CISG-online 2973	
Arbitral Tribunal	ICC International Court of Arbitration
Date of the decision	2013
Case no./docket no.	18203/2013 (Final award)
Case name	*"Laws as defined by the EEC (European Economic Community)" case*

Excerpt:

i jurisdiction

1 Claimant's Position

[1] "Claimant submits that the Arbitral Tribunal has jurisdiction to determine the present dispute pursuant to the arbitration clause contained in the Distributor Agreement.

[2] "Claimant argues that the Arbitration Agreement is valid and effective regardless of the termination of the Distributor Agreement, as it results from the principle of autonomy governing arbitration agreements, as established by Art. 1447 of the French Code of Civil Procedure.[1]

[3] "Claimant also notes that the Arbitration Agreement covers all disputes arising from the Distributor Agreement even if these disputes concern any indebtedness incurred under any such prior agreement and for any breach thereof. As a result, the present dispute arising out the Distributor Agreement is covered by the Arbitration Agreement.

[4] "Claimant submits that since the UAE (both Parties' country of incorporation) is party to the 1958 New York Convention on the recognition and enforcement of foreign arbitral awards, the Arbitration Agreement satisfies the in-writing requirement as set forth in said treaty (Art. II(1)).[2]

[5] "Lastly, Claimant submits that the Parties have agreed that the Final Award with the Arbitral Tribunal's decision will be final and binding pursuant to Art. III of the New York

[1] Art. 1447 of the French Code of Civil Procedure reads:

> "An arbitration agreement is independent of the contract to which it relates. It shall not be affected if such contract is void.
>
> If an arbitration clause is void, it shall be deemed not written."

[2] Art. II(1) of the1958 New York Convention reads:

> "Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration."

Convention."[3]

2 Respondent's Position

[6] "Although Respondent was given full opportunity to reply and to file a submission on this issue, it did not do so and has thus not expressed any position as to whether the Arbitration Agreement was valid, effective or applicable to the present dispute."

3 The Sole Arbitrator's Decision

[7] "Having thoroughly considered Claimant's arguments insisting that the Arbitral Tribunal has jurisdiction to settle the present dispute, none of which has been challenged or addressed by Respondent, the Arbitral Tribunal is of the view that the manner in which the Arbitration Agreement was drafted, although not ideal or using very accurate wording, shows an intention by both Parties to solve their potential/future disputes through ICC arbitration, namely in the framework of an arbitration conducted and governed by the ICC Rules.

[8] "This first point (above) remains true, notwithstanding the vague reference to the Parties' 'consent to and accept(ance of) the jurisdiction of its (i.e. EEC's) courts'. Indeed, this ambiguous reference is clearly superseded by the following and clearer sentence entitling either party to freely 'apply for arbitration in accordance with the settlement clauses of the International Chamber of Commerce in Paris'. Also, this first and unclear sentence appears to be rather an inaccurate drafting: it is not unlikely that it was meant to cover (awkwardly) the question of the applicable law only[4] (which itself was not dealt with in a clear manner), rather than deal with the court or tribunal having jurisdiction to hear and settle the dispute. Thus, even if the arbitration clause was deemed to be solely optional, it is a clear clause and it cannot be denied that the Parties clearly contemplated the possibility to settle their dispute through arbitration. Ultimately, the Sole Arbitrator is of the opinion that the clear part of this clause should supersede its unclear one.

[9] "The scope of the Arbitration Agreement appears to be sufficiently large to encompass any of the claims submitted by Claimant in this arbitration, as they all relate, whether directly or indirectly, to the Distributor Agreement, including an ancillary agreement entitled 'Terms and Conditions of Sale', attached to, intertwined with and directly following the Distributor Agreement, and in which there is no clause contradicting the application of the Arbitration Agreement.

[3] Art. III of the 1958 New York Convention reads:

> "Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."

[4] "As confirmed by the fact that the 'Terms and Conditions of Sale' attached to the Distributor Agreement and which the latter expressly refers to, contain a clause providing for the application of the 'current applicable laws of the EEC (the European Economic Community)'."

[10] "French international[5] arbitration law, which is based on both statutory provisions (Arts. 1442 and seq. of the French Code of Civil Procedure) and longstanding case law, and which favors the validity, effectiveness and broad application of arbitration clauses, should be applicable to the present issue (since Paris is the place of arbitration) and lead the Tribunal to confirm its jurisdiction over all aspects of the present dispute.

[11] "The Sole Arbitrator further notes that none of the Parties has challenged (i) the applicability of the Arbitration Agreement to the present dispute being hereby settled and/or (ii) the Tribunal's jurisdiction to settle the said dispute. However, following the Court's decision to proceed with the arbitration on the basis of Art. 6(2) of the Rules, the Arbitral Tribunal hereby ascertains jurisdiction.

