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Hamburg Friendly Arbitration
Award of 27 May 2002

Parties:
Claim Seller (nationality not indicated)
ant:
Defen Buyer (nationality not indicated)
dant:

Place of arbitration: Hamburg, Germany

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Schiedsgerichte, RKS B1 no. 76.

Subject Matters:
- consolidation
- "payment" arbitration
- quality arbitration
- no set-off against cash payment

Facts

The claimant sold raw cocoa to the buyer from a damaged lot under several contracts. The contracts stated that the
coconut was "slightly to heavily damaged and needed drying" and provided that payment would be "net cash against
invoice/release respectively net cash against invoice and removal". The contracts further provided for arbitration of
disputes in Hamburg by Hamburg Friendly Arbitration (HFA) under the Hamburg Trade Usages (Platzusancen für den
Hamburgischen Warenhandel).

A dispute arose when the buyer, alleging that the cocoa had a "musty, earthy, woody smell"; was moldy; and contained
stones and pieces of concrete, refused to pay for the deliveries received and refused further deliveries. On 24 April 2002,
the seller commenced HFA arbitration, seeking payment of the unpaid purchase price (the payment arbitration -
Zahlungsarbitrage). Both parties appointed an arbitrator. On 29 April 2002, the buyer commenced HFA quality arbitration,
seeking a certain amount in damages for the lower value of the goods (the quality arbitration). The seller took the position
that the proceedings should
be kept distinct, while the buyer argued that the payment and quality arbitrations should be heard together by the same
panel which should then render a "simultaneous decision" (Zugleichentscheidung). On 8 May 2002, at the request of the
arbitrators appointed in the payment arbitration, the Hamburg Chamber of Commerce appointed Dr. M as president of the
panel in the payment arbitration and Mr. L as arbitrator in the quality arbitration.

By the award reported below, the arbitrators in the payment arbitration held that the proceedings should be kept
separated. The arbitrators noted that even if the proceedings were consolidated, this would not lead necessarily to the
"simultaneous decision" sought by the buyer, because of the prohibition for set-off against the claim for payment of the
contractual price in the "net cash" clauses in the contracts. Hence, the claim for payment would have to be decided
directly, whereas the quality arbitration claim was not even quantified and required further examination of the facts. The
arbitrators noted that the separation of the proceedings did not disadvantage the parties from the point of view of costs,
as the fees of the arbitral tribunal are always charged separately for claim and counterclaim where no set-off is allowed.
The arbitrators concluded that the same applies in HFA arbitration in this respect as applies generally in procedural law,
namely, that proceedings are independent, and consolidation is only a matter of expediency. In the present case, the
contractual prohibition of a set-off led to find against consolidating the proceedings.

**Excerpt**

[1] "The arbitral tribunal has been duly constituted; only the payment arbitration may be heard and settled. The arbitral
tribunal shall also examine the [buyer's] objection to the separation of the payment and quality arbitration and its request
for a 'simultaneous decision' as being an objection to the composition of the arbitral tribunal, since the buyer [argues that]
it is a party to two proceedings with differently composed panels instead of being, as it deems proper, a party to only one
payment and quality arbitration proceeding.

[2] "This procedural objection is unfounded. Substantive law considerations lead to hold in this case that the payment
arbitration and the quality arbitration should not be heard in one proceeding only; rather, a different president should
be appointed in each proceeding by the Hamburg Chamber of Commerce and [the two arbitrations] are to be heard
separately. Recognizable legal considerations are in the foreground in the [payment] arbitration, while in the [quality]
arbitration a further explanation of the facts may be necessary that requires specific or different expertise.

[3] "Two alternatives, equivalent in principle, are open to the arbitral tribunal. The tribunal can either consolidate the
proceedings and examine them jointly, appointing one president for both, or leave them separate and have two different
presidents be appointed.

[4] "Even if the arbitral tribunal chose the first alternative, this would not necessarily lead to a 'simultaneous decision'
being rendered as requested by the buyer. By this term, the buyer clearly does not mean a Zugleichentscheidung in the
legal technical sense, namely [a decision rendered after] joining a third party in the arbitral proceeding.... Rather, the
buyer means that no decision may be rendered in the payment arbitration without deciding at the same time on the
counterclaim (quality arbitration).

[5] "The buyer's request fails because of the contractually agreed prohibition of any set-off against the claim for payment
of the sale price. Even if only one proceeding were held, that claim [for payment of the sale price] could and should be
deemed directly, whereas the quality arbitration (counterclaim) is not ripe for decision as it is not yet quantified.

