

CISG-online 1856

Arbitral Tribunal	Spoljnotrgovinska arbitraža pri Privrednoj komori Srbije (Foreign Trade Court of Arbitration of the Chamber of Commerce and Industry of Serbia)
Date of the decision	28 January 2009
Case no./docket no.	T-8/08
Case name	<i>Medicaments case</i>

*Translation by Dr. Vladimir Pavić and Milena Djordjević, LL.M**

Award

Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce in Belgrade, sole arbitrator Dr. Z, in a dispute concerning the claim of [Seller] of Serbia against the company Y, [Buyer] of Albania for termination of the contract and recovery of debt in amount of EUR 25,569.47 on the basis of the entire proceedings, including the hearing held at 9 January 2009 where the minutes were taken by Mr. M. 1

- (1) DECLARES that the Sales and Distribution Agreement no. 811 of 4 May 2007 has expired on 31 December 2007.
- (2) ORDERS [Buyer] to pay to the [Seller] EUR 25,569.47 as purchase price, within 15 days of the receipt of this Award;
- (3) ORDERS [Buyer] to pay to the [Seller] 6 percent annual interest rate on the amount referred to in paragraph (2) above, as of 15 December 2007 within 15 days of the receipt of this Award;
- (4) ORDERS [Buyer] to pay to the [Seller] RSD 283,514.00 on account of arbitration costs, within 15 days of the receipt of this Award.

* Dr. Vladimir Pavić was an Assistant Professor in Private International Law and Arbitration, and Milena Djordjević, LL.M. (U. of Pittsburgh) was a Lecturer in International Commercial Law at the University of Belgrade Faculty of Law at the time this translation was prepared.

Statement of Reasons

1. Jurisdiction

The jurisdiction of the Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce in this matter is established by Article 8 of the Sales and Distribution Agreement no. 811 of 4 May 2007 (hereinafter 'the Contract'). Said article provides for jurisdiction of the «Foreign Trade Arbitration with the Chamber of Economy in Serbia». Although the exact name of the institution is «Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce», there is no doubt as to the institutional arbitration chosen. Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce is the first, one and only institutional arbitration operating in Belgrade and it has been attached to the Chamber of Commerce of Serbia since dissolution of the federal state. Therefore, there is no doubt whatsoever that the parties had this particular institution in mind when concluding their contract. 2

Although the underlying contract has expired, in its own terms, on 31 December 2007, the arbitration clause contained in the contract was clearly not time-barred in the same manner and its operation could have been invoked (and was indeed invoked) at a later point in time. The arbitration clause itself provides that it 'shall survive termination or expiration of (the Contract)'. Therefore, the fact that the arbitration clause was invoked after the expiration of the contract does not affect jurisdiction of this arbitration. Even if the clause itself were silent on this, the outcome would be the same. Every dispute resolution clause is clearly meant to survive the expiration or termination (avoidance) of the underlying contract, at least to resolve disputes arising out of the expired contract. Otherwise, effectiveness of dispute resolution clauses would be severely limited. 3

Finally, although the admissibility of the Claim is not among jurisdictional issues which are to be monitored by the Sole Arbitrator even when uncontested, it is observed that [Seller]'s action is clearly admissible. Arbitration clause provides that one may resort to arbitration if the dispute cannot be amicably settled within 30 days. In its Statement of Claim, the [Seller] has stated that it has 'repeatedly demanded the [Buyer] to fulfil its payment obligation' and that such attempts were met with 'vague promises' or even 'absence of any reaction'. Since the [Buyer] did not object to such assertions, their persuasiveness, especially within the overall framework of the evidence offered by the [Seller], seems to be beyond doubt. Therefore, the Sole Arbitrator finds that the requirement of pursuit of amicable settlement has been observed by the [Seller]. 4

Therefore, the jurisdiction is correctly established pursuant to Articles 12 and 13 of the Rules of the Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce (hereinafter 'the Rules'). 5

2. Appointment of sole arbitrator

The parties failed to determine the number of arbitrators in the arbitration agreement, i.e. whether the dispute is to be settled by a sole arbitrator or an arbitral tribunal of three arbitrators. The amount in dispute is EUR 25,569.47. Pursuant to Article 20(1) of the Rules, in absence of parties' agreement on the number of arbitrators, disputes whose value is less than USD 70,000.00 are to be settled by a sole arbitrator. Since the [Buyer] failed to submit an Answer to the Statement of Claim, and the parties could (consequently) not agree upon the person to act as a sole arbitrator, the sole arbitrator was appointed by the Chairman of the Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce on 6 October 2008, pursuant to Article 21 paragraph 3 of the Rules.

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3. Procedure

[Seller] submitted its Statement of Claim to the arbitration [tribunal] on 29 May 2008 and has paid the registration fee on 6 June 2008 and the costs of arbitration on 3 July 2008. The Statement of Claim was delivered to [Buyer] on 27 August 2008 via DHL. [Buyer] failed to submit an Answer to the Statement of Claim. Initial and subsequent notifications were all delivered to [Buyer]'s address as indicated in the agreement (and the arbitration agreement), in accordance with Article 34(2) of the Rules. All DHL shipments to the [Buyer] were actually delivered, signed and accepted.

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Subsequently, [Buyer] was duly notified (10 November 2008) by DHL of the appointment of the Sole Arbitrator and invited to raise its objections within 15 days, in accordance with Article 25(2) of the Rules. [Buyer] raised no objection.

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Sole Arbitrator has scheduled the hearing for 9 January 2009. Notice of the hearing was delivered to the [Buyer] by DHL on 10 December 2008. Although duly summoned, [Buyer] has not participated in the hearing. Notification contained the information that the hearing can be held in absence of a duly notified party pursuant to Article 37(6) of the Rules. Therefore, even though the [Buyer] failed to appear at the hearing, the hearing was held in accordance with Article 34(7) and 37(6) of the Rules.