[12] "As a result, the Arbitral Tribunal decides it has jurisdiction over the present matter and over the claims submitted by Claimant."

ii applicable law

1 Claimant's Position

[13] "Claimant submits that the Parties are free to choose the substantive applicable law to govern their contract and potential future disputes, pursuant to the principle of parties' autonomy, as recognized by most modern arbitration rules, as do the ICC Rules, to which this dispute is submitted (Art. 17 ICC Rules). Similarly, the French provisions of the Code of Civil Procedure (Art. 1511)[6] and the Rome Convention on the law applicable to contractual obligations of 1980 (EU Regulation No. 593/2008, also known as Rome I) should also apply.

[14] "Claimant also notes that the Distributor Agreement is international in character and, as such, Claimant and Respondent have chosen to use an international arbitral institution as well as a neutral body of law to be applied to the merits of the dispute, with a specific contractual choice of law (Clause 15 of the Agreement).

[15] "Claimant adds that the Parties have made a choice of substantive law which refers to the law governing the Parties' contractual relationship and does not refer to conflict-of-laws rules arising under private international law, pursuant to Art. 28(1) of the Model Law of the United Nations Commission on International Trade Law (UNCITRAL).[7]

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[5] "As indirectly, but rightly, argued by Claimant, rules (statutes and case law) governing international arbitration in France are here applicable because the dispute 'involves international trade stakes' (as per Art. 1504 of the French Code of Civil Procedure). Indeed, although the Distributor Agreement is signed by two UAE nationals/entities, its subject matter involves the commerce of goods beyond that single country…."

[6] Art. 1511of the French CCP reads:

> "The arbitral tribunal shall decide the dispute in accordance with the rules of law chosen by the parties or, where no such choice has been made, in accordance with the rules of law it considers appropriate.
>
> In either case, the arbitral tribunal shall take trade usages into account."

[7] Art. 28(1) of the UNCITRAL Model Law reads:

> "*Rules applicable to substance of dispute*

[16] "Claimant submits that the Parties when negotiating the Distributor Agreement, had expressly chosen to submit said Agreement to 'the law as defined by the EEC', which the Arbitral Tribunal should apply in this dispute. However, Claimant argues that, with the entry into force of the Maastricht Treaty, 'EEC' was renamed and even abolished in 2009. As a result, the reference to the 'EEC' should be construed as referring to the 'EU' [European Union].

[17] "Claimant also argues that the EEC has regulated certain categories of agreements and concerted practices, defined in Art. 1 in Regulation No. 19/65/EEC. Claimant states that the Distributor Agreement falls into these categories of agreements.

[18] "Claimant notes that the 1980 Vienna Convention on International Sales of Goods (the 'CISG'), which provides a set of uniform international sales contract rules developed by UNCITRAL, is part of the legal system of most of EU member States that have ratified said Convention. As a result, Claimant submits that the Arbitral Tribunal should interpret 'laws as defined by EEC' as including the CISG.

[19] "Claimant submits that the Arbitral Tribunal should supplement the substantive applicable law chosen by the parties, provided it remains within the framework of the Parties' contractual intentions. Claimant also notes that the Parties' choice with respect to the EEC law reflects the intent of the Parties not to submit the Distributor Agreement to a particular national law.

[20] "Claimant adds that in order to determine the supplemental rules to be applied to the Distributor Agreement and to the present dispute, the Arbitral Tribunal has two alternatives: either choose a neutral national law not connected to any of the Parties or to comply with the choice of the Parties and conclude that the Distributor Agreement must be subject to general principles of law applicable to international contractual obligations; i.e. the lex mercatoria.

[21] "Claimant submits that, according to Art. 17 of the Rules, the Arbitral Tribunal shall take into account relevant trade usages based on the CISG as the conditions required for its applicability are met. Claimant submits that the ICC Rules, as well as the French Code of Civil Procedure, do not oblige the Arbitral Tribunal to determine the substantive law to follow any conflict-of-law rules. Indeed, both state in substance, according to Claimant, that: 'in the absence of any such agreement, the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate'.

[22] "Claimant further argues that the CISG is applicable even to distribution contracts such as the Distributor Agreement because in some cases the borderline between the standard distribution contract and the contract for sales of goods may be uncertain as the former already contains most of the typical obligations of a seller and of a buyer precisely formulated. For Claimant, the CISG rules are of a more general nature. Finally, Claimant submits that the applicability of CISG to an international distribution contract has to be solved on the basis of the facts of each particular transaction.

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(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules."

[23] "Claimant submits that the expression used by the Parties 'laws as defined by the EEC' could be interpreted also as a conflict-of-law rule. In EU jurisdictions, conflict-of-law rules are governed by the Rome I Regulation according to which (Art. 4) if the law applicable to the contract has not been expressly chosen, it shall be governed by the law of the country with which it is most closely connected and the contract is presumed to be most closely connected with the law of the central administration of the party providing the 'characteristic performance' in the case of corporate or unincorporated bodies, which is according to the French court of cassation 'la fourniture du produit' [the supply of the product]. Thus, Claimant submits, a conflict-of- laws approach should lead to the application of the law of EU Country X since that country is the country with which it is most closely connected.

