International Court of Arbitration of the International Chamber of Commerce

... 

[46] “Art. 74 CISG explicitly includes the ‘loss of profit’ into the damages which have to be compensated. However, Art. 74 CISG specifically requires that the damage, including the loss of profit, must have been ‘suffered’. That means that the damage must have occurred, that it is not only hypothetical or potential.

[47] “It appears at first glance that Claimant ‘obviously’ suffered a damage since it could not realise the ‘margin’ which it calls profit. If Respondent had performed, Claimant would have received the difference between the purchase price and the sales price, e.g. the amount which it claims. Important elements of the case render, however, this conclusion highly doubtful.

[48] “Due to the fact that Claimant made no serious attempt to undertake a cover purchase and that the Tribunal was insufficiently informed about the fulfilment of the State X Entity contract, the members of the Tribunal became more and more doubtful whether Respondent's breach effectively caused a damage to Claimant. Most of the questions raised in this respect remained without a satisfactory answer. This leads to a situation where the doubts prevail over the normal course of the events.

[49] “The Tribunal has all through the proceedings been wondering why Claimant did not actively pursue to undertake a cover purchase. It can be safely stated that there was no serious effort on Claimant's side to do that. The offers from three named companies are neither negotiated nor do they entirely correspond to the Contract. Since then, no further effort was made. The
Tribunal was indeed surprised that, when the procedure started anew after the Partial Award on the Merits, it received the same documents as produced at the beginning of the arbitration, which are, to say the least, a preliminary exploration of some suppliers. A ‘normal’ business operator would have acted differently. The margin which Claimant is alleging was so important that it would have incited every reasonable business operator to realise it. There must have been other reasons.

[50] “The only reason given by Claimant for not having made a cover purchase is that the successive validity periods of the letter of credit were too short. When the letter of credit was reopened three months after the Partial Award on the Merits, it provided for shipment until April of the following year. The letter of credit was probably not reopened without prior negotiation between the contracting parties (Claimant and the State X Entity). If it had been too short, Claimant would have protested and claimed against the State X Entity that the insufficient validity period prevented it from fulfilling the contract. Moreover, in order to comply with a shorter validity, Claimant could have approached suppliers and prepared the conclusion of the contract. The validity of a letter of credit has to take into account the delivery periods of the suppliers. Additionally, Claimant, in February of the year following the Partial Award on the Merits, was able to deliver within the remaining time period even though it was much shorter than the initial delivery period.

[51] “For all those reasons, Claimant's arguments did not convince the Tribunal.

Referring Principles:

VII.3.2 - Calculation of damages