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| Seat of Arbitration | Zurich (Switzerland) |
| Tribunal | ICC International Court of Arbitration |
| Date of the decision | Jan 1997 |
| Case no./docket no. | 8786 |
| Case name | *Clothing case* |

[...]

None of the parties alleges that there has been delivery of the samples until December 31, 1994. Defendant concludes from this fact that Claimant has committed a fundamental breach of contract in the sense of Art. 25 CISG... Defendant thereby relies upon the GDI, according to which delayed delivery is a fundamental breach of contract. It is not clear, however, whether this provision of the GDI also applies to delivery of samples. It is without doubt that the GDI apply to the delivery of Goods. Goods are defined as the merchandise to be delivered to (Defendant). Samples, however, do not qualify as 'Goods in the sense of the GDI. This follows from the context of the GDI because Samples, as far as they are addressed by the GDI, are explicitly mentioned... Furthermore, it has to he mentioned that in the Orders only the delivery of the goods themselves is addressed under the heading Delivery date. On the other hand, the remarks in the Orders regarding samples do not contain the term Delivery. However, the question whether late delivery of samples constitutes a fundamental breach of contract or not may remain open. As will be discussed below, Claimant is not only responsible for the delayed delivery of samples hut also for a delay in the delivery of the goods themselves.

Claimant knew and had to anticipate that Defendant would not be able to give its green light for production by March 29... if Claimant delivered its samples only on March 10, respectively March 23 . . . and if the samples were defective (at least) with respect to the first series of samples. As late as March 29 ... Claimant declared that delivery of the products within the time limit set in the Orders had become impossible. Based on reasonable expectations and the ordinary course of events it was the late delivery of samples which were (at least partly) defective which caused the impossibility to deliver the products within the agreed time limit. The delayed delivery of samples by Claimant adequately caused its failure to deliver the products in time (cf. BGE [Rulings of the Swiss Federal Court] 119V 401 Ss.; Peter Gauch/Walter R. Schluep, Schweizerisches Obligationenrecht Allgemeiner Teil, Vol. II 6th ed. Zurich 1995, para. 2715). It is Claimant, and not Defendant, who has to bear the responsibility for the untimely examination of samples. The same holds true for the failure to deliver the products at the time agreed. This follows from Claimant's own admission that timely delivery of the products became impossible as a consequence of the late examination of samples.

However, the question may remain open whether Defendant in the present case needed more time for the examination of the samples as usual and, as a consequence, caused the late de-

livery of the products. Based on Art. 61 and 62 CISG, Claimant may only require from Defendant to accept delivery of the products later than the agreed date if Claimant can prove that Defendant has breached a contractual obligation. However, Claimant has not been able to prove such breach of a contractual obligation by Defendant (i.e. Art. 60 CISG), not even on a prima facie basis, with the documents submitted.

It does not become clear, based on Claimant's allegations, how Defendant would have breached its obligations under Art. 71 CISG... According to this provision, a party is entitled to suspend fulfilling its performance under an agreement if the other party is in fundamental breach of contract. In the present case it was the Claimant and not the Defendant which committed a fundamental breach of contract by not delivering the products at the time agreed upon. In addition, Defendant did not suspend its performance under the agreement but terminated the agreement in accordance with Art. 72 para. 1 CISG. Art. 35 and 39 CISG to which Claimant refers... are not applicable to the present situation. Those provisions are applicable to situations in which delivery of the products has already occurred. However, in the present case there has never been delivery of the products at all.

In its letter dated March 29... Claimant declared that, as a consequence of delayed examination of its samples, Claimant would not be in a position to deliver the products at the agreed date, i.e. that it would breach its contractual obligations. The agreement between the parties stipulates clearly that the products have to be delivered between April 5 and 7... And Art. 33 CISG states: The seller must deliver the goods: (a) if a date is fixed or determinable from the contract, on that date. By declaring that it would be unable to deliver the products on time, Claimant committed an anticipatory breach of contract in the sense of Art. 71 ss. CISG. In view of Claimant's clear denial to deliver the products at the date agreed upon the question may remain open whether Claimant would have been able to manufacture the products within four days or not.

According to the GDI, the delayed delivery of products is explicitly defined as a fundamental breach of contract. The applicability of the relevant provisions of the GDI has not been questioned by any of the parties. Therefore, by declaring not to deliver the products at the date agreed upon, Claimant committed an anticipatory and fundamental breach of contract. It should be noted that delayed delivery is considered a fundamental breach of contract not only under the GDI but as well under the CISG. Art. 25 CISG states that delayed delivery constitutes a fundamental breach of contract if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind! in the same circumstances would not have foreseen such a result. In the event of a delivery of seasonal products such as in the fashion industry, late delivery is a typical case of fundamental breach of contract (cf. v. Caemmerer/Schlechtriem, Art. 25, para. 14; Fritz Enderlein, Die Verpflichtung des Käufers zur Einhaltung des Lieferzeitraums und die Rechte des Käufers bei dessen Nichteinhaltung nach dem UN-Übereinkommen über Vertrage uber den internationalen Warenkauf Praxis des Internationalen Privat und Verfahrensrechts, IPRax, 1991, page 313 ss). In a decision rendered by the German Oberlandesgcricht Hamm dated December 8 1980 regarding the delivery of modische Damenoberkleidung (fashionable ladies wear) it has been stated: Bei Saisonware