[24] "Finally, Claimant concludes that the CISG applies indirectly when the conflict of laws rules of the lex fori refer to the laws of a contracting state pursuant to Art. 1(1)(b) of the CISG.[8] And since EU Country X is a CISG contracting State (and the state to which the conflict rules of the forum state refer to), then CISG governs the merits of the present dispute.

[25] "Lastly, Claimant believes that, whatever substantive law is applicable to the present dispute, the Arbitral Tribunal should apply the contractual provisions provided by the Agreement signed by the Parties and decide the case."

2 Respondent's Position

[26] "Although Respondent was given full opportunity to reply on this issue and to file a submission, it did not do so and has thus not expressed any position concerning what law and/or rules should apply to govern the present dispute."

3 The Sole Arbitrator's Decision

[27] "This issue arises from certain flaws within the Arbitration Agreement, which also includes a provision/sentence on the law applicable and provides that the Distributor Agreement 'shall be governed by the laws as defined by the EEC (European Economic Community), and the parties hereto consent to and accept the jurisdiction of its courts'. Since the EEC zone no longer exists and because there is no straightforward meaning for the terms 'laws as defined by the EEC', the Arbitral Tribunal is compelled to construe the Parties' true intention in that respect.

[28] "The Sole Arbitrator is satisfied with Claimant's arguments that this phrasing could mean or at least encompass the rules deriving from the CISG. More generally, even if the CISG was not per se applicable, the Sole Arbitrator deems the general principles and rules applicable in the field of international commerce, which are common to those deriving from the CISG, will also give guidance to settle the present dispute, which encompass, inter alia, pacta sunt servanda, the good faith duty, the principle of contractual liability in case of breach of a

[8] Art. 1(1) of the United Nations Convention on Contracts for the International Sale of Goods (1980) (CISG) reads:

"(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:

(a) when the States are Contracting States; or

(b) when the rules of private international law lead to the application of the law of a Contracting State."

contract, the duty to fully compensate the harm suffered by the non-breaching party as proven by the latter.

[29] "First, it is a fact that the CISG is today part of most of European countries, i.e. in the European Union, an organization that has succeeded to the EEC. At the time the EEC existed, and on the eve of its incorporation in 1993 with the EU, the EEC encompassed twelve European countries: Germany, France, Italy, Belgium, Luxembourg, the Netherlands, the United Kingdom, Ireland, Denmark, Spain, Portugal and Greece. Although the 'laws' of these EEC countries contain significant differences, this geographical zone has also built and agreed upon some common legal rules, even beyond the numerous EU Regulations applicable in almost all European jurisdictions.

[30] "Among those common rules, it is not unreasonable to state that the CISG has been incorporated in a great majority of these ex-EEC countries,[9] and more generally in most European jurisdictions belonging today to the EU and even beyond (such as Norway). Thus, if one was to determine the Parties' intention when construing the wording 'laws as defined by the EEC', the Sole Arbitrator does not find it unreasonable to include the CISG therein and, ultimately, to rely more specifically on that Convention applicable to the type of transactions as the one here disputed.

[31] "Indeed, this inclusion is all the more relevant, as the CISG is meant to govern international sales of goods, which is the case of the Distributor Agreement (see below) and is the law governing such contracts in those European countries.

[32] "True, the CISG contemplates, as to its ratione materiae scope, that it applies to contracts of sale of goods between parties whose places of business are in different States, notably when the States are Contracting States (Art. 1(1)(a)) of the CISG). This is not however the case here as both Parties are UAE nationals and the UAE has not, as of today, and to the best of the Sole Arbitrator's knowledge, ratified the CISG. Yet, this is not an absolute obstacle.

[33] "The Sole Arbitrator agrees with the authorities quoted by Claimant according to which the CISG may be opted for and/or applied, even though neither the country of the buyer nor that of the seller are State parties to the CISG.[10] Furthermore, the CISG also contemplates its applicability when the rules of private international law lead to the application of the law of a Contracting State (Art. 1(1)(b)). The Sole Arbitrator believes that those international private law rules lead indeed to such a result (see infra). Consequently, the application of the CSIG both meets the Parties' intent and appears consistent with its ratione materiae scope.

[34] "Second, it is also a fundamental liberty, implied by the CISG, for parties involved in international trade to be able to stipulate a set of rules, specifically designed for this field, although their countries have not ratified the CISG, and even if the law chosen has no connection whatsoever with the national law of the parties. This stems from the CISG's preamble, its Art. 1(3) (which disregards the nationality of the parties when considering its

[9] With the notable exceptions of the United Kingdom, Ireland and Portugal.

[10] See e.g. ICC award no. 5713/1989, published in Collection of ICC Arbitral Awards/Recueil des [illegible]sentences arbitrales de la CCI, by Sigvard Jarvin, Yves Derains and Jean-Jacques Arnaldez, 1994, Kluwer Law, pp. 223-226, p. 225.

scope of application), as well as from its Art. 1(6) (giving parties the liberty to exclude the application of the Convention or to depart from some of its provisions). Art. 17(1) of the [ICC] Rules also confirms the parties' autonomy in choosing freely the national law or the rules that best fit their contractual framework. Here, UAE Parties have freely chosen various 'EEC laws', exactly like they could have stipulated other non UAE rules to govern their agreement.

