Final Award in Case 8502

Date: November 1996
Lang English
usage:

Claimants and Respondent entered into a contract for the supply of a given quantity of rice of a given quality during a given period of time. Claimants allege that Respondent failed to supply the rice despite all required formalities having been carried out. Respondent is accused of seeking to delay performance, of alleging difficulties arising from government action and flooding in the country of exportation, and of attempting to renegotiate the agreed prices. The sales contract contains an arbitration clause referring to the ICC Rules of Arbitration. Respondent refuses to take part in arbitration proceedings. The arbitration therefore continues on an ex parte basis pursuant to Article 15(2) of the 1988 ICC Rules of Arbitration. The Arbitral Tribunal decides to apply to the contract trade usages and generally accepted principles of international trade, as reflected in the 1980 Vienna Convention on the International Sale of Goods and the Unidroit Principles (Article 74.6 of which is referred to for the calculation of damages). The Arbitral Tribunal decides that Respondent was in breach of its obligations and that there was no case of force majeure preventing it from performing. Claimants are awarded damages. Three quarters of the arbitration costs are to be borne by Respondent and the remaining one quarter by Claimant; each party is to bear its own legal expenses.

With respect to compensation due to Claimant owing to Respondent's default:

'The Arbitral Tribunal found that the Respondent failed to comply with its obligations under the Contract and that said failure was not legally justified. It now remains to calculate the amount of compensation due to the Claimants caused by the Respondent's default.

As regards the applicable law on the question of compensation, the Arbitral Tribunal, as previously mentioned, considers
that the Parties have expressed their mutual intention to have their relationship governed by general principles of international trade.

The Incoterms 1990 or the UCP 500, to which reference is made in the Contract, contain no provision regarding the effect of the failure by one party to fulfil its obligations under the Contract.

The Arbitral Tribunal considers that this question should be examined in light of generally admitted principles of international trade as contained for example in international treaties. For this reason, the Arbitral Tribunal is of the opinion that the principles embodied in the Vienna Convention on the International Sale of Goods of 1980 (Vienna Sales Convention) reflect widely accepted trade usages and commercial rules. Although the Vienna Sales Convention is not as such directly applicable to the Contract (Vietnam has not ratified this Convention), the Arbitral Tribunal finds that it may refer to its provisions as the expression of usages in the world of international commerce . . .

Article 76 of the Vienna Sales Convention reads as follows:

"(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. ( ...)

(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

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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."

The method of calculation of damages in the Vienna Sales Convention is analogous to that envisaged by different national laws. . . .

Finally, the Arbitral Tribunal shall refer to the work of the International Institute for the Unification of Private Law (Unidroit). Article 7.4.6 of the Unidroit Principles of International Commercial Contracts provides:

"(1) Where the aggrieved party has terminated the contract and has not made a replacement transaction but there is a current price for the performance contracted for, it may recover the difference between the contract price and the price current at the time the contract is terminated as well as damages for any further harm.

(2) Current price is the price generally charged for goods delivered or services rendered in comparable circumstances at the place where the contract should have been performed or, if there is no current price at that place, the current price at such other place that appears reasonable to take as a reference."

Based on these applicable principles of law, the Claimants are entitled to damages calculated as the difference between the contract price and the relevant market price. The contract price is easily determined by the contractual provisions agreed upon by the Parties, which include the initial Contract and its amendment. . . .

With respect to the determination of the relevant market price, two issues must be addressed. One needs first determine the reference time at which the market price is calculated, and the place of reference. . . .

[Reference to Article 76 CISG and various national laws.]

It results from the foregoing analysis that, unless a current price is not available, damages should be calculated with reference to the market price at the place where delivery of the goods should have been made. In the present case, the goods being sold FOB Ho Chi Minh City port, the place of delivery of the goods for the purposes of this provision is Ho Chi Minh City . . .

As regards the relevant time to refer to the local market price, the Arbitral Tribunal shall apply the general rule according to which the relevant time for specifying the current price is that of the default. . . .

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Referring Principles:

VII.1 - Damages in case of non-performance