

Case 1405: CISG 1; 6; 7; 30; 33; 45; 79; 79(1)

Ukraine: International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry
218y/2011

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On 26 July 2011, a Swiss buyer commenced an arbitration before the International Commercial Arbitration Court at the Ukrainian Chamber of Commerce and Industry (tribunal) against a Ukrainian seller for a breach of contractual obligations to supply corn under a contract dated 14 June 2010.

The contract specified Ukrainian law as the governing law of the contract. Part 14 of the contract incorporated the provisions of Grain and Feed Trade Association standard contract No. 200 (Gafta No. 200), noting that they should be applied unless in contradiction of the provisions of the underlying contract. Gafta No. 200 Article 22 excludes application of the CISG.

One of the core issues raised by the parties was the question of the applicability of the CISG.

The tribunal reasoned that the underlying contract provided for the application of the law of Ukraine and that no provisions specifically limited this application to Ukraine's law governing domestic contracts. As Ukraine is a party to the CISG, the tribunal noted that the Convention is thus part of the law of Ukraine and is therefore the applicable law under Article 1 CISG. The tribunal added that pursuant to Article 6 CISG, "the parties may exclude the application of the Convention or, subject to Article 12, derogate from or vary the effect of any of its provisions". In the underlying contract, however, the parties did not expressly exclude the application of the CISG. The tribunal noted that the provisions of Gafta No. 200 are subsidiary to the provisions of the contract. Therefore, in light of the parties' selection of Ukrainian law, the provisions of Gafta No. 200 excluding the application of CISG contradict the provisions of the underlying contract and, accordingly, should not be applied. In line with this reasoning, the tribunal applied the CISG noting that if the parties wish to exclude the CISG or particular provisions, their intention must be express and clear. The tribunal added that, in line with Article 7 CISG, Ukraine's law governing domestic contracts should be applied to the contract on a subsidiary basis.

The tribunal also considered the issue of the seller's failure to deliver the corn. Pursuant to the contract, the seller should have supplied the buyer with the corn in five shipments. The seller supplied the first shipment in conformity with the contract but failed to supply the remaining four shipments due to a change in domestic legislation making it impossible to obtain the license needed to export corn.

Here, the tribunal considered Articles 30, 33, 45, and 79 CISG. It noted the seller's obligations under Article 30 and 33 related to delivery. The tribunal also noted the remedies for breaching these obligations under Article 45 CISG.

Furthermore, the tribunal considered the parties' arguments concerning the impossibility of obtaining the license needed to export corn. The buyer contended that the introduction of the licensing requirement did not preclude the seller's obligation to make all the shipments of the corn. The seller argued that the remaining deliveries under the contract could not be effected due to the introduction of the licensing requirement which thus constituted an export prohibition allowing cancellation of the contract under Gafta No. 200 Article 13.

In considering this issue, the tribunal considered Article 79 CISG. The tribunal found that Article 79 CISG has the character of a "force majeure clause". The tribunal concluded, however, that the contract contained other provisions on force majeure than those found in Article 79(1) CISG. Therefore, applying Article 6 CISG allowing derogation or variance from the CISG, the tribunal noted that the provisions of the contract should prevail over Article 79(1). Having examined the provisions of the contract, the tribunal found that the failure to supply the second to fifth shipments of corn was due to "force majeure" circumstances as envisaged, in any case, both in the contract and Article 79 CISG.