[35] "Third, the same Art. 17(1) of the Rules entitles the arbitrators to set the rules they deem the most appropriate in light of the circumstances in case the parties had not chosen a specific law, or even no law at all, situations which could be assimilated to the present case. In addition, it is not an uncommon practice for arbitrators, especially those seating under the ICC Rules, not to feel bound by strict, rigid, complex or too mechanical conflict-of-laws rules, all the more so as they would go against the clear intention of the parties, which is rather to apply sets of rules in Europe than a particular national law.

[36] "Indeed, the CISG rules, which incorporate many trade usages – often referred to as the lex mercatoria – appear to adequately fit the arbitral tribunal's inclination and power to apply, in similar situations, rules that do not pertain to a specific national legal system, which appears to be precisely the Parties' intention in this case. Indeed, both Art. 17(2) of the Rules and Art. 1511 of the French Code of Civil Procedure vest the arbitrators with such a faculty, which seems to meet the Parties' intention in the present case: an international contract for the sale of goods with no reference to a specific national law.

[37] "Fourth, it is the Sole Arbitrator's opinion, as per the case law quoted by Claimant, that the above remains true, even if part of the Distributor Agreement pertains not to items or goods per se but also, and to a certain and limited extent, to services.

[38] "At last, from a pure conflict-of-laws approach, the Arbitral Tribunal is not convinced about the rationale followed by Claimant in relation to EU Regulation no. 593/2008 – the Rome I Regulation – leading, according to the latter, to the application of the law of a EU Country X as the law of the country with which the contract has the closest ties. First, because this EU Regulation applies only to contracts concluded after 17 December 2009 (Arts. 28 and 29), which is not the case of the Distributor Agreement. Second, because, assuming Rome I Regulation was applicable and that one may reason on the basis of the provisions of the Rome Convention (which the Rome I Regulation replaces as it stands and which provisions are almost identical to said regulation), Art. 4(1)(a), (e) and (f), Art. 4(2), Art. 4(3) and Art. 4(4) of the Rome I Regulation[11] would all lead to the application of the law of the UAE, although it is not

[11] Art. 4 of Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) reads:

> "*Applicable law in the absence of choice*
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> 1.To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows:
>
> (a) a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence;
>
> (b) a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence;

the law of a EU member State (as per Art. 2). Third, because, even focusing on one secondary criterion (not necessary applicable here), Claimant has not produced sufficient evidence that the law of EU Country X is the most appropriate legal system with regard to the Rome I Regulation. Fourth, if one pushes the rationale of Art. 4 of the Rome I Regulation to its fullest extent, then, if the law of a EU country is to be considered, it is for its substantive rules of law and not for its international private law ones. Thus, the Rome I Regulation should not be even considered here, according to its own logic.

[39] "For all these reasons, a pure conflict-of-laws methodology, especially if based on the Rome I Regulation could not lead to the application of the CISG, through the law of EU Country X.

[40] "However, this does not mean that all methods based on international private law are necessarily to be excluded. To the contrary, before proceeding to identify any law pursuant to a conflict-of-law method, most countries, including all EU jurisdictions and the UAE, pose this fundamental and preliminary rule that supersedes any other one in the contractual field: the law governing a contract is the law of autonomy, i.e. the law that was chosen by the parties in their contract. If this is the case, then, it is the end of the international private law query.

[41] "Thus, going back to the provisions of the CISG pertaining to its applicability scope and relying specifically on its Art. 1(1)(b), the Sole Arbitrator considers that the CISG should apply when the rules of private international law lead to the application of the law of a Contracting State. This is the case here since international private law makes the law of autonomy – the

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(c) a contract relating to a right in rem in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated;

(d) notwithstanding point (c), a tenancy of immovable property concluded for temporary private use for a period of no more than six consecutive months shall be governed by the law of the country where the landlord has his habitual residence, provided that the tenant is a natural person and has his habitual residence in the same country;

(e) a franchise contract shall be governed by the law of the country where the franchisee has his habitual residence;

(f) a distribution contract shall be governed by the law of the country where the distributor has his habitual residence;

(g) a contract for the sale of goods by auction shall be governed by the law of the country where the auction takes place, if such a place can be determined;

(h) a contract concluded within a multilateral system which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments, as defined by Article 4(1), point (17) of Directive 2004/39/EC, in accordance with non-discretionary rules and governed by a single law, shall be governed by that law.

2.Where the contract is not covered by paragraph 1 or where the elements of the contract would be covered by more than one of points (a) to (h) of paragraph 1, the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence.

3.Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.

4.Where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is most closely connected."

law the parties opted for – prevail over any other competing or potentially applicable laws. As the Parties have chosen the 'laws of the EEC', this choice must be given full effect and lead to the application, not necessarily of a specific national law, but rather of those rules that are common to those 'EEC' jurisdictions, which includes the CISG.

