Title:
ICC Award No. 8817, 10 ICC Bull. No. 2, 1999, at 75 et seq. (also published in: YCA 2000, at 355 et seq.)

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Final Award in Case 8817

Date: December 1997
Lang: Spanish
Claimant: Spanish company
Respondent: Danish company
Place of Arbitration: Paris, France

Claimant objects to the termination with immediate effect of an exclusive distribution agreement relating to food products between itself and Respondent. The latter had given as the reasons for termination (i) the change that had occurred in Claimant's management, which in its view came within the causes of termination provided for in the agreement, and (ii) Claimant's lack of sufficient resources to pay the sums due within the agreed time-limits. According to Claimant, such reasons concealed unfair competition, as the change in question was the dismissal of the general manager, who, it alleges, had created a rival undertaking with which Respondent had established commercial relations competing with those existing between Claimant and Respondent. In determining the applicable law, the sole Arbitrator takes into account the nature of the contractual relations between the parties. He decides to apply the United Nations Convention on Contracts for the International Sale of Goods (Vienna Convention) and at the same time draws upon the Unidroit Principles which echo them (namely, in the present case, the force of prior practices between the parties (1.8) and mitigation of harm (7.4.8)). The Arbitrator finds that there was no justification for the termination of the agreement in such conditions and awards Claimant damages for the harm caused by the severance of the agreement and commercial relations of several years standing and by the unfair competition which it had suffered. Interest is added to the damages at the rate applicable to the currency in which the latter are calculated. Respondent is ordered to bear the entire costs of the arbitration, as Claimant had been successful in almost all its claims.

[...]

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With respect to Claimant's request to be compensated for the interruption in its business resulting from its being unable to use other suppliers' products:

...the arbitrator considers that the sudden, unexpected interruption of deliveries to Claimant caused harm to the company. Such harm took the form of difficulties in adapting to a new situation requiring changes in manufacturing arrangements. The arbitrator notes that Claimant neither provides proof that these difficulties lasted for a year nor indicates what efforts it made and what difficulties it encountered during the stage of adapting to different conditions and products.

Respondent points out pertinently that it is a principle of international commercial law that the party suffering harm must take the necessary steps to mitigate the harm. For contracts of sale, this rule is expressed in Article 77 of the Vienna Convention in the following terms: "A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated."

In general, a similar rule is set out in Article 7.4.8. of the Unidroit Principles, which states: "The non-performing party is not liable for harm suffered by the aggrieved party to the extent that the harm could have been reduced by the latter party's taking reasonable steps."

In the absence of indications as to the efforts and attempts made by Claimant during the alleged year of inactivity, the arbitrator considers that this commercial inactivity was caused in part by Claimant's inertia.

Referring Principles:

VII.4 - Duty to mitigate