bewirkt Verzögerung regelmässig wesentlichen Vertragsbruch (in the event of seasonal products delay generally constitutes fundamental breach of contract; quotation at Enderlein, page 315; cf. v. Caemmerer/Schlechtriem, Art. 25, para. 14). This holds particularly true in the present case because the products obviously were part of the spring collection and the sale was intended in the turn over peak time around Easter vacation. Accordingly, the contractual delivery day has been fixed approximately one week in advance of the Easter Weekend.

Summarizing the above, it may be stated that with its delayed delivery of defective samples Claimant has itself caused the impossibility of delivery of the products at the date agreed upon. By informing Defendant that it would not meet the delivery deadline Claimant committed an anticipatory and fundamental breach of contract.

[...]

Claimant has made it clear in its fax dated March 29... that it would not be able to deliver the products at the date agreed upon and, therefore, that it would commit a fundamental breach of contract. According to Claimant's own statement of facts, it received, within two hours from its own fax, fax No of Defendant in which the latter declared to terminate the agreement. .. The termination was based on delay... Art. 72 para. 1 CISG states: If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach of contract, the other party may declare the contract avoided.

Defendant terminated the agreement based on delay, i.e. based on late delivery of Orders. The termination of the agreement by Defendant therefore occurred on the basis of a fundamental breach of contract. Because Claimant itself declared that it would not meet the delivery deadline Defendant was under no obligation to ask for a bond from Claimant in accordance with Art. 72 para. 2 CISG (Art. 72 para. 3 CISG), as Claimant has alleged. Equally, Claimant's references to Art. 47 CISG..., Art. 46 and 49 CISG. . . are not applicable. The buyer is under no obligation to set an additional time limit to seller if seller has committed a fundamental breach of contract. Furthermore, Claimant's reference to Art. 26 CISG... is without merit. Art. 26 CISG states: A declaration of avoidance of the contract is effective only if made by notice to the other party In the present case, termination of the agreement occurred by the telefax No... which has been submitted as evidence by Claimant itself. Claimant has further admitted to have received this telefax.

Art. 7 para. 1 CISG states: In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade. Claimant maintains that Defendant has acted in bad faith when terminating the agreement because, on earlier occasions, delayed delivery has been accepted by Defendant. . . Claimant appears to maintain that with its termination Defendant has violated the principle of bona fide as expressed in Art. 7 para. 1 CISG. This principle also includes the prohibition of abuse of right, in particular the general concept non conceit venire contra factum proprium (cf. Collection of ICC Arbitral Awards 1986-1990, Deventer/Boston 1994, Case no. 4381, page 272 and Case No. 5103, page 369; von Caemmerer/Schlechtriem, Art. 7, para. 37; Klaus Peter Berger, International Economic Arbitration, Deventer/Boston 1993, page 141, 166, 184, 266). However, the fact that Defendant has not insisted on delivery dates agreed upon in earlier examples mentioned by Claimant hut

has formally granted an additional time for delivery may not result in a prohibition for Defendant to insist on timely delivery in the future. This holds particularly true because Defendant, when extending time limits for delivery, always explicitly mentioned the urgency of Delivery.

[...]

Art. 74 sentence 1 CISG states: Damages for breach of contract by one party consist of a sum equal to the loss of profit, suffered by the other party as a consequence of the breach. Damages in the sense of Art. 74 CISG include compensation for suffered losses (damnum emergens) and, on the other hand, compensation for lost profits (lucrum cessans; cf. v. Caemmerer/Schlechtriem, Art. 74, para. 13 Ss.; Karl H. Neumayer/Catherine Ming/François Dessemontet, Convention de Vienne sur les contrats de vente internationale de marchandises, Commentaire, Lausanne 1993, Art. 74, para. 1 Defendant claims the following elements as damages in the sense of lost profits (lucrum cessans).

Defendant's claim for lost profits in the amount of... appears reasonable in the light of the foregoing.

In addition to the lost profits referring to above, Defendant further claims Indirect Loss of Profit in the amount of... In light of the fact that the products to be delivered by Claimant were only part of the total [collection] and that the expected turn-over to be achieved with the products to be delivered by Claimant would have amounted to ... it may he concluded with reasonable certainty that Defendant suffered additional damages in the amount of at least . . . in light of Art. 42 para. 2 CO...

Defendant furthermore claims compensation for damages suffered in connection with travel costs (damnum emergens).

