

ICC Arbitration Award 8611/HV/JK of 1997

Arbitrator: Dr. Roland Loewe
Translation: Beate Satory

Award

In International Chamber of Commerce Arbitration Proceeding 8611/HV/JK of 1997 between the [claimant] W (formerly I), Germany [seller], and the respondent R, Spain [buyer], regarding claims of DM 161,558.82, deducting the amount of the counterclaim of the [buyer], interest and cost, the arbitrator has decided:

- The [seller] is to be awarded the sum of DM 161,538.82.
- The counterclaims of the [buyer] against the [seller] rightly exist to the sum of DM 54,500.
- The [buyer] is required to pay the [seller] the amount of DM 107,058.82 plus 5% interest from 1 October 1992 as well as to compensate [seller] \$3,333.33 for the costs of arbitration and DM 2,333.33 for the costs of [seller] for his participation in the proceedings.
- The additional demand for capital, interest and costs is to be dismissed.

Opinion

In the claim of 24 March 1995 the [seller] requests the payment of a number of invoices between 12 June 1991 and 2 July 1992 amounting to DM 157,430.27 and interest payable on arrears to the sum of DM 4,128.55, thus making a total of DM 161,568.82, as well as further interest at a rate of 13.25 % since 1 October 1992.

In [buyer's] defense statement of 12 June 1995 the [buyer] does not dispute having received the goods specified in the invoices, yet without paying. However, the [buyer] claims to have been damaged by the behavior of the [seller]. Therefore, the [buyer] maintains a right to set-off damages against the [seller]'s claim.

On 15 January 1988 the [seller] and the [buyer] had entered in a so-called "contract of representation". This contract included the agreement of the [seller] to grant the [buyer] the exclusive right of preemption for all I-products with the exception of a certain [type of machine] in Spain including the Balearic Islands but not the Canary Islands. Subsequently, numerous individual purchases had been transacted.

The contract contains the following Clause 13: "Any dispute will be settled under the Rules of the International Chamber of Commerce; the place of arbitration will be A (a location in Germany)."

On 24 July 1996 in A at the oral hearing, the representatives of the parties signed the following statement:

"The parties correspondingly declare that by the 'Rules of the International Chamber of Commerce' in Clause 13 of the contract dated 25 January 1988 they meant the arbitration rules of the International Chamber of Commerce. Furthermore, they submit to settle all disputes in arbitration concerning the contract of representation as well as all later individual purchases."

Moreover, the contract between the parties contains the following clauses significant to this proceeding:

§ 4 para. 2: "[Seller] I will not supply other companies in Spain with its products."

§ 8 para. 4: "Date of payment: 120 days from date of invoice, 90 days from date of delivery less 2 % cash discount."

§ 10: "This contract is valid until 31 December 1990 beginning on 1 April 1988 and will be automatically renewed for another year provided that there has been no earlier written termination of the contract by either party."

§ 11: a) "[Seller] may terminate the contract at the end of the year provided that the following net purchase values have not been attained:

1988 DM 750,000
1989 DM 1,000,000
1990 DM 1,000,000

"In this case, the contract will expire after 6 months of the year in question."

b) "In the case of termination after 3 years, no reasons will be required; the period of notice will then be 6 months."

c) "The contract may be terminated by either party at any time, without notice, for the following serious reasons:

1. Bankruptcy, insolvency or liquidation of one of the parties of the contract;
2. Breach of contract by one of the parties of the contract."

§ 15: "The language of contract is German."

On 8 January 1992, the [seller] informed the [buyer] of the future impossibility of shielding the Spanish market from [seller's] I-products by other suppliers.

This was justified by the argument that in 1991 the [buyer] had purchased only DM 203,000 worth of goods from [seller] representing approximately half of their purchase of 1990 and this figure was far behind the [seller]'s expectations. Furthermore, due to a takeover by the W-group in November 1991, [seller's] I-products would also be sold by S-Espana (another company of the same group).

At the same time, [seller] promised to continue fulfilling all orders of the [buyer], however not on an exclusive basis.

The [buyer] justified its counterclaims, stating that the [seller] had breached the exclusive contract glutting the Spanish market via company S, as well as failing to supply ordered goods. Moreover, the [seller] not only supplied defective goods, which [seller] refused to take back, but also did not supply required replacement parts.

