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Published in: Unpublished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

[...]

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[...]

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.

[...]

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[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.

[...]

Referring Principles:

  I.2.3 - Presumption of professional competence and equality of parties
  VI.3 - Force majeure