[42] "To conclude, based on the Parties' common intent and following the contracts and related agreements or exchanges at stake in this arbitration, notably the Distributor Agreement, the Condition of Sale and the Addendum, the Sole Arbitrator confirms that he does not act here an amiable compositeur, but shall rule in law and shall thus apply the Parties' agreements, as agreed between the Parties, the applicable rules of law (CISG notably), as well as international trade usages and principles deriving from the CISG as well as, more generally, the lex mercatoria."

iii merits

[43] "The Sole Arbitrator shall first consider the issue of whether the Distributor Agreement was terminated or not (1). It will then examine the question of the breach Claimant purports Respondent is responsible for (2). At last, the Sole Arbitrator will settle the question of damages and how much Claimant is entitled, if at all, to request in dollar/euro amount (3)."

1 Termination of the Distributor Agreement

a Claimant's position

[44] The Distributor was appointed as an exclusive distributor by the Principal according to the Distributor Agreement in March of Year X and the original expiry date of the agreement was set as December of Year X+2.

[45] "Claimant submits that, pursuant to the Distributor Agreement, the Principal had the right to terminate said Agreement in case the Distributor breached or failed to perform its contractual duties to pay any sum owned, to conduct its operation in the normal course of business, or to change the management with the written consent of the Principal. Claimant also notes that Respondent has not complied with the duty of good faith and fair dealing. For this reason, Claimant submits that it has duly exercised its right of termination by giving written notice to the Distributor in May of Year X+2 (legal notice for breach of contract)."

b Respondent's position

[46] "Although Respondent was given full opportunity to reply and to file a submission on this issue, it did not do so and thus has not expressed any position on the termination of the Distributor Agreement."

c The sole arbitrator's decision

[47] "Art. 8(a) of the Distributor Agreement provides that the:

> 'Principal shall have the absolute right to terminate this agreement and the appointment made hereby upon the occurrence of any of the following events:
>
> (a) Distributor's breach or failure to perform any term, provision or condition hereof

> on Distributor's part to be performed, or to pay when due any sum owed to Principal.'

[48] "It thus seems clear that Claimant has an 'absolute right to terminate' the latter. Among the events that trigger such a right, Art. 8(a) contemplates the hypothesis where the distributor fails to pay amounts due under the Agreement, which appears to be the case on the basis of the documents submitted by Claimant, the amount due being the main question to be here settled rather than the principle of a debt owed by Respondent to Claimant – and as recognized by Respondent itself in some of the exchanges submitted by Claimant.

[49] "As a result, the Arbitral Tribunal deems that Claimant's termination right has crystallized and has been properly exercised. The Distributor Agreement must thus be deemed rightly terminated."

2 Breach of Contract

a Claimant's position

[50] "Claimant submits that the essential elements of a breach of contract claim are:

> (a) The existence of a valid contract,
>
> (b) Claimant's performance,
>
> (c) Respondent's breach of the contract, and
>
> (d) Claimant's damages as a result of the breach.

Claimant relies here on Art. 64(1)(a) of the CISG which provides that the seller may declare the contract void in case of 'failure by the buyer to perform any of his obligations under the contract or this convention amounts to a fundamental breach of contract'.

[51] "Alternatively, Claimant submits that, according to Art. 25 of the CISG, Respondent's absence of payment, the cancellation of orders of products ready for delivery, the purchase of an amount of products lower than that agreed upon as a minimum sales target and the lack of promotion of the Principal's products in the area, all constitute fundamental breaches.

[52] "Moreover, Claimant notes that the Distributor owed the Principal a duty of good faith and fair dealing and, through its conduct, has deprived the Principal of what it was entitled to expect under the Distributor Agreement. For Claimant, its interest was not only the sale of a certain amount of goods but the reinforcement of its worldwide leadership as a producer of the products in a strategic area such as the Middle East and the Gulf regions.

[53] "According to Claimant, the Distributor's conduct constitutes a breach of its duty. Respondent ensured, during the negotiations, that there would be no problem for payment of the price of the products purchased or of the services rendered by the Principal, while Claimant acted diligently and in total good faith vis-à-vis Respondent.

[54] "Claimant further relies on Art. 7 of the CISG which provides that, alone, breach of the obligation to act in good faith generates contractual liability: it is not necessary for the

defaulting party to undertake an action with the intent to cause harm to the other party."

b Respondent's position

[55] "Although Respondent was given full opportunity to reply on this issue and to file a submission, it did not do so and has thus not expressed any position with respect to this issue."

c The sole arbitrator's decision

[56] "The Arbitral Tribunal is satisfied that the conditions required by Art. 64(1)(a) of the CISG[12] for a fundamental breach to occur are here met. Respondent has indeed breached its major contractual duties, by cancelling firm orders, by failing to pay some orders and by failing to adequately promote Claimant's products, all of which are clear obligations for Respondent under the Distributor Agreement. Regardless of the application of the CISG, the documents submitted by Claimant are a sufficient basis for the Sole Arbitrator to conclude that there has been a 'contractual breach', as this notion exists in most, if not all, European countries and as it is sanctioned by the lex mercatoria.

