Title:
ICC Award No. 9392/9426, YCA 2001, 13 et seq.

Content:

FRANCE

ARBITRATION CHAMBER OF PARIS

Final award in case no. 9392/9426 of 16 January 1998

Arbitrators: J.-C. Petit (President); R. Bertin Lehmann; P. Caillau

Parties: Claimant: Buyer (Netherlands); Respondent: Seller (Asian country)

Place of arbitration: Paris, France

Published in: Unpublished

Subject matters:
- customs of international trade
- calculation of damages

[...]

IV. MERITS

[...]

[9] "According to the rules and usages of international trade, the buyer who suffers by the failure to deliver is entitled to calculate his loss based on the 16 difference between the price in the unexecuted contract and the market price on the date of the default (compare various types of contracts such as the standard conditions INCOTERMS no. 13 FOB Maritime or the GAFTA Contract no. 120 FOB terms..., various national laws such as Sect. 2712 of the United States Uniform Commercial Code,2 or international conventions, like Arts. 75 and 76 of the Vienna Convention on the International Sale of Goods.3
Art. 2-712 of the United States Uniform Commercial Code reads: “1. After a breach within the preceding section the buyer may ‘cover’ by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller. 2. The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages as hereinafter defined (Section 2-715), but less expenses saved in consequence of the seller’s breach. 3. Failure of the buyer to effect cover within this section does not bar him from any other remedy”

Arts. 75 and 76 of the United Nations Convention on Contracts for the International Sale of Goods 1980 (Vienna Convention) read: Article 75 “If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction as well as any further damages recoverable under article 74. Article 76 ”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. If, however, the party claiming damages has avoided the contract after taking over the goods, the current price at the time of such taking over shall be applied instead of the current price at the time of avoidance. 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 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.”

Referring Principles:

VII.1 - Damages in case of non-performance