II. Termination of the Agreement (Article 64 (1) (b) CISG)

1. Was Claiment in Breach of its Obligation to Pay the Price When the Additional Period of Time Was Granted?

   e. The possible application of Article 71 CISG

III. Lucrum cessans

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e. The possible application of Article 71 CISG

[43] "Claimant has submitted that it was entitled not to perform its own obligations, due to the failure of respondent to perform its own. In the CISG system, the exceptio non adimpleti contractus is regulated by Art. 71, which provides that a party may suspend the performance of his obligations if, after the conclusion of the contract, it becomes apparent that the other party will not perform a substantial part of his obligations as a result of (a) a serious deficiency in his ability to perform or in his credit-worthiness; or (b) his conduct in preparing to perform or in performing the contract."

[44] "Art. 71 of the CISG might be applied only in respect of the risk of a future breach of a party's obligations, in the light of the conduct of such party, or of its ascertained inability to comply with its obligations. It should therefore be seen whether claimant had serious reasons to believe, at the time when the opening of the letter of credit for the Fall/Winter collection was requested that respondent would not perform its future obligations. It should also be assessed whether the formal requirements set by Art. 71 have been met by claimant."

[45] "In this regard, it should first of all be stressed that the circumstance that claimant disagreed on the prices for the collection does not in itself justify the application of Art. 71 of the CISG. As a matter of fact, such disagreement does not relate to the performance of one of respondent's obligations, but to the performance of claimant's own obligation to pay the price."

[46] "Leaving that issue aside, it appears that claimant had no particular reason to believe, in June, that respondent would fail to comply with its obligation of timely delivery of the orders.... In any event, claimant has failed to justify compliance with Art. 71 (3) of the CISG, which provides that "A party suspending performance, whether before or after dispatch of the goods, must immediately give notice of the suspension to the other party..."."

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[47] "Claimant's submission that it was entitled to resort to the exceptio non adimpleti contractus to justify its refusal to open the requested letter of credit shall therefore be rejected."

III. Lucrum cessans

(...)

[76] The sole arbitrator first rejected the claim for direct losses as the claimant's fixed and variable costs were a direct consequence of the performance of the Agreement, not of its wrongful termination. He then continued with the question of lucrum cessans: "Art. 74 of the CISG provides that

"Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach."

Art. 7.4.2 of the Unidroit principles also provides, as an expression of a generally accepted principle of law, that the harm suffered by the aggrieved party includes any gain of which such party has been deprived.

[77] "Loss of profit, to be indemnifiable, needs to have been foreseeable by the party in breach at the time of the conclusion of the contract (Art. 74 of the CISG). In this case, it was perfectly foreseeable to respondent, at the time the Agreement was signed, that its premature termination would cause a loss of profit. Claimant is consequently grounded in principle to claim the loss of profit suffered as a consequence of the Agreement's termination."

IV. Interest

2. Interest on Amounts Due by Respondent

[80] "The Agreement does not contain any indication as to the interest rate applicable to the sums due by respondent to claimant. Claimant has submitted that the legal rate applicable in the State of Washington should apply because this is the place where it is registered. The Arbitrator does not believe such solution to be appropriate. As a matter of fact, by submitting the Agreement to the CISG, the parties have clearly indicated their intention to avoid their respective internal law rules, and to resort to neutral solutions. This will should be respected also regarding interest.

[81] "In international arbitration, arbitrators have the broadest powers to determine interest on the basis of the most appropriate rate, without resorting to any rule of conflict. As indicated above, the interest rate to be applied should correspond to a generally accepted rate, applied on the international financial markets to the currency in which the damages shall be paid. In this regard, the London Inter Bank Offered Rate (LIBOR) on the US$ at 12 months (around 1.5%), increased of a spread of two points, constitutes a correct reference. An interest of 3.5% per year shall therefore be applied to all amounts due by respondent to claimant from the date of the present award until payment."

Referring Principles:

- V.1.4 - Principle of simultaneous performance; right to withhold performance
- VII.3.2 - Calculation of damages
- VII.6 - Duty to pay interest