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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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 cocoa 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 decided 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.

[7] "The decision of the Hanseatic Court of Appeal of 9 February 1966 (4 U 300/65 - HSG A 2 No. 2 = AWD 1966, 120) 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,\(^3\)

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Referring Principles:

III.1 - Set-off