

Case 93: CISG 1(1)(b); 7(2); 53; 58; 61; 74; 78

Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft - Wien; SCH-4366
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In 1990 and 1991, an Austrian seller and a German buyer concluded contracts for the sale of rolled metal sheets. The initial contracts provided that the goods were to be delivered "FOB Hamburg", by March 1991 at the latest. Later, the seller allowed the buyer to take delivery of the goods in installments. The buyer resold the goods and had to pay the price and the storage costs promptly after receiving each invoice. The buyer took delivery of some of the goods without paying, and refused to take delivery of other goods. Pursuant to an arbitration clause contained in the sales contract, the seller commenced arbitral proceedings, demanding payment of the price. In addition, the seller demanded damages, including those arising from a sale of the goods, which the buyer refused to accept, to a third party.

The sole arbitrator held that, since the parties had chosen Austrian law, the contracts were governed by CISG as the international sales law of Austria, a contracting State (art. 1(1)(b) CISG).

With regard to the goods delivered but not paid for, the arbitrator found that the seller was entitled to payment of their price (articles 53 and 61 CISG). Regarding the sale made by the seller in order to mitigate its losses, the arbitrator held that the seller had the right, and, presumably, the duty to mitigate its losses (art. 77 CISG). As a result, the seller was found to be entitled to the difference between the contract price and the substitute sale price.

The arbitrator further held that interest on the price accrued from the date payment was due (articles 78 and 58 CISG). Since the parties' agreement required the buyer to pay after receiving each invoice, interest accrued from the date of such receipt, which occurred within 10 days after issuance of each invoice.

Moreover, the arbitrator held that, since the interest rate was a matter governed but not expressly settled by CISG, it should be settled in conformity with the general principles on which CISG is based (art. 7(2) CISG). Referring to Arts. 78 and 74 CISG, the arbitrator found that full compensation was one of the general principles underlying CISG. It was also found that in relations between merchants it was expected that the seller, due to the delayed payment, would resort to bank credit at the interest rate commonly practiced in its own country with respect to the currency of payment. Such currency may be either the currency of the seller's country, or any other foreign currency agreed upon by the parties. The arbitrator observed that the application of art. 7.4.9 of the UNIDROIT Principles of International Commercial Contracts would lead to the same result. The interest rate awarded was the average prime rate in the seller's country (Austria), with respect to the currencies of payment (US dollars and German marks).