Title:
ICC Award No. 16369, YCA 2014, at page 169 et seq.

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Parties:
Claimant: Buyer (Switzerland)
Respondent: Seller (Kosovo)

Place of arbitration:
Zurich, Switzerland

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Subject matters:
- limited participation in arbitration proceedings
- jurisdiction of the Special Chamber of the Supreme Court of Kosovo
- admissibility of amicus curiae brief in ICC arbitration
- capacity of signatory
- applicable law to arbitrability
- arbitrability and insolvency proceedings
- avoidance of contract
- hardship
- fall in the commodity's price
- adaptation of contract
- loss of profit
- rate of interest

[...]

[112] "Even in cases where the change in circumstances is gradual the final result of those gradual changes may constitute hardship."

[113] "The documentation provided by the Claimant in response to the Tribunal's request (in particular the annual price tables for the commodity) as well as the Tribunal's own research make it clear beyond doubt that, subsequent to the conclusion of the Contract, the equilibrium was fundamentally altered in that the value of the performance the Respondent was to receive under the terms of the contract drastically diminished. This conclusion is evident if one looks at the dates of the Contract, the development of the relevant market during the relevant period of time and the Parties' communications.

[...]

[119] "At this point the question arises as to whether the risk of the market breakdown was not assumed by the Respondent (Art. 6.2.2(d)). Indeed, where parties to a contract of sale for delivery over a period of time agree on the market price at any point in time the seller may well be deemed to have assumed even the risk of not receiving any consideration in return for the goods sold. Exchange rates may collapse without that collapse qualifying as hardship. Yet the case at hand is different. The price formula agreed in Clause 6 with certain fixed parameters and a number of variables, including increases and decreases of the treatment charge in function of above-average and below-average settlement prices in the Tribunal's view reflects the Parties' understanding that market shocks were not to be assumed by either one of them but rather constituted a shared risk.

[...]"
5. Loss of Profit

a. In general

[127] "The Claimant demands compensation for the profit lost when the Claimant, due to non-performance on the part of the Respondent, became unable to perform its own obligation owed to its buyer, the Second Buyer, under the onward sales contract. This claim is, in principle, well founded.

[...]

[129] "Non-performance loss is generally recognized as a category of recoverable loss, and loss of profit is specifically mentioned in Art. 74 CISG.46

[130] "More specifically [a company engaged in the supplying and trading of the commodity at hand] clearly foresees that its buyer will enter into onward sale contracts. And it will in normal circumstances do so at higher sales prices than the price it purchased the commodity for. In this connection, it is noteworthy that commentators generally hold that market changes that are unfavourable to the party breaching the contract, as happened in the case at hand, are, as a matter of principle, deemed to be foreseeable.47

[131] "While this is the principle, its application is subject to the hardship test and specific remedies in extreme situations.

[...]

c. Duty to mitigate damage

[135] "The Respondent raises the defence that the Claimant's claim must fail because the Claimant should have made a cover purchase. In other words in the Respondent's view the Claimant did not comply with its duty to mitigate the loss.

[136] "Indeed, Art. 77 CISG provides that the party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss of profit, resulting from the breach. However, it follows from the wording of the provision that it would have been for the Respondent to substantiate its (implied) assertion and, ultimately, the burden of proof was on the Respondent.48

[137] "The Tribunal does not have any positive knowledge about the 'circumstances' of the transactions, not least the onward sale, sourcing alternatives, etc., so as to be in a position to assess the criterion of 'reasonableness'. Without any substantiation of its implied assertions the Respondent's defence must therefore fail."

[...]

46"Oberster Gerichtshof, 14 January 2002; Schwenzer, Art. 74 no. 52."
47"Benicke, 'Teil B - Warenhandel', in Kronke/Melis/Schnyder (eds.), Handbuch Internationales Wirtschaftsrecht, Cologne 2005, N. 381, p. 95; Schwenzer, Art. 74 no. 52; Schönle, Art. 74 no. 24, in Honsell (ed.), Kommentar."
48"Magnus, Art. 77 no. 16, in Honsell (ed.), Kommentar, Schwenzer, Art. 77 no. 13 (with references to case law).»

Referring Principles:

- VII.3.5 - Future damages/Lost profits
- VII.4 - Duty to mitigate
- VIII.1 - Definition