

Case 727: CISG 1 (a), 10 (a), 45 (2), 47 (2), 73, 78

Italy: Arbitral Tribunal - Chamber of National and International Arbitration of Milan

28 September 2001

Original in English

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In 1999 a seller – a Cyprus company having its principal place of business in Russia – and a buyer, an Italian company, entered into an agreement concerning steel goods.

The parties agreed on many specifications of the contract – in order to detail sorts of production, prices, delivery and payments – but when they begun performance, a dispute arose on the quality standards of some delivered goods. Once settled the matter, with a reduction of the price of the goods already delivered, the parties decided to go on with further deliveries.

Nonetheless, divergences arose between them on alleged misconduct in the performance of their mutual obligations, mostly regarding the payment of the reduced price and the further deliveries of goods at the terms and conditions agreed upon.

The contract contained an arbitration clause referring to the Rules of the Chamber of National and International Arbitration of Milan. Thus, the seller initiated an arbitration proceedings.

The contract was silent on the rules applicable to the merits of the case. The seller identified it with Russian law whereas, according to the buyer, the Italian law should apply.

The Arbitral Tribunal, going beyond parties' assumptions on the point, concludes that the CISG is the body of law applicable to the arbitration, under the following reasoning.

The CISG is the special regulation for international sales of the national legal system of the two States more directly involved in the case (both of which have ratified the CISG).

The Arbitral Tribunal upheld the seller's position considering Russian law as the national law applicable – Russia indeed had a closer connection with the contract as the goods were to be produced in Russia, according to Russian standards and delivered on Russian ships, being all these circumstances perfectly known by the parties – whereas the CISG applied to the dispute as *lex specialis* within the domestic general law of sales. Moreover, in the Arbitral Tribunal's opinion, CISG must automatically apply also by virtue of articles 1(a) and 10(a), as the law applicable to a sale contract between parties belonging to different contracting states.

The Arbitral Tribunal considered the framework contract plus various specifications as a contract for delivery of goods by instalments, pursuant to article 73 CISG.

The Arbitral Tribunal found that the buyer's failure to complete payment of the goods already delivered was without well founded reasons, consequently the seller was entitled to recover the corresponding amount. The fact that the seller made its agreement to further deliveries subject to cooperation of the buyer on some requests did not constitute either a violation of the duty of good faith or a fundamental breach of the contract. Thus, the buyer could not refuse to make the payment assuming a fundamental breach on the seller's side.

In the Arbitral Tribunal's opinion the principle *inadimplenti non est adimplendum* did not apply to the case at hand. First, CISG does not include that exception among the remedies to be used. Secondly, the buyer did not validly terminate the contract (article 73 CISG) in its entirety or with respect to the third shipment.

Besides, wherever permitted, the exception could be used to withhold the performance until the other party has performed its obligation in respect of the same instalment.

The Arbitral Tribunal ruled that the seller was entitled also to interest on the payment pursuant to article 78 CISG. The interest rate was to be calculated in conformity with Russian law.

As for the incomplete shipment of goods complained by the buyer, the seller's refusal was groundless and the buyer was so entitled to compensation of damages for delayed performance (articles 45.2 and 47.2 CISG) as it bought other goods in replacement (paying a different price).