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Seat of the arbitration	Beijing (China)
Arbitral Tribunal	China International Economic & Trade Arbitration Commission (CIETAC)
Date of the decision	30 January 1996
Case no./docket no.	CISG/1996/05
Case name	*Compound fertiziler case*

Translation[*] *by Zheng Xie*[**]

Translation edited by Meihua Xu[***]

China International Economic & Trade Arbitration Commission CIETAC (PRC) Arbitration Award

Compound fertilizer case (30 January 1996)

China's International Trade and Economic Arbitration Commission (hereafter, "the Arbitration Commission") accepts the present case according to the arbitration clause in Contract No. 94 ITTD 003 F signed by Claimant Xiamen XX Trust (Group) Stock Corporation [Buyer] and Respondent Australia XX International Ltd. [Seller] on 24 March 1994 and the written arbitration application submitted by [Buyer] on 25 October 1994. 1

The Presiding Arbitrator Ms. P appointed by the Chairman of the Arbitration Commission according to the Arbitration Rules, the Arbitrator Mr. A appointed by [Buyer], and the Arbitrator Mr. D appointed by Respondent formed the Arbitration Tribunal on 7 March 1995 to hear the case. 2

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[*] All translations should be verified by cross-checking against the original text. For purposes of this translation, Claimant of the People's Republic of China is referred to as [Buyer]; Respondent of Australia is referred to as [Seller]. Amounts in the currency of the United States (*dollars*) are indicated as [*US $*]; amounts in the currency of the People's Republic of China (*renminbi*) are indicated as [*RMB*].

[**] Zheng Xie, LL.M. Washington University in St. Louis, LL.M., BA in Economics, University of International Business and Economics, Beijing.

[***] Meihua Xu, LL.M. University of Pittsburgh School of Law on an Alcoa Scholarship. She received her Bachelor of Law degree, with the receipt of Scholarship granted by the Ministry of Education, Japan, from Waseda University, Tokyo, Japan. Her focus is on International Business Law and International Business related case study.

The Arbitration Tribunal held a court session in Beijing on 24 July 1995. Both parties sent representatives to present at the session. The representatives made oral statements and arguments, and answered the Arbitration Tribunal questions. After the session, the parties submitted supplementary materials. 3

The case has been concluded. On 5 December 1995 and 5 January 1996 the Arbitration Commission prolonged the hearing of the case to 7 February 1996 according to Article 52 of the Arbitration Rules. The Arbitration Tribunal now hands down the award by consent. 4

The following are the facts, the Arbitration Tribunal opinion and the award. 5

FACTS

On 24 March 1994, [Buyer] and [Seller] executed Contract No. 94 ITTD 003 F, which stipulates that [Seller] deliver 20,000 tons of compound fertilizer N.P, K. 16-16-16. The contract includes the following terms: 6

Price: US $161.50 per ton

Total contract price: US $3,230,000

Time of shipment: Before 15 June 1994

[Seller] did not deliver the goods. [Buyer] submitted its arbitration application to the Arbitration Commission. 7

[Buyer]'s position

[Buyer] asserts:

After signing the contract, [Buyer] issued a letter of credit [L/C]. On 16 and 28 May 1994, [Buyer] urged [Seller] twice by mail to deliver the goods on time. However, after the time of delivery stipulated in the contract, [Seller] still did not deliver the goods. On 3 June, [Seller] requested release of its liability for breach due to force majeure, but according to the related materials, there were no matters which constitute force majeure during the period of delivery stipulated in the contract. In addition, [Buyer] did not receive any evidence from [Seller] to prove force majeure. [Buyer] had resold 10,000 tons of the goods under the contract to Xiamen XX Raw Material for Production Corporation, and the other 10,000 tons to Shenzhen XX Raw Material for Production Corporation. When [Buyer] knew that [Seller] could not deliver the goods on time, it took measures to avoid enlarging the damage, but was unable to make any agreement due to the problems of season and price. [Buyer] suffered severe damages due to [Seller]'s breach. Accordingly, [Buyer] submits arbitration application for the following claims: 8

