Ad hoc Arbitration: Arbitral Award, December 17, 2019
Seat: Spain
Parties´countries: Germany and Spain

The controversy arises between a party of a country A (seller) dedicated to the design, manufacture and commissioning of industrial plants and a party B (buyer) specialized in the supply of industrial plants. The parties entered into a contract entitled "Purchase order" under which Party A was responsible for the design, manufacturing, supply, inspection, testing, sea packing and/or preparation for transportation, transport and insurance up to delivery FCA Port in the country of A, of part of the Equipment and materials to be installed in a country C.

In addition, the contract established the obligation or possible contracting, as appropriate, of the on-site services (supervision and training of workers), as well as, subject to a negotiation of the price and a subcontract, to the erection, installation, pre-commissioning, commissioning and start up. The contract concluded is linked to another contract concluded between party B and a third party (C), the main contractor of the globally considered construction work, with numerous references between the contract object of the arbitration and the contract signed between parties B and C.

The two parties to the arbitration procedure request that the breach of the contract be declared by its counterpart: breach of the buyer as regards part of the payment of the contract price and the right to charge interest, and the breach of the seller of his contractual obligations, in particular, on delivery of part of the equipment, and certain lack of conformity of some of them. The buyer acknowledges that he owes some of the invoices although he considers that the set-off operates.

Among the various issues discussed, the legal nature of the contract was one of them. Party A considers it is a CISG contract, while party B supports the application of the national law of its country and considers the contract as turn-key contract and specifically a subtype of this, the work contract typified in national law, assimilating the type of contract with the one he has with C.

The sole arbitrator considers the application of the Vienna Convention to the case in question, and refers to numerous of its principles such as internationality, uniformity and good faith (art.7.1), citing scholars and case law. The arbitral award considers that the conditions of applicability that the Convention requires (arts.1.1 a), direct application of the CISG as both the countries of the buyer and the seller have ratified the Convention at the time of the conclusion of the contract, and particularly relying on art.3 CISG: the contract analyzed is a contract of sale (art.3.1) that includes certain services (art.3.2) that are not the main part of the obligations of the seller.

Of particular relevance is the unitary consideration of the contract and the application of the CISG on the basis of Art.3 CISG and with support in CISG-AC Opinion 4. A central element of the discussion regarding the legal nature of the contract was given by the scope of the obligations assumed under the contract and in particular if for the seller there was an obligation of supervision, training, erection, installation, preparatory work, commissioning and start-up of the equipment.

The sole arbitrator considered, based on CISG-AC Opinion No. 4 both on the basis of article 3.1 and article 3.2 CISG, the application of the CISG. The Convention allows mixed contracts of sale and services to be included within the scope of the Convention, so that if the part of the services is not the main part (preponderant part) of the contract, the Convention applies to the totality of the contract. In this way, the services that logically are an accessory and not the main part of the contract object of the arbitration are integrated within the broad concept of the contract of sale under the CISG. In addition, under the contract, the clause regarding the erection, installation and commissioning did not establish any price (unlike the contract between B and C), but left a subsequent negotiation and the conclusion of a sub-contract for these services.

The sole arbitrator also considered other principles to apply:

a) Principle of good faith in the interpretation and performance of the contract (art.7.1 CISG);
b) The doctrine of own acts and the principle of *venire contra factum propium* (art.29 CISG).
c) The principle of "the avoidance of business disruption and economic waste (Arts 25 and 77)": CISG-AC Opinion no 9, nº3.11 and 3.23.
d) The principle of preservation of the contract (arts. 19.2 and 21.2 CISG).
e) The principle of "favor executionis".
f) The principle of full compensation: CISG-AC Opinion No. 6, No. 1.
g) The duty or principle of mitigation in art.77: CISG-AC Opinion nº6, nº1.1.

The sole arbitrator also referred as to the proof of the damages to the principles of reasonableness and proportionality, as well as to the principle of certainty of the damages in such a way that the existence of the damage must be able to be determined with a reasonable degree of certainty and that, even when the amount of compensation for damages cannot be established with sufficient degree of certainty, it is at the discretion of the arbitral tribunal or the court to determine the amount of compensation, with support in Art.7.4.3 of the UNIDROIT Principles (2016).