

Russian Federation arbitral proceeding 98/1998 of 24 November 1998

Translation [] by Serge Lapine [**]*

1. SUMMARY OF RULING

1.1 Existence in the arbitration clause of the indication on the friendly settlement of the dispute before its submission to the International Commercial Court of Arbitration at the Chamber of Commerce and Industry of the Russian Federation (hereinafter the Tribunal) does not deprive the Claimant [seller] of the right to bring suit if the Respondent [buyer] tries to avoid such friendly settlement.

1.2 The Convention on Contracts for the International Sale of Goods 1980 (hereinafter Vienna Convention 1980) is considered to be applicable in the case since the parties' places of business are located in Contracting States that are Parties to this Convention. Pursuant to Article 166(1) of the Fundamentals of Civil Law of the USSR 1991 (hereinafter FCL 1991), German law is considered to be applicable as subsidiary law being the law of the seller.

1.3 Capacity of a legal person is to be determined under the law of the country where it is established. Accordingly, the law of this country determines the limits of power which a legal person can delegate to its employees or other persons.

1.4 Empowering the representative to bring the claim on behalf of a legal person, including the right to sign the brief, does not mean the transfer of the rights and obligations under the contract to a third person and accordingly does not require the consent of the other party to the contract when this contract prohibits such transfer without such consent.

1.5 A party is not relieved from the responsibility because of the circumstance about which it knew or ought to have known at the time of conclusion of the contract and where it did not make any effort to avoid or overcome this circumstance.

1.6 Having violated the principle of good faith in international trade, the [buyer] made himself responsible for the consequences of this violation.

1.7 A legal person bears responsibility for its employees' actions which lead to non-fulfilment or inappropriate fulfilment of obligations.

1.8 In the absence of proof of the officials' relevant competence, the avoidance of contract is considered to be unaccomplished. Accordingly, the sanctions provided by the contract for the case of its avoidance cannot apply.

1.9 Since the [buyer] delayed the payment, he is to pay to the [seller] the fine fixed in the contract for such cases.

2. PLEADINGS

The suit was brought by a German company [seller] against a Russian company [buyer] because of the latter's refusal to make payment under the contract signed by the parties on 28 March 1997 which provided for payment in instalments for the equipment.

On 3 April 1997, the [buyer] notified the [seller] that he would not be able to pay the first instalment provided by the contract in time because of circumstances beyond [buyer]'s control as he needed a special licence of Central Bank of the Russian Federation but would not be able to get it in time. That is why [buyer] asked either to postpone the date of the first instalment to 1 July 1997 or to conclude a contract of delivery to the [seller] of goods produced by the [buyer].

Later on, by the letters of 11 and 17 April 1997, the [buyer] reaffirmed the existence of *force majeure* and, referring to Article 9 of the contract, dealing with such circumstances, asked the [seller] to communicate his decision.

By letters of 15 and 28 April 1997, the [seller] proposed to the [buyer] a new schedule of payments and declared that he could not consider the [seller]'s difficulties as *force majeure*. [Translator's note: this is a typing error; the intent is, of course, to state that [seller] would not consider [buyer]'s difficulties a case of *force majeure*.]

By the letter of 7 May 1997, the [buyer] declined the [seller]'s proposals for a new schedule of payments and declared that he considered this contract cancelled since the circumstances of *force majeure* had lasted for more than a month.

In response to this declaration, the [seller] sent to the [buyer] his claim of 8 May 1997 requiring the [buyer] to pay the fine of 10% of the sum of the contract fixed in its Article 11 for cases of its cancellation as he did not consider the circumstances invoked by the [buyer] as *force majeure* and they were not part of the circumstances listed in Article 9 of the contract.

As the [buyer] declined the claim by the letter of 19 May 1997, the [seller] seized the Tribunal with the claim to exact the fine.

The [buyer] produced a testimonial where he asked to reject the claim alleging that the [seller]'s brief was signed by an inappropriate person and because the [seller] transferred the right to claim exaction of the fine to a third person without the [buyer]'s consent in violation of Article 11 of the contract.

At the hearing of the Tribunal, the [buyer]'s representative added to the objections contained in the testimonial reference to the fact that persons with whom the [seller] had correspondence were not empowered by the [buyer] either to change the conditions of the contract, or to avoid it, or to settle disputes. In [buyer]'s opinion, the [seller] did not follow the procedure of friendly settlement provided by the contract before bringing the suit before the Tribunal and, accordingly, the [seller] has no right to bring such suit. The [seller]'s representative did not agree with the [buyer]'s arguments and asked to satisfy the claim.

3. AWARD

The Tribunal's finding contained the following main points:

3.1 The arbitration clause contained in Article 10 of the above mentioned contract provided for settlement of disputes arising between the parties in the International Commercial Court of Arbitration at the Chamber of Commerce and Industry of the Russian Federation. Accordingly, the Tribunal is competent to hear the present case.

Because of the circumstances cited below, the [buyer]'s arguments that the [seller] has no right to bring the claim cannot be taken into account.

3.2 Considering the issue on applicable law, the Tribunal took the following position. At the time of conclusion of the contract between the parties, Russia and Germany were Contracting Parties to the Vienna Convention 1980. Under Article 1(1)(a) of this Convention the relations between the parties are guided by its provisions. Under Article 7(2) of the Vienna Convention 1980, in determination of the law applicable to questions not expressly settled in it which cannot be settled in conformity with the general principles on which the Convention is based, the Tribunal referred to a conflict of law rule of Article 166(1)(1) of FCL 1991. This rule provides for application of law of the country where the seller is established. Since the [seller] is established in Germany, German law must apply.