1. Fee for issuance of the L/C, renminbi [RMB] 42,408.75;

2. Interest on the guaranty bond for issuance on the L/C, US $35,122.93;

3. Anticipated profits, RMB 1,800,600;

4. The difference between the contract price and market price, US $260,000.

[Seller]'s position

[Seller] asserts:

The goods under the contract for [Seller]'s performance were bought by [Seller] from Tectrade Corporation, Italy. Because Tectrade Corporation did not deliver the goods, [Seller] could not deliver. Moreover, [Seller] had notified [Buyer] before the time of shipping that it could not deliver the goods on time, and requested that [Buyer] take measures to mitigate damages. [Buyer] did not take measures to avoid enlarging the damages, so it should be liable for the damages. To [Buyer]'s claims, [Seller] asserts: 9

1. *Fee for issuance of the L/C and interest on the guaranty bond for issuance on the L/C*: If [Buyer] claims loss of profits, [Buyer] should not claim this fee and interest.

2. *Anticipated profits*: The rate of profits claimed by [Buyer] is 6.41%. [Buyer] wants to make an exorbitant profit. [Buyer]'s evidence for profits is not sufficient. Furthermore (because of import quotas), it is illegal to sell 10,000 tons fertilizer to Shenzhen. Thus, [Seller] should not pay for such profits.

3. *The difference between the contract price and the market price*: [Buyer] neither sent written declaration that the contract is avoided, nor did it declare the contract avoided. Thus, [Buyer] has no right to claim for the difference between the contract price and the market price according to United Nations Convention on Contracts for the International Sale of Goods (CISG).

[Seller] further alleges that [Buyer]'s damage is trivial, but [Seller] agrees to indemnify it within 2% of the contract price. 10

THE ARBITRATION TRIBUNAL OPINION

1. Applicable law

The parties did not stipulate the applicable law in the contract. Because China and Australia are Parties to United Nations Convention on Contracts for the International Sale of Goods (CISG), and the parties' application and defense materials cite the articles of the CISG, the CISG applies to this case. 11

2. [Seller]'s liability for breach of contract and force majeure defense

The basic obligation of the [Seller] is to deliver the goods. In fact, [Seller] did not perform such obligation at all. According to Article 25 of CISG, [Seller]'s failure to deliver the goods, which substantially deprives [Buyer] of what it is entitled to expect under the contract, is a fundamental breach. Although it is the Italian Corporation that did not deliver the goods, which [Seller] could not control, it is not related to this case, and [Seller] can claim for damages from the Italian Corporation. In this case, [Seller] is liable to [Buyer] because of its non-delivery. 12

3. Avoidance of the contract and the declaration of avoidance

Under the circumstances of [Seller]'s breach, according to Articles 49(1), 51(2) and 72(1), [Buyer] had the right to declare the contract avoided. In fact, on 2 June 1994, [Seller] wrote to [Buyer] stating: 13

"... It is impossible to deliver the goods. We will try to find other sources, but because it is hard to find such goods, the possibility is low ... Due to the above reasons, [Buyer] needs to make arrangements for non-delivery (including bank guarantee, etc.)"

This fax shows that [Seller] expressed clearly that it would not perform its delivery obligation. According to Article 72(3), under such circumstances, the party intending to declare the contract avoided need not notify the other party. 14

- On the same day, [Buyer] informed [Seller], "Because it is impossible to deliver the goods under Contract No. 94 ITTD 003 F ... On the basis of the result of non-delivery, [Buyer] officially requests [Seller] indemnify for the damages," instead of requiring [Seller] to deliver the goods, which means requiring not for delivery, but for compensation.

- On June 3, [Seller] wrote to [Buyer] again requesting resolution of the problem of delivery according to the force majeure clause, which demonstrates that [Seller] would not perform its obligation of delivery. On the same day, [Seller] wrote to [Buyer] to cancel the L/C under the contract, which shows that [Seller] voluntarily requested or agreed that [Buyer] cancelled the L/C and need not perform its obligation of payment.

