Buyer paid the invoices, totaling FF 412,770.64, on the 11th of March 1996.

In March 1996, several States, including France, prohibited the import of English beef because of the risk of BSE, the so-called mad cow disease. When the Mayotte health authorities suspended the import of English beef, the two shipments at issue were either being cleared or awaiting clearance. The French Buyer and the English Seller agreed that the beef be returned to England. Upon arrival at Felixstowe, a small part of the shipment was sold in England and the remainder of the beef was destroyed by order of the British health authorities.

The French Buyer commenced Arbitration on the 24th of January 1997, seeking restitution of the sums paid under the invoices relating to order confirmation no. 111 and no. 222. The British Seller objected on the grounds that the Arbitration Chamber of Paris lacked jurisdiction.

The Arbitral Tribunal held that it had jurisdiction over the dispute as the Seller had accepted the Arbitration clause in the Buyer's order confirmations: explicitly in the case of confirmation no. 222, which he had signed, and tacitly in the case of confirmation no. 111. On the merits of the Buyer's claim, the Tribunal held that the Buyer, having bought the beef FOB Felixstowe, was the owner of the beef and could not claim restitution of the price of the beef, subject to the Seller being compensated.

Excerpt

I. JURISDICTION

[1] "The English Seller ... argues that, although the French Buyer's order confirmations did contain an Arbitration clause, the Seller signed only one of the two confirmations at issue [that is, confirmation no. 222], his order acknowledgments refer to Incoterms 1990 and to English law, and the general conditions of contract provide for the jurisdiction of the English courts. [The Seller also argues that], since the conditions of purchase and the conditions of sale differ, the Seller may not be deemed to have been aware of or to have unambiguously accepted the Buyer's Arbitration clause. Hence, the Arbitration clause may not be invoked against the Seller. The Arbitral Tribunal should, therefore, find that it lacks jurisdiction unless the Buyer proves that the Seller accepted the Arbitration clause.

[2] "The French Buyer ... maintains that his claim is admissible because the Seller signed two of the three order confirmations which the Buyer sent to him, confirmations which all include an Arbitration clause referring disputes to the Arbitration Chamber of Paris. [He also maintains that] the Seller, whose invoices refer to the Buyer's order confirmations and which received several orders from the Buyer before the ones at issue, all containing the same Arbitration clause, may not claim that he was unaware of

the existence of the Arbitration clause, which appeared on the front page of the Buyer's order confirmations or, since he remained silent, that he refused to accept this clause.

(...)

[3] "The Arbitral Tribunal notes that the Seller raises an objection of lack of jurisdiction, alleging that there is no Arbitration agreement between the parties, both because the Seller did not agree to the Arbitration clause in the Buyer's order confirmations, and because the Seller's order acknowledgments refer to Incoterms 1990 and provide for the application of English law. Also, the Seller's general conditions of contract provide for the jurisdiction of the English courts. On his part, the Buyer maintains that an Arbitration clause is printed on the front page of the three order confirmations he sent to the Seller, and that the Seller not only made no reservation when receiving these contracts; but also he sent invoices to the Buyer which explicitly mention the above-mentioned contracts and which in all cases refer, under 'Buyer's reference', to the order confirmation concerned. Also, the claimant argues that the Seller signed his confirmations of order no. 222 and no. 333....

[4] "In order to settle this dispute, the Tribunal first notes that the two contracts at issue concern the sale of two shipments of frozen beef: the first contract was the object of the Buyer's order confirmation no. 111 of the 9th January 1996 and of the Seller's order acknowledgment of no. 5 of the 10th January 1996; the second contract was the object of the Buyer's order confirmation no. 222 of the 1st February 1996 and of the Seller's order acknowledgment ... of the same date. [5] "As to the second contract, the Buyer's order confirmation no. 222 which, like all his confirmations, contains an Arbitration clause printed in capital letters on its front page, referring all disputes which may arise between the parties to the Arbitration Chamber of Paris, was signed by a representative of the Seller; this signature undoubtedly means that the Seller accepted all conditions of the confirmation of order, Arbitration clause included.

[6] "As to the first contract, which was the object of the Buyer's order confirmation no. 111 of the 9th of January 1996 and of the Seller's order acknowledgment no. 5 of the 10th of January 1996, the Tribunal notes that the Buyer's order confirmation is not contested by the Seller, just like the Seller did not contest eleven such confirmations received between the 12th of May 1995 and the 5th of January 1996, which were regularly executed, or four confirmations issued in February and March 1996, which have been filed in this dispute.

[7] "Further, the Seller's order acknowledgment no. 5, just like all his order acknowledgments, merely provides for the application of Incoterms 1990 and of English law. These provisions are not at all at odds with the Arbitration clause in favour of the Arbitration Chamber of Paris, contained in the buyer's order confirmations.

[8] "The Seller also refers to his general conditions of contract, which ... provide for the jurisdiction of the English courts, but he does not prove that he sent them to the Buyer at the time of concluding the contracts at issue or earlier or later contracts.

[9] "The Seller signed order confirmation no. 222 of the 1st of February 1996 as well as the Buyer's order confirmations nos. 444, 555 and 333, respectively made out on the 1st of August 1995, 25th of October 1995 and 14th of February 1996. These confirmations rule out all clauses which are at odds with the Arbitration clause designating the Arbitration Chamber of Paris contained therein ('We reject all contrary clauses, which we consider null and void.'). Hence, the defendant apparently did not attach great importance to the jurisdiction of the English courts provided for in his general conditions of contract.

