

Case 166: CISG 1(1)(b); 45(2); 61; 63; 74; 79

Germany: Schiedsgericht der Handelskammer Hamburg

- (a) 21 March 1996 (Award on substantive issues)
Published in German: Neue Juristische Wochenschrift (NJW) 1996, 3229
Commented on by Hardt in Neue Wirtschaftsbriefe 1996, 1925;
- (b) 21 June 1996 (Award on costs of proceedings)
Original in German; Unpublished

The claimant, a Hong Kong company, and the respondent, a German company, had concluded a general agreement for the exclusive delivery and distribution of Chinese goods. Under this agreement, the claimant was responsible for the business relations with Chinese manufacturers while the respondent was responsible for the distribution of the goods in Europe. On this basis, the parties concluded regularly separate sale of goods contracts. Owing to financial difficulties, a Chinese manufacturer could not deliver the ordered goods to the claimant, who consequently could not fulfill its contractual obligation to the respondent.

The claimant demanded payment of the sum due resulting from previously delivered goods. The respondent set off against this claim a damage claim for lost profit owing to the termination of the business relation with the claimant and refused to pay.

The arbitral tribunal applied the CISG as the relevant German law under article 1(1)(b) CISG. The arbitral tribunal upheld the claimant's demand for payment. It further held that the respondent could set off against the claimant a claim resulting from the breach of the relevant sales contract but not from the general distribution agreement.

With respect to the damages claim for the non-performance of the sales contract, the arbitral tribunal held that the contract could be declared void and damages could be claimed under article 45(2). It further held that a claimant could be deemed to have unlawfully refused performance if it made delivery dependent on payment of arrears from previous sales contracts, even if the parties had agreed on cash payment in advance. The arbitral tribunal also held that the respondent's damage claim was not precluded under article 79 CISG since the financial difficulties of the claimant's Chinese manufacturer were within the sphere of the claimant's responsibility.

With respect to the general distribution agreement, the arbitral tribunal held that the damages claim was without sufficient merit since it was not a consequence of the breach of a sales contract by the claimant in the sense of article 74 CISG.

The arbitral tribunal, in rendering its award on the costs of the proceedings, held that the claimant could claim its attorney's fees for the arbitration proceedings as damages according to articles 61 and 74 CISG. It also held that, if the respondent refused to pay because it set off an alleged claim for damages, the claimant did not have to fix an additional period of time for payment according to article 63 CISG.