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The hearing served for evidentiary purposes and submissions of the [Seller] were read at the hearing.

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4. Applicable Law

Article 8 of the Contract contains a choice of law clause, providing that the Contract «shall be governed and construed in accordance with applicable regulations and laws of the Republic of Serbia». Since Serbia ratified the UN Convention on Contracts for the International Sale of Goods (CISG), which thereby became an integral part of Serbian law, the sole arbitrator finds that the CISG should be primarily applied to the Contract (Official Gazette of the RS – Treaties, No. 10-1/84). This finding is in accordance with the foreign judicial and arbitral practice, which

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should be taken into consideration for the purpose of achieving uniform application of the CISG, pursuant to Art. 7(1) of the CISG.

Although Albania is not a party to the CISG, CISG is still applicable by virtue of its Art. 1(1)(b) CISG as the party autonomy, the primary rule respected in the private international law, points to a law of the Contracting State – Serbia. It has generally been held that the choice of law of the Contracting State, absent explicit exclusion of the CISG or exercise of Art. 95 CISG reservation, means that the CISG will be applicable [OLG Köln 22 February 1994; ICC case 7754 (1995), Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, award of 9 February 2001].

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However, the CISG is applicable only to individual sales transactions concluded within the framework of the distribution contract and not to the distribution contract as a whole [OLG Düsseldorf 11 July 1996; Metropolitan Court Budapest 19 March 1996; OLG Koblenz 17 September 1993]. This view has been upheld in the practice of this Arbitration Court as well [award T-25/06]. In the present case, the only claim put forward by the [Seller] is the one based on a single sales transactions made pursuant to the distribution agreement.

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5. [Seller]'s claims

In its Statement of Claim of 29 May 2008, the [Seller] requested the arbitration tribunal to:

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- (1) Terminate [the] contract;
- (2) Order [Buyer] to pay EUR 25,569.47 for the goods sold and delivered;
- (3) Order [Buyer] to pay interest on the principal debt, and
- (4) Order [Buyer] to pay the costs of the proceedings.

Upon examining the provisions of the Contract, the Sole Arbitrator noted that it was concluded for a definite period, and pursuant to its Article 7, expired on 31 December 2007. Not being able to terminate the Contract, as the [Seller] requested, Sole Arbitrator could only observe and declare that it has expired on 31 December 2007.

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However, the individual sales transaction (sales contract) concluded in accordance with the provisions laid out in the Contract (concerning payment, delivery and acceptance of the goods) has remained in force and has not been avoided.

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- Under this sales transaction, [Seller] was to deliver goods specified in the invoice, and [Buyer] was to pay within 45 days of the delivery. [Seller] submitted invoice FG 00397906 of 31 October 2007, on the amount of EUR 25,569.47 and the accompanying CMR 0330465 dated 31 October 2007. Given that the term delivery pursuant to the Contract was CIP Tirana, [Seller]'s obligation was fulfilled on 31 October 2007, when the goods were handed over to the transporter.
- Pursuant to Article 4 of the Contract, [Buyer] had to pay within 45 days, i.e. on 15 December 2007 the latest. The evidence establishes that the [Buyer] has received

the goods and has not paid for them within the prescribed period. Consequently, [Seller]'s request for payment of the contract price is justified by the terms under which the sales transaction was concluded and Art. 62 CISG.

In accordance, with Art. 78 CISG, [Seller] is also entitled to interest on the purchase price [Buyer] failed to pay. Art. 78 CISG does not provide for the exact rate to be applied. [Seller] requested 'domicile' interest rate for the sum requested in EUR. Since the matter of interest rates is governed, but not settled by the CISG, there is no need to examine [Seller]'s request in the light of any national law, but rather examine whether it is within the checks provided in Art. 7 CISG. Therefore, the proposed rate has to be determined in accordance with the principles underlying the CISG [CLOUT cases No. 93, SCH-4366 of 15 June 1994 and No. 94 SCH-4318 of 15 June 1994]. One of the main principles of the CISG is the principle of full compensation. However, another principle suggests that compensation should not put creditor in a better position than he would be had the contract been performed. [Seller]'s request is fully in line with the above mentioned principles.

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In order to determine exact 'domicile' (Serbian) rate for euro, one should not resort to Serbian law, since it regulates and is appropriate for local currency (RSD) rates only and would result in overcompensation if applied to sums denominated in Euro. Rather, it is more appropriate to apply interest rate which is regularly used for savings, such as short-term deposits in the first class banks at the place of payment (Serbia) for the currency of payment, as this represents rate on a relatively riskless investment. After examining interest rate figures and indicators on short-term Euro deposits in Serbia, Sole arbitrator finds that the appropriate rate would be 6 percent annually.

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6. Costs of arbitration proceedings

In its submission of 20 January 2009, [Seller] requested compensation of RSD 16,303.00 registration fee and RSD 267,211.00 for the costs of arbitration. Both sums reflect the amounts [Seller] had to pay pursuant to the Rules in order to initiate the arbitration proceedings.

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Given that the [Seller] has succeeded entirely in its claim, the costs are awarded in full, in a total amount of RSD 283,514.00.

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7. Finality of the Award

Pursuant to Article 64 of the Law on Arbitration and Article 56 paragraph 1 of the Rules, this arbitral award is final and is not subject to appeal. It has the force equal to a final decision of a court of the Republic of Serbia.

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In Belgrade, 28 January 2009

Sole Arbitrator: Dr. Z