Defendant further claims to be compensated for design expenses ... Based on the Arbitral Tribunal's knowledge about design costs in the fashion industry the design expenses of... per design appear to he reasonable.

[...]

In Art. 74 second sentence CISG the damaged party's claim for compensation is defined as follows: Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters of which he then knew or ought to have known, as a possible consequence of the breach of contract.

Claimant has submitted several documents which prove that, in earlier cases, Defendant had accepted delayed delivery without claiming compensation of damages due to delayed delivery. These documents, however, only prove that Claimant did not foresee that Defendant would actually claim damages suffered due to delayed delivery in the present case. But the documents submitted by Claimant do not prove this for the relevant point in time for the foresee of damages, i.e. the time of the conclusion of the agreement (Art. 74 CISG; cf. von Caemmerer/Schiechtriem, Art. 74, para. 37; Neumayer/Ming/ Dessemontet, Art. 74, para. 3; H. Ercüment Erdem, La livraison des marchandises selon la Convention de Vienne, Diss. Fribourg 1990, para. 1090). More importantly the documents submitted by Claimant did not

prove that the risk for Defendant to suffer damages as a consequence of breach of contract was unforeseeable for Claimant. Claimant was well aware of the importance to meet delivery deadlines for Defendant: ...we all know that to he able to sell the goods which are left at the end of the season can only be sold by reducing the price of the goods ... It was, therefore, foreseeable for Claimant that Defendant would suffer losses of profits because Claimant knew that the clothes manufactured by itself were destined to be sold in Defendant's retail stores (cf. von Caemmerer/Schlechtriem, Art. 74, para. 41; Neumayer/Ming/Dessemontet, Art. 74, para. 5).

[...]

Claimant alleged in its rebuttal... to be in the possession of considerable production capacities. However, at the same time, Claimant makes it clear that orders have to be received within three to four months in advance in order to meet delivery deadlines. Claimant thereby admits that it would have been impossible for Defendant to have the Orders in dispute produced by another manufacturer on such short notice. Due to the fact that the clothes ordered from Claimant were part of a [collection] with distinctive colors, Defendant further was not in a position to buy the products ordered from another source within the short period available after Claimant declared that it would not meet its delivery deadline. Therefore, Defendant does not have to bear a reduction of the compensation for damages in the sense of Art. 75 or 76 CISG.

Art. 77 CISG states: A party who relies on a breach of contract must take such measures as a reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.

Claimant does not explicitly allege that Defendant has omitted to take measures to mitigate the loss. However, this allegation is made indirectly in Claimant's briefs.

However, the documents submitted to the Arbitral Tribunal do not show that Defendant has omitted such measures. [Defendant's agent Y learned on March 24. about the fact that Claimant had difficulty to meet the delivery deadline. . . On the following working day... [Defendant's agent Y] submitted the proposal to [sub-agent X] to accept the delivery despite the delay, however, only if Claimant would agree to a price reduction in the amount of approximately 10%. It is not conceivable that [sub-agent X] did not transmit this proposal to Claimant. The proposal would not have been unacceptable for Claimant by its own admission: ... we all know that to be able to sell the goods which are left at the end of the season can only be sold by reducing the price of the goods...

Defendant, therefore, has submitted sufficient evidence for the fact that it would have allowed delayed delivery to Claimant although not being under any obligation to do so. Claimant has not submitted any evidence that Defendant has omitted measures to mitigate the loss. Therefore, the compensation for damages claimed by Defendant may not he reduced based on Art. 77 CISG...

Furthermore, Claimant's reference to Art. 79 CISG does not help its position... According to this provision, a party is not liable for a failure to perform any of his obligations if he proves

that the failure was due to an impediment beyond his control.... The performance of Claimant's main obligation was within Claimant's control. Had Claimant delivered the samples in time and without defect the delivery deadlines for the products could have been met. Claimant has not submitted any proof that its failure was due to an impediment beyond its control.

Summarizing the above it may be stated that Claimant has to compensate Defendant for damages suffered (lost profits and actual damages) in the amount of... Based on the allegations and documents submitted by Claimant there is no basis for any reduction of this amount.

[...]

Defendant claims interest at the rate of 5% per annum for all amounts claimed, starting as of... (filing of the Request for Arbitration). The interest claimed by Defendant is not explicitly contested by Claimant. However, Claimant contests any claims submitted by Defendant and, therefore, it has to be concluded that this also applies to interest. Defendant has, for the first time, submitted claims against Claimant with a defined amount in its Rejoinder dated..., i.e.,, when it substantiated its Answer and Counterclaim. Therefore, Claimant has only known about the exact amount claimed by Defendant at this date. Consequently, Defendant may not claim interest on the principal amount prior to [date of Rejoinder]. The obligation of the parties to pay for the arbitration costs as well as Claimant's obligation to pay part of the legal costs incurred by Defendant are created by this Final Award. Therefore, no interest shall be payable on these amounts prior to the entering into force of this award.}}