[6] "The separation of the proceedings does not disadvantage the parties, in particular from the point of view of costs. The
fees of the arbitral tribunal are namely charged separately for claim and counterclaim if no set-off is allowed. This rule
applies also when both [claim and counterclaim] are heard by one and the same arbitral panel.

does not stand in the way of the proceedings being separated, the arbitral panels being differently composed and only the
payment arbitration being heard. According to this decision, quality arbitration and proceedings before an arbitral tribunal
are to be conducted together. The Hanseatic Court of Appeal was hearing a typical case in which the buyer relied against
the seller on its rights under a guarantee for defects in the goods delivered. Even if it is assumed that there is such a rule
that proceedings
are to be heard together, this rule applies at the most to quality arbitration, not to the procedural hearing of payment arbitration and quality arbitration, not even when the claims in both quality and payment arbitration concern the same deliveries.

[8] "In this respect what is true in procedural law in general is also true in HFA proceedings, namely that proceedings are and remain independent. Joining them to hear them together is merely a matter of expediency. In the present case, the contractual prohibition of a set-off speaks against consolidating the proceedings. Hence, the buyer does not have the right to a sole proceeding and to having the payment and quality arbitrations decided on by the same arbitral tribunal. Also, the flexibility of this main feature of the HFA rules was clearly indicated by the German Supreme Court in its decision of 28 April 1960, VII ZR 99/59 (NJW 1960, 1296 ...)."²

[9] "The set-off for defects in the goods is inadmissible. All contracts [between the parties] contain the payment clause 'Net Cash against ...' and thus a contractual prohibition of set-off (BGHZ 14, 62; 23, 134; NJW 1976, 852; NJW 1985, 550; accord, in general, the practice of commercial arbitral tribunals, see the numerous decisions in HSG/RKS Volumes 1-6 Section J 5 a).

[10] "There are no circumstances objectively making the [seller's] request for payment appear to be 'abusive' (see the 'Cash against documents' clause in Sect. 13 Conditions of Business of the Waren-Verein of the Hamburg Stock Exchange).³

which in this respect codifies an expression of the principle of good faith). In particular, the counterclaim is not undisputed nor has it been established. It is not even quantified, that is, no decision thereon can be directly rendered...."

¹ Sect. 20(4) of the Hamburg Trade Usages (Platzusancen für den Hamburgischen Warenhandel) provides that the party-appointed arbitrators appoint a president if they cannot reach an agreement on the settlement of the dispute. If they cannot agree on a president, they shall request the Hamburg Chamber of Commerce to make that appointment. ² "In the ... decision of 28 April 1960, the Supreme Court held that practice has split the sole proceeding envisaged by Sect. 20 Hamburg Trade Usages in quality arbitration, leading to a contractual decision (Schiedsgutachten) and arbitral proceedings leading to an arbitral award. This separation makes the proceeding flexible, but requires the claimant to formulate its request to the other party pursuant to Sect. 20(2) precisely: if it only requests the appointment of a quality arbitrator (Schiedsgutachter), only a Schiedsgutachten not an arbitral award, can be rendered." Sect. 20 of the Hamburg Trade Usages provides in relevant part: "(1) Arbitration means the settlement of disputes by arbitration to the exclusion of state courts, as concerns not only quality disputes, but also all other controversies arising out of the transaction, in particular also legal issues, unless explicitly otherwise provided in the contract. (2) If there is an agreement for 'friendly arbitration', ' private arbitration ' or ' Hamburg arbitration', the claimant shall communicate the name of its arbitrator and request the other party in writing to appoint an arbitrator within a reasonable time limit [further defined later in the same paragraph]. (...)"

³ Sect. 13 of the Conditions of Business of the Waren-Verein der Hamburger Börse e.V. (Commodities Association of the Hamburg Stock Exchange) reads in relevant part: "13 Cash against documents. Other cash clauses. Payment from letter of credit. (1 ) Where 'cash against documents' terms have been agreed upon the buyer shall pay the agreed purchase price without delay upon delivery by the seller of all the contractual documents duly constituted in accordance with the contract. The buyer may neither set off nor withhold the purchase price. He has no right to refuse performance. In particular he may not make payment dependent on prior inspection of the commodities not even in the event that the commodities have already arrived at their destination. The buyer's obligation to pay is not affected by any claims, objections or pleas on the grounds that the commodities do not correspond to the contract description. Any claims, objections or pleas of the buyer are only to be considered if particular circumstances make the seller's demand for payment appear to be abusive; seller's demand for payment especially is to be regarded as being abusive if and as far as the buyer has set off a claim which is undisputed or has become res judicata...."

Referring Principles:

III.1 - Set-off