Final award in case 5885

Facts

In April and May 1986, parties entered into two sales contracts under which claimant was to provide two cargoes of a commodity C&F Chittagong (Bangladesh) and defendant was to provide confirmed letters of credit within a certain time. Claimant, however, rejected the letters of credit offered by defendant. According to claimant, the letters of credit then were not rectified within the time stipulated in the contract. Claimant therefore terminated the contracts and claimed damages for non-performance.

Subsequent negotiations to “revive” the contracts did not succeed, since, according to claimant, defendant did not offer letters of credit in conformity with the terms of the contracts.

In the ensuing arbitration, defendant alleged that claimant had wrongfully terminated the contracts and had not acted in good faith by refusing it the opportunity to remedy the alleged deficiencies in the letters of credit. Defendant counter-claimed the price difference resulting from its cover purchase of the commodity. The sole arbitrator held that the contracts had been rightfully terminated due to the lack of confirmed letters of credit, reasoning as follows.

Excerpt

[...]

III. Damages

15 The arbitrator referred to evidence contrary to claimant’s allegation that its option to purchase the commodity from its suppliers had expired when it telexed defendant on 14 May. The export manager of the supplier, Mr. [S], testified that their offer to claimant did not lapse until 30 June 1986.

16 "Further, it appeared from the statement of [witness Mr. Q] that the market price of [the commodity] rose subsequent
to claimant's termination of the contracts. Although Mr. [Q]'s statement referred to 'quota' [commodity], and not the 'non-quota' [commodity] offered to claimant by the [supplier], a rise of the market price of 'quota' [commodity] must also imply an improvement of the possibilities to sell. 'non-quota' [commodity] of the same contractual description. Thus, a seller having terminated a contract of sale for [the commodity] would normally benefit from the rising market and be able to avoid a loss of the kind which claimant alleges to have suffered in the present case (cf. Sect. 50(3) of the Sale of Goods Act 1979). However, claimant's claim for compensation of damages rests on the alleged fact that the option to buy the [commodity] had expired and that this was the very reason for their termination and the ensuing loss of profit. This being so, there is no further evidence presented by claimant about any cover sale of the [commodity] except the statement of Mr. [S] that the [commodity] was finally offered to buyers in Tanzania. Relying on the statement of Mr. [S] I think, however, that claimant, in a rising [commodity] market, should have been able to avoid any financial loss resulting from their termination of the contracts by making better use of the firm offer from the [supplier] which, I conclude, had not expired at the time when claimant terminated the contracts with defendant. Thus, I cannot find that claimant has met its burden of proving that, in spite of the rising market price of [the commodity], they were unable to avoid the loss of profit allegedly resulting from the termination.

Nevertheless, I find it probable that claimant may have been unable to avoid every loss resulting from the termination. In view of the fact that claimant at least must have incurred substantial expenditure and loss of time for contracts, which they were entitled to terminate and did lawfully terminate because of defendant's breach, I assess the damages incurred by claimant to the amount of US$ 50,000."

2Sect. 50(3) of the Sale of Goods Act 1979 reads: "Where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted or (if no time was fixed for acceptance) at the time of the refusal to accept."

**Referring Principles:**

VII.4 - Duty to mitigate