[10] "We must thus find that the Seller accepted the Arbitration clause for the Arbitration Chamber of Paris contained in the Buyer's order confirmations. This acceptance was explicit for the confirmation no. 222, which the Seller signed, and tacit for the confirmation no. 111, which the Seller did not contest and which his order acknowledgment no. 5 does not contradict. The Tribunal has jurisdiction over the dispute and the Buyer's claims are, therefore, admissible."

II. MERITS

(...)

[11] "This dispute concerns the return of the goods to the Seller ... which he had previously sold to the Buyer and which the Buyer could not sell on the island of Mayotte. The claimant claims that the goods were returned because the sale [contracts] at issue were terminated and that the claimant may, therefore, claim reimbursement of the price paid. The Seller argues that the contracts were not terminated and that the Buyer, which remained the owner of the goods until they were destroyed or resold, may not claim reimbursement.

[12] "In order to settle this dispute, the Tribunal notes that only three containers, loaded on vessel X with destination Mayotte, are at issue here and that the Buyer, since the sale was FOB Felixstowe, became the owner of the shipments of meat when these were loaded onto the vessel and shall bear all risks relating to the goods after loading. One of these risks is the political risk of an embargo. This risk, though unrelated to the intrinsic quality of the goods, became reality on the 22nd of March 1996, that is, several weeks after the Seller carried out his obligations, when the veterinary authorities of Mayotte decided to suspend the import of English beef because of the risk of BSE.

[13] "In order to escape the consequences of the embargo on English beef ordered by a large number of countries, among which the countries of the European Union, to which Mayotte is a dependent, the Buyer maintains that, faced with the fait accompli of the goods having been refused, he agreed on an amicable termination of the contracts with the Seller. However, the Buyer does not prove these allegations, which are based essentially on his own request for 'instructions' [from the Seller] for the return of the containers. The goods were in fact returned to England by the Seller and at the Seller's expense; in England, the Seller was able to sell half the meat in one container and recover the price.

[14] "The evidence in the case proves that the Seller never departed from his position that he had performed under his contractual obligations, that the requested payment of the unpaid invoices and that reimbursement of the price of the shipments paid [by the Buyer] was linked to a [possible] indemnification by the British authorities.

[15] "On the 2nd of May 1996, the Seller wrote to the Buyer that he had carried out his contractual obligations in conformity with the provisions of Incoterms 1990 and that he requested confirmation by the Buyer that he would pay the outstanding invoices when they become due. On the 18th of June, the Seller faxed the Buyer to state that he has not been included in the indemnification scheme [of the British government, the so-called Compensation Fund] and that he could not reimburse the [price of the beef] to the Buyer for the time being; however, since he deemed that [his exclusion from the scheme was incorrect], he commenced court proceedings against the British government. On the 26th of June, replying to a fax of the Buyer which demanded immediate reimbursement, the Seller referred to his action against the British government and stated that he would reimburse the [price of the beef] to the Buyer when he received reimbursement from his original supplier. On the 8th of July, again replying to the Buyer who insisted on immediate reimbursement, the Seller referred to his position of the 26th of June and threatened legal action against the Buyer if the two unpaid invoices were not paid. On the 9th of July, at the request of his credit insurer, the Seller requested a declaration from the Buyer ... that he had no claim against the Seller and confirmed that he was not able to pay for the goods which the Buyer refused from the Seller just as the Seller refused them from its own supplier. On the 18th of July, the Seller reaffirmed his position, as stated on the 9th of July, and added on the 22nd of July that the Buyer would profit from all sums which the Seller would receive from his suppliers as reimbursement for the goods.

[16] "It appears from the evidence above that the Seller, at the request of the Buyer, returned the meat to England, a necessary condition for requesting an indemnification and for allowing the Buyer to take advantage of the indemnification mechanism set in place by the British authorities if the Seller's supplier received an indemnification, from which the Seller could benefit. The Seller would then be willing to reimburse the Buyer. It also appears that the Seller made all necessary efforts to obtain an indemnification, first from the [British] Compensation Fund and later through the British courts, which would have allowed him to repay the Buyer and his other Buyers, at least in part.

[17] "It does not appear from the evidence that the Buyer and the Seller ever agreed to terminate the contracts at issue. The fact that the Seller eventually did not claim payment of the two unpaid shipments in court is probably occasioned by the Seller's wish to maintain a business relation with the Buyer. Also, half of a container was sold at Felixstowe on behalf of the Buyer, and the price of this sale went to cover the costs incurred by the Seller for returning the goods [to England] and for the suit before the English courts. The Buyer does not contest the account of this sale filed by the Seller ... nor does he contest that the Buyer owed the Seller FF 113,305.79 under other contracts.

[18] "In the absence of a contractual termination of the sale [contracts] at issue, the Buyer, who was the owner of the beef, which he bought FOB Felixstowe, until its destruction or its sale on the Buyer's behalf, may not claim restitution of the price of this beef. Consequently, the Buyer's claim and accessory claims are rejected. On the contrary, the Seller's counterclaim for FF 113,305.79, mentioned above, is founded and the Buyer shall pay this sum to the Seller, together with interest at the French legal rate from the Seller's formal request to pay on 10 February 1997.

[19] "The Buyer has caused the Seller to incur irrecoverable and frivolous legal costs by his unjustified action and shall consequently pay FF 15,000 to the Seller under Art. 700 NCCP' as well as the Arbitration costs."

1. Art. 700 of the French New Code of Civil Procedure (NCCP) reads:

"As provided in Article 75 of Law no. 91-647 of 10 July 1991, in all instances, the court shall order the party who is to bear the costs, or failing that, the losing party, to pay the other party an amount regarding the accountable expenses which are not included in the costs. The court shall take fairness or the economic situation of the party who is ordered to pay into consideration. The court may, on its own initiative, for the above reasons, decide not to make any such order."