[57] "However, the Arbitral Tribunal, although it finds indeed that Claimant appears to have been acting diligently and in total good faith, is not convinced of Respondent's bad faith, or at least that its behavior could qualify as such. Indeed, the financial hardship Respondent has been going through, as explained by Claimant itself, as well as the obvious efforts by some of Respondent's past representatives to settle the matter and at least some of the invoices, tend to show that Respondent has not behaved in the improper manner Claimant has described. By the same token, attempting to delay or win some time to pay some unsettled or pending invoices cannot be tantamount to and characterized as being per se bad faith. For such a harsh finding to apply, Claimant should have showed documents better evidencing this position.

[58] "The same is true for what Claimant has considered as an artificial claim by Respondent, when the latter raised it, as result of purportedly defective product units sold by Claimant several years back. The Sole Arbitrator disposes of very few elements to assess whether this claim was totally frivolous or well-grounded, even to a limited extent. In any case, on this last point, it is likely that, as Claimant has rightly pointed out, Respondent has lost its right to rely on the lack of conformity of the goods, as a result of Art. 39 of the CISG."[13]

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[12] Art. 64(1)(a) of the CISG reads:

> "(1) The seller may declare the contract avoided:
>
> (a)if the failure by the buyer to perform any of his obligations under the contract or this Convention amounts to a fundamental breach of contract…."

[13] Art. 39 of the CISG reads:

> "(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.
>
> (2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless this time-limit is inconsistent with a contractual period of guarantee."

3 Damages

a Claimant's position

[59] "Claimant submits that, according to Art. 61(1)(b) of the CISG, due to the breach of the Distributor Agreement by Respondent, Claimant is entitled to seek the remedies provided in Arts. 74 to 77 of the CISG, according to which the seller is entitled to damages consisting 'of a sum equal to the loss, including loss of profit'. It is what Claimant calls the principle of full compensation of losses. It adds that, according to Art. 74 of the CISG, the compensation covers all damages: direct costs, loss of profits, non-performance loss, incidental loss and consequential loss resulting from breach of contract.

[60] "Claimant submits that restitution is not admissible by Art. 74 of the CISG and the loss arising from a breach of contract must be calculated concretely; such compensation can only be made in money. The Principal submits that it has suffered various losses, which all deserve to be indemnified."

i Products purchased but unpaid

[61] "Claimant submits that it shipped and delivered some products to the Distributor, according to Clause 5 of the Distributor Agreement, while the latter did not, upon delivery or immediately thereafter, raise any claim, objection or written notice. Claimant adds that the price of such products had been fixed by the Principal in accordance with the contract and as follows: [...].

[62] "Claimant notes that Respondent lost its right to rely on lack of conformity of the goods, as stated by Art. 39 of the CISG.

[63] "Claimant thus relies on the CISG and claims that Respondent has to pay the purchase price as this is the buyer's main and essential obligation under the CISG. Indeed, according to Art. 53 of the CISG: 'Buyer must pay the price for the goods and take delivery of them as required by the contract.'

[64] "Finally, Claimant relies on pacta sunt servanda as a 'universal principle', well-known to all legal systems."

ii Cancellation of orders for products ready for delivery

[65] "Claimant submits that Respondent ordered and purchased products for Project A and Project B. Relying on these orders, Claimant argues that it started the production of the corresponding items as ordered by the Distributor and was ready to ship them. Claimant argues that the price of such products had been fixed by the Principal as follows: [...].

[66] "Claimant adds that Respondent has expressly recognized its obligation but never paid for such products despite the several requests by Claimant.

[67] "According to Claimant, Respondent infringed Clause 8 of the 'Terms and Conditions of Sale' which provides that any cancellation of orders is subject to Claimant's approval.

[68] "Claimant submits that it is entitled to damages consisting of a sum equal to the loss

including loss of profit as provided by Arts. 74 to 77 of the CISG.

[69] "For all these reasons, Claimant claims it is entitled to a total amount of [...]."

iii Expenses anticipated for third-party inspections and currency adjustment related to Project C

[70] "Claimant notes that Respondent requested three tests, from an independent company, for the Principal products in relation to Project C. It further claims that the cost associated with such inspections, as anticipated by the Principal and accepted by the Distributor, was [...], a sum that was never reimbursed by Respondent despite Claimant's several requests and reminders.

[71] "Beyond these facts, and on a strictly legal basis, Claimant relies on Art. 74 of the CISG, which provides that the injured party's expenses may be recoverable if the following requirements are met: (1) expenses incurred by the buyer/seller were reasonably incurred in reliance on the contract; (2) as a result of the seller's/buyer's breach, these expenses were wasted [...].

[72] "Claimant further submits that Respondent has not paid the cost arising from the currency adjustment related to the letter of credit opened by the Distributor's bank for Project C, which cost was valued at [...].