3.3 The [buyer]'s arguments that the [seller]'s brief was signed by an inappropriate person and that the [seller] transferred the right to claim exaction of the fine to a third person without the [buyer]'s consent in violation of Article 11 of the contract cannot be taken into account. First of all, the file contains the [seller]'s proxy of 27 February 1998 giving the person who signed the [seller]'s brief the right to bring before the Tribunal the suit against the [buyer] with the right to sign the brief. Second, Article 11 prohibits "transfer to third persons or companies of the rights and obligations stipulated in the present contract without the written consent of both of the parties." In the present case, there was no transfer of rights or obligations *under the present contract*. The [seller] gave the proxy of 11 August 1998 with the right to represent the [seller]'s interests in the present case before the Tribunal to the person who signed the brief and to another person.

3.4 The Tribunal notes that the [buyer] did not submit evidence of existence of circumstances relieving him from the responsibility for non-execution of his obligations which fulfilled the requirements of Article 9 of the Contract entitled "*Force majeure*". Under this Article, the party can be relieved from the responsibility only in case of certain circumstances "arising after the conclusion of the present contract". However, when concluding the contract on 28 March 1997, the [buyer] ought to have foreseen that for its execution he would have to get the license of the Central Bank of the Russian Federation. This procedure is provided by the Regulation of 26 July 1995 on the Mode of Execution of the Monetary Control over the Legitimacy of Payments in Foreign Currency for Imported Goods adopted by the Bank of Russia and the State Customs Committee of the Russian Federation (letter of the Bank of Russia of 15 November 1995 No. 208). And it follows from the [buyer]'s letter of 7 April 1997 that the [buyer] did not apply for such licence at all, referring to the fact that he would have no chance to get it. Moreover, the [seller] by his fax of 15 April 1997 proposed to the [buyer] the ways allowing to do without the license of the Bank of Russia, but the [buyer] did not agree with them.

3.5 The Tribunal considers that the argument invoked by the [buyer]'s representative that his employees, with whom the [seller] corresponded, did not have power either to correspond or to make declaration on the avoidance of the contract due to *force majeure* cannot serve as a ground for relieving the [buyer] from the responsibility for non-fulfilment of his obligations under the contract. First of all, the contract signed by the parties contained a schedule of payments which the [buyer] did not even start to fulfil. In accordance with the principle of good faith in international trade enshrined in the Vienna Convention 1980 (Article 7) and with analogous provisions of German law (§ 242 of the German Civil Code), competent organs of the [buyer] company should have assured the fulfilment of the contractual provisions, and in case of difficulties should have contacted the [seller] on this issue. If they did not do it, then

the responsibility for non-fulfilment of the obligations lies with the [buyer] company. Second, the [seller] had no grounds to think that the messages sent to him on the official form of the [buyer] company and signed by its employees were not actions for fulfilment of the obligations under the contract.

Pursuant to the provisions of the Russian civil legislation, the capacity of a legal person is to be determined under the law of the country where this person is established. Accordingly, the law of this country determines the limits of power which a legal person can delegate to its employees or other persons. Since the [buyer] is a company established in the territory of Russia, relevant rules of Russian civil law cannot be disregarded. In this connection, the Tribunal notes that Article 402 of the Civil Code of the Russian Federation contains express reference to the fact that the actions of a debtor's employees to fulfil his obligations are regarded as the debtor's actions, and if these actions led to non-fulfilment or inappropriate fulfilment of the obligations, the debtor is responsible for them. Relying on the principle of "faith and confidence" ("*Treu und Glauben*") of German law the Tribunal comes to the conclusion that, bearing in mind the circumstances of the present case, German law applies an analogous approach.

At the same time, for cancellation of the contract there is a need for special powers. In their absence (and the file does not contain any evidence that the person who signed the form the [buyer] company faxed to the [seller] on 7 May 1997 had such powers) the Tribunal cannot consider that the cancellation took place. Since the [buyer] committed a fundamental breach of contract (Article 25 of the Vienna Convention 1980), the [seller] in accordance with Article 64 of the Vienna Convention 1980 has the right to declare the contract avoided. But while bringing the suit to the Tribunal he did not use this right thinking that it was the [buyer] who cancelled the contract. At the hearing of 24 November 1998, the [seller]'s representatives declared that the [seller] was ready to fulfil his obligations under the contract. But the [buyer]'s representative, refraining from considering the contract cancelled, declared that he had no powers to certify the intent to fulfil the contract.

The fact that the cancellation of the contract by the [buyer] was not recognized does not absolve him from the responsibility for delaying the payment. Comparative analysis of the contractual provisions (Articles 8 and 11) led to the Tribunal's conclusion that the fine of 10% of the sum of each payment provided by Article 8 for delay in payment is a particular sanction for non-fulfilment of a concrete contractual provision. Accordingly, in case of violation of the schedule of payments it is this sanction which must be applied and not the general sanction fixed in Article 11.

Bearing in mind that under the contract (its schedule of payments) the last (5th) payment had to be made only after the beginning of the exploitation of the equipment, the Tribunal considered it reasonable and fair to impose on the [buyer] the obligation to pay the fine in the amount provided by the contract (10% from the sum due within the terms fixed by the contract).

3.6 The [seller]'s claims to recover his costs for defending his interests in the present case are to be partly satisfied according to § 9 of the Tribunal's "Arbitration Costs and Expenses Rules" which provide that "the winning party can claim to impose on the other party the obligation to recover its reasonable arbitration costs".

FOOTNOTES

* This is a translation of data on Proceeding 96/1998, dated 24 November 1998, of the Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry reported in Rozenberg *ed.*, *Praktika* No. 66 [232-237]. All translations should be verified by cross-checking against the original text. For purposes of this presentation Claimant of Germany is referred to as [seller] and Respondent of the Russian Federation is referred to as [buyer].

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