Thus, the basic obligations of the parties -- [Seller] delivering the goods and obtaining payment; [Buyer] paying the price for the goods and taking delivery of them -- were denied or cancelled. 15

Accordingly, although the parties did not use the words "avoiding the contract" or "declaring the contract avoided", the intention of the parties to avoid the contract is clear; [Buyer] need not officially declare the contract avoided again. 16

4. [Buyer]'s resale of the goods at a high price ([Seller]'s allegation of an exorbitant profit) and [Seller]'s allegation of illegality (said to be due to import quotas)

The Arbitration Tribunal notes that according to [Seller]'s calculation, [Buyer] bought the goods at US $3,230,000, and resold at RMB 34,000,000, with a gross profit of 19.21% and net profit of 6.41% (according to [Buyer]'s calculation, the net profit is 5.37%). However, [Seller] did not provide any evidence to prove its assertion that "the gross profits for bulk commodities shall not exceed 3%", and that otherwise it is an exorbitant profit. 17

The *Import Quota for General Commodity Interim Management Measures* provided by [Seller] prohibits selling import quota without approval, but does not prohibit a company with an import quota from reselling the imported goods for adjusting short or extra. 18

5. [Buyer]'s duty to mitigate damages

The Arbitration Tribunal notes that [Seller] has criticized [Buyer] for failure to mitigate damages, but it does not request a deduction of the amount by which the damages could have been reduced. According to the material relevant to the purchase of substitute goods provided by [Buyer], the Arbitration Tribunal finds that [Buyer] has made efforts to mitigate damages, but failed. 19

6. [Buyer]'s claims

(1) The fees for issuing the L/C and correspondence. Under normal circumstances, [Buyer] would have to pay the fees for issuing the L/C and correspondence, but due to [Seller]'s breach, the fee for issuing the L/C becomes [Seller]'s loss, which shall be indemnified by [Seller]. However, [Buyer] has deducted such fees as costs to calculate anticipated profits, so such fees shall not be indemnified as loss once more. 20

(2) Interest on the guaranty bond for issuance on the L/C. [Buyer]'s claim for interest on the guaranty bond for insurance on the L/C is for interest on loans when the interest on guaranty bond for insurance on the L/C is deducted (see [Buyer]'s supplementary opinions on 2 March 1995). [Buyer] used a bank loan instead of its own capital to import the goods from a foreign country. The Arbitration Tribunal holds that [Buyer]'s claim for the interest on the loan is not supported, because no law supports it. 21

(3) The difference between the contract price and the market price. According to Article 76 CISG, when the contract is avoided, [Buyer] is entitled to the difference between the price fixed by the contract and the current price at the time of avoidance, but the Arbitration Tribunal holds that [Buyer]'s evidence for the market price is not authoritative and does not reflect the market price correctly. Thus, the Arbitration Tribunal cannot support [Buyer]'s claim for US $260,000, the difference between the contract price and the market price. 22

(4) Anticipated profits. According to Article 74 of CISG, the breaching party shall indemnify the aggrieved party for actual loss including loss of anticipated profits. Anticipated profits are net profits, which are anticipated gross profits deducting fees payable. 23

After examining the materials submitted by both parties, the Arbitration Tribunal concludes that [Buyer]'s calculation by deducting fees payable from the anticipated profits is reasonable. Thus, the Arbitration Tribunal supports [Buyer]'s claim for the anticipated profits, RMB 1,800,600. 24

7. Arbitration fee

[Seller] shall pay the entire arbitration fee of this case. 25

AWARDS 26

1. [Seller] shall pay [Buyer] RMB 1,800,600, the loss of anticipated profits due to its breach.

2. [Buyer]'s other claims are dismissed.

3. [Seller] shall pay the entire arbitration fee of this case.

The above amount shall be paid before 15 March 1996. 27

This is the final award. 28