[73] "For all these reasons, Claimant notes that it is entitled to the payment for a total amount of [...]."

iv Bank charges

[74] "Claimant submits that Respondent failed to pay bank charges, which are ancillary costs also associated with the opening of letters of credit for the above-mentioned projects, as well as other costs such as the discrepancies for the method of transport and documents. Claimant has estimated the cost of such expenses at [...]."

v Expenses anticipated for a certificate related to Project A

[75] "Claimant submits that Respondent requested a certain certificate for some products in relation to Project A and that the cost of this certificate was [...], a sum never reimbursed by Responden

[76] "To provide legal grounds for this claim, Claimant again relies on the application of Art. 74 of the CISG."

vi Targets not reached

[77] "Claimant relies here on the Addendum to the Distributor Agreement. It flows from that addendum that the Parties had agreed on certain target objectives [...], but this target was never reached by Respondent.

[78] "Furthermore, Claimant relies on Clause 4 of the Distributor Agreement which provides

that Respondent has the duty to 'sell, display, advertise and otherwise promote the sale and use of the products throughout the territory and fulfill such sales goals as it may agreed upon with the Principal'. But the Distributor did not promote the Principal's products nor allow the Principal to contact other distributor companies or customers in the area.

[79] "The Principal claims and requires full compensation on the basis of Art. 74 of the CISG which states that the seller is entitled to damages consisting 'of a sum equal to the loss, including loss of profit'. Such losses must be calculated on a concrete basis, applying the CISG's general principle of 'reasonableness' and the party must show that it would have actually made a profit.

[80] "Here, Claimant argues that its expectations were to make a profit out of the minimum target sales which represented at least 20 percent of the products sold. For these reasons, Claimant states that it is entitled to recover the loss of such profit corresponding to [...]. This figure is based on the following calculation: [...]."

b Respondent's position

[81] "Although Respondent was given full opportunity to reply on this issue and to file a submission, it did not do so and has thus not expressed any position with respect to this issue."

c The sole arbitrator's decision

[82] "The Sole Arbitrator reasons first on the fundamental principle, based on the CISG (Art. 74 and seq.), as well as other principles of lex mercatoria, according to which an injured party, suffering damages because of a contractual breach, is entitled to damages, amounting to as much as – and to no more than – the loss actually suffered and proven.

[83] "On that fundamental basis, the Arbitral Tribunal, having thoroughly considered the Claimant's arguments and various documents submitted by Claimant, has reached the following conclusions."

i Products purchased but unpaid

[84] "The Sole Arbitrator considers that Claimant has indeed proven that it is entitled to be indemnified for the following amounts with respect to this particular claim, either because there exists a proper invoice evidencing the corresponding amount or (and) because Respondent has, whether directly or indirectly, recognized the claim [...]. This amount excludes that of US$ [...], also requested, for which no evidence that it corresponds to an invoice actually borne by Claimant or sent or accepted by to Respondent has been produced.[14]

[85] "It must also be noted that another specific amount, as requested by Claimant in its submission and which would fit into the present category, does not appear to be supported by any document or invoice and cannot be considered as being the mere aggregation of two

[14] "The format of this invoice does not match that of the other invoices and is very remote in time. Also, the email exchanges that purport to correspond to this invoice refer to a 'price blower' of a lower sum, whereas the invoice produced by Claimant shows a higher sum (excluding transport charges). As a result, the documents produced do not constitute sufficient evidence to support this claim."

figures (the first figure being inaccurate and the second being unsupported by any conclusive evidence)."

ii Cancellation of orders for products ready for delivery

[86] "The Sole Arbitrator considers that Claimant has indeed proven that it is entitled to be indemnified for the following amounts with respect to this particular claim, either because there exists a proper invoice evidencing the corresponding amount or (and) because Respondent has, whether directly or indirectly, recognized the claim [...].

[87] "The Sole Arbitrator thus excludes a certain amount, which is not based on any particular evidence, even not a document justifying the amount was due."

iii Expenses anticipated for third-party inspections and currency adjustment related to Project C

[88] "The Sole Arbitrator considers that Claimant has indeed proven that it is entitled to be indemnified for the following amounts with respect to this particular claim, either because there exists a proper invoice evidencing the corresponding amount or (and) because Respondent has, whether directly or indirectly, recognized the claim [...].

[89] "However, the Sole Arbitrator notes that there is nothing in the file evidencing a further sum claimed by Claimant. As a result, the Sole Arbitrator may not take this additional amount into account."

iv Bank charges

[90] "The Sole Arbitrator considers that Claimant has not proven that it is entitled to be compensated for the cost related to such expenses, as the only supporting document produced is a spreadsheet that is neither explicit nor conclusive. Claimant could have produced some official documents or certificates released by the issuing bank, which it choose not to do.

[91] "For these reasons, the Sole Arbitrator rejects this particular claim in total."

v Expenses anticipated for a certificate related to Project A

[92] "Here too, the Sole Arbitrator finds that Claimant has not been able to prove that the purported cost associated with the certificate for some Claimant Products in relation to Project A was indeed of US$ [...].

[93] "Hence, the Sole Arbitrator rejects this particular claim as a whole."

vi Targets not reached

[94] "The Sole Arbitrator agrees with Claimant on the principle that it is entitled to be compensated for lost profits, whether based on Art. 74 of the CISG or on the lex mercatoria. It is also a fact that the Parties have expressly agreed on a minimum target of sales Respondent should reach, as per the Addendum to the Distributor Agreement [...]. Finally, Claimant has produced a document showing that this target was not reached by Respondent, which the

latter has not challenged or contested.

