

Case 2107: CISG 1(a); 2; 6; 7; 8; 9(1); 26; 33; 35(1); 45(1)(b); 46; 49; 51(1); 75; 77; 78; 79

Egypt: Cairo Regional Centre for International Commercial Arbitration

Case No.1527/2021

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A company with place of business in Italy (buyer) and a company with place of business in Egypt (seller) concluded, on 24 January 2021, a contract for the sale of diammonium phosphate (DAP) to be delivered by 2 March 2021. However, the seller only delivered part of the amount agreed upon and notified the buyer that, due to a price surge and the halt of production on the part of the manufacturer that supplied DAP to the seller, it was unable to ship the remaining amount of DAP agreed upon. The buyer deemed such action a breach of contract and, consequently, terminated the contract, concluded a cover purchase with another seller and initiated arbitral proceedings before the Cairo Regional Centre for International Commercial Arbitration. The buyer requested the arbitral tribunal to order the seller the payment of USD 369,600 amounting to the difference in DAP price, in addition to 5 per cent legal interest, calculated from the date of the purchase under the new contract.

Regarding applicable law, the arbitral tribunal noted that the parties had their places of business in different CISG contracting States and found that, as the parties had expressly indicated Egyptian Law as the applicable law, the CISG applied being an integral part of it and that, in the absence of the express or implied intention to exclude it, the CISG was applicable. The arbitral tribunal also noted that, in light of article 7 of the CISG, in the absence of Egyptian case law applying the CISG court decisions by other contracting States provided binding guidance.

Concerning the quantity of the goods to be delivered, the arbitral tribunal first noted that the seller did not object to the buyer's decision to select the carrier and the quantity of the product to be delivered. Considering articles 8(3) and 9(1) of the CISG, it noted that the parties had established a practice that the buyer determined the carrier and the quantity to be delivered, which was in the majority of cases never below a certain amount. The arbitral tribunal concluded that the seller had given the buyer and the supplier through correspondence the expectation of delivery of the quantity determined by buyer.

Regarding the seller's possible exemption from liability in light of the argument of the seller, that the change in circumstances qualified as hardship under domestic law leading to a renegotiation of the contract, the arbitral tribunal noted the differences in the notions of hardship under domestic law, the ICC Force Majeure Clause (ICC Clause) and article 79(1) of the CISG. Mindful that the parties had agreed to apply the ICC Clause, and in light of article 79(1) of the CISG, the arbitral tribunal indicated that the notion of hardship in the CISG did not allow renegotiating the contract and also highlighted that the CISG set a higher threshold for exemption of hardship than domestic law. Accordingly, the arbitral tribunal did not consider the price surge and the halt of production on the part of the supplier sufficient grounds to qualify as exempting impediments, and characterized such risks, including the supplier's position as the only DAP source in Egypt for the seller, as foreseeable and avoidable, so that the seller could have overcome the impediment, which was not beyond its reasonable control.

In addition, guided by article 35(1) of the CISG, the arbitral tribunal stated that, notwithstanding the assumption for the product to originate from Egypt, there was no evidence of an obligation to that effect. Furthermore, the tribunal did not consider the

differences between article 79(1) CISG and the ICC Clause as significant, namely, the inexistence in the CISG article of the word “reasonable” and the addition of “the effects” in the ICC Clause. By expressly mentioning that mandatory rules, i.e., the CISG, are not to be overridden, the ICC Clause, as chosen by the parties, did not exclude the CISG, placing the latter as the greater parameter for interpretation. In line with the predominant view of the judiciary and arbitral tribunals, the seller could not invoke its supplier’s default as the basis for an article 79(1) CISG exemption. Also, noting article 79(4) of the CISG concerning the obligation of notice to the buyer about the existence of an impediment, the tribunal noted the inadequacy of informing the buyer upon the latter’s inquiry. For the above reasons, the arbitral tribunal considered the force majeure argument raised by the seller to be unfounded.

As per the allocation of damages, the arbitral tribunal, guided by articles 33, 49(1)(b) and 51(1) of the CISG, found that the partial non-performance of the seller sufficed as a fundamental breach justifying the buyer’s avoidance of the contract, without the need for the buyer to establish an additional period for seller to deliver. Noting articles 75 and 77 of the CISG, the arbitral tribunal found that the buyer was entitled to terminate the contract and thereafter request damages for the cover purchase, and that it fulfilled its duty to mitigate the damages since, among others, a declaration of avoidance of the contract was communicated to the seller (article 26 of the CISG) and the substitute transaction and a notice thereof were carried out in a reasonable manner and time.

Since the buyer had prevailed in all claims, the arbitral tribunal ordered the seller to pay compensation and interests (article 78 of the CISG), applying the rate pursuant to Egyptian law. According to the arbitral tribunal, calculation of damages should begin from the date of the cover purchase only if this coincided with the date when the buyer could have used the money paid in excess for the cover purchase in a different manner.