

Case 293: CISG 8; 26; 45(1)(a); 49(1)(a); 73(1); 73(2); 81(2); 84(1)

Germany: Schiedsgericht der Hamburger freundschaftlichen Arbitrage (Arbitral Award)

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A German buyer, plaintiff, sued a Czech seller, defendant, for restitution of a payment made in advance for a second (out of fifteen) delivery of cheese, which had been cancelled by the seller.

The arbitral tribunal (the “tribunal”) held that it had jurisdiction in the case in accordance with the arbitration clause agreed upon by the parties. In the absence of an express choice of law, the tribunal ruled that, by choosing a German place of arbitration, the parties implicitly agreed upon German law to govern the contract, and thus the CISG was applicable.

The tribunal found that the buyer was entitled to restitution of the advance payment under article 81(2) clause 1 CISG.

In view of the fact that the parties had agreed that the buyer should collect the cheese in 15 deliveries, the contract was construed to be a contract for delivery of goods by instalments under article 73 CISG.

The tribunal held that the buyer had the right to declare the contract avoided under articles 45(1)(a) and 49(1)(a) CISG. Referring to article 8 CISG, the tribunal found that an agreement on advance payment does not allow suspension of the subsequent delivery of the goods concerned on grounds such as settlement of other claims. When refusing delivery on such grounds, the seller was considered to be in fundamental breach of contract, irrespective of the existence of any other claim. Accordingly, the tribunal held that the buyer was entitled to declare the contract avoided, even without fixing an additional period of time for delivery. Although a fundamental breach of contract by one party in respect of an instalment gives the other party the right to declare the contract avoided with respect to that instalment only (article 73(1) CISG), the tribunal found that the buyer was entitled to declare the entire contract avoided, since the seller had refused to deliver further installments (article 73(2) CISG).

The tribunal further held that the buyer’s letter stating that no further business would be done with the seller had met the conditions of a declaration of avoidance under article 26 CISG.

Finally, the tribunal awarded interest from the date on which the advance payment was made according to article 84(1) CISG. The interest rate was determined under German law as applicable under the private international law provisions.