[95] "Furthermore, the Sole Arbitrator endorses Claimant's reasonable expectations and the method of calculation as to profit out of the minimum target sales, which is based on a percentage of 20 percent of the products sold. This calculation led originally to an amount of US$ [...], which Claimant has eventually decreased to claim only US$ [...].

[96] "As a result, the Sole Arbitrator hereby grants this amount as a reasonable estimation of the lost profit suffered by Claimant as a result of the breach of the Addendum."

iv costs and miscellanea

[97] "The Arbitral Tribunal will first consider the cost borne by Claimant vis-à-vis the ICC to commence and conduct this arbitration (1). It will then turn to the attorney's fees Claimant incurred to present its case in an efficient and legal manner (2). To reach its decision, the Sole Arbitrator has relied on Art. 31 of the Rules and his discretion to allocate the costs fixed by the Court as well as the parties' legal costs and those costs associated thereto."

1 Arbitration Fees

a Claimant's position

[98] "Claimant argues that, pursuant to Art. 36.2 and Art. 1 of the Appendix III of the Rules, parties are bound to pay the costs of the proceedings in equal shares. In order to proceed with the arbitration proceedings, Claimant had no choice but to bear the Distributor's share since the latter did not pay its share. Claimant requests that such conduct should be taken into account by the Arbitral Tribunal."

b Respondent's position

[99] "Although Respondent was given full opportunity to reply on this issue and to file a submission; it did not do so and has thus not expressed any position with respect to this issue."

c The sole arbitrator's decision

[100] "In light of Respondent's non-participation, the fact it did not pay its share of the arbitration costs (the Sole Arbitrator's fees and ICC administrative fees) and the fact that Claimant has been diligent and prevailing in this arbitration, the Sole Arbitrator decides Claimant should be reimbursed by Respondent the entire cost of this arbitration, which was finally fixed by the Court [...] as amounting to [...]. This amount also equals the advance on costs as entirely paid by Claimant."

2 Legal Fees

a Claimant's position

[101] "Claimant submits that recovery of the litigation costs is a matter of the applicable domestic rules on allocation of costs and applicable arbitration rules.

[102] "Claimant stresses that it was forced by Respondent to commence a legal action and

specifically an arbitration proceedings, while Respondent remained silent, did not participate and has not fulfilled its obligation of fair dealing and good faith. Claimant requests the Arbitral Tribunal to take this conduct into account in the allocation of the costs of the defense. Furthermore, Claimant relies on French procedural law (as the place of arbitration) to submit that the Arbitral Tribunal is free to award the prevailing party its reasonable attorney's fees for successfully pursuing claims including a breach of contract claim.

[103] "Claimant submits that, according to an invoice dated August of Year X+1, the legal fees for the assistance provided to the Principal were [...]. By virtue of another invoice dated March of Year X+4, the legal fees paid by Claimant to its counsel were [...]. One last invoice, also dated March of Year X+4, was also produced, showing legal fees amounting to [...]."

b Respondent's position

[104] "Although Respondent was given full opportunity to reply on this issue and to file a submission, it did not do so and has thus not expressed any position with respect to this issue."

c The sole arbitrator's decision

[105] "On the basis of the same parameters considered above (for the arbitration cost), the Sole Arbitrator considers it fair to have Respondent bear the legal fees incurred by Claimant to bring this case and advocate it adequately before an arbitral tribunal.

[106] "Consequently, the Sole Arbitrator hereby grants the total amount of the fees paid by Claimant in legal advice ..., requested by Claimant to be reimbursed, as another claim sanctioned by the Arbitral Tribunal and enforceable in the framework of this arbitration in favor of Claimant."

3 Miscellanea

[107] "The Sole Arbitrator wishes to thank the Parties and the ICC for their trust, their work and the professional quality of their involvement in this arbitration.

[108] "The Sole Arbitrator also confirms that he has thoroughly reviewed all the submissions and documents filed in this arbitration and that, in order to settle this dispute, each was duly considered, even if not specifically referred to in the body of the present award.

[109] "Although Respondent has not participated to this arbitration, the Sole Arbitrator confirms that all correspondences have been duly notified thereto, whether by email or express courier."

v award

[110] "For the reasons set out above, the Arbitral Tribunal hereby:

(1) Decides that it has jurisdiction to hear the case;

(2) Declares the Distributor Agreement terminated;

(3) Orders Respondent to pay Claimant [the following sums for products purchased;

unsettled invoices; spare parts related to various projects; cancellation of orders; costs associated with some inspections undertaken by Claimant for some projects; the reasonable estimation of the lost profit suffered by Claimant as result of the breach of the Addendum to the Distributor Agreement; reimbursement of the costs associated with this arbitration as incurred by Claimant and decided by the ICC International Court of Arbitration [...]; reimbursement of the legal fees borne by Claimant to present, advocate and submit its case before the arbitral tribunal];

(4) Dismisses all other claims."