The decisive criterion of rights and duties can only be the contract of sole representation itself. Regarding any questions not determined by the contract, the arbitrator has to apply the law resulting from the suitable conflict-of-law norm (Art. 13(3) of the ICC Rules of Procedure).

The language of the contract is German; the parties have chosen the German residence of the [seller] as being the place of arbitration. Therefore, it would seem advisable to apply German rules of conflict of law. Article 28 para. 2 of the Introductory Law of the German Civil Code in the version of the law governing international private law from 25 July 1986, BGBI II 809, assumes that the closest connection of a contract exists with the State in which the party with the characteristic performance (i.e., not the paying party) has its residence or, if the party concerned is a company or a legal person, its headquarters. In the present case, this is the Federal Republic of Germany and, since there is nothing to be said against this assumption, German law is applicable.

The contract of 25 January 1985 also applies to the individual contracts as far as contract-affecting clauses are concerned (Contract Art. 8: setting of the price and terms of payment; Contract Art. 12: no obligation to take back unsold goods or to issue credit notes for them after conclusion of the contract; Contract Art. 13: dispute settlement).

The [seller] maintains that [seller] attached [seller's] sales and delivery conditions to every invoice, which the [buyer] never contradicted. [Seller] has presented two different examples of those conditions. One of these examples shows simply from the citing of the bank accounts and the name of the manager (before the merger with W) that it concerned conditions of I; the other is headed "W S - I" and is more detailed. The latter could not

have been used for sales before the takeover. No information has been given by the [seller] concerning the moment of changing forms.

Presuming that sales and delivery conditions were not attached to every single invoice, it is likely that at least from time to time sales and delivery conditions were attached to invoices. After all, the conditions had been printed to be announced to the business partners. They must have been imparted to the [buyer] at least in the old version, possibly also in the new version. The [buyer] has not asserted that [buyer] had contradicted any point of this version, or that [buyer] had transmitted [buyer's] own purchase conditions.

Questions concerning the individual contracts which are not dealt with by the contract of sole representation will be handled by the UN Convention of 11 April 1980 on Contracts for the International Sale of Goods (CISG). As stated in CISG Art. 1(1)(a), this relates to sales after 1 August 1991 (effective date for Spain) and, on the basis of CISG Art. 1(1)(b), to sales after 1 January 1991 (effective date for Germany), considering that German law is applicable for international sales contracts as of 1 January 1991.

There are doubts as to whether the attached sales and delivery conditions constitute a deviation from the offer thus turning the purported acceptance into a refusal combined with a counter-offer. . . . In the present case, this problem is only of theoretical importance. If one were to consider the deviation an essential modification, the contract was concluded with the acceptance of the delivered goods together with the copy of the sales and delivery conditions. However, if the modification were not essential, in accordance with Art. 19(2) CISG, the contract would be concluded with the delivery of the goods. This refers also to the first sending of the sales and delivery conditions, thus becoming a practice between the parties (Art. 9(3) CISG).

Disputes not settled by the general principles of the CISG (Art. 7(2) CISG) will be decided by internal German law.

After the effective date of the terms of reference, by the sending of the letter of 15 May 1996 the arbitrator ordered the parties to address all issues of the proceedings as well as to produce all documents of evidence by 20 June 1996. On 24 July 1996 in A, the parties attended the oral hearing which took place in the presence of a sworn translator. At first, the parties intended to interrogate witnesses but did not name any specific person and finally waived an interrogation altogether. They neither moved for interrogation of the parties nor the appointing of an expert to examine the delivered goods which the [buyer] had designated faulty. This examination would more than likely have been useless simply causing excessive costs, since any expert would hardly have judged with certainty the condition of the goods four or five years after the time of delivery.

A further extension until 1 September 1996 was granted to the [buyer] for production of documents. Finally, the arbitrator instructed the [buyer] to present all evidence for the notice of defects which [buyer] had presented. The [seller] was ordered to present all evidence of [seller's] response to these notices of defects as well as all evidence justifying the claimed interest rate. This extension, too, expired without any document having been produced.

In the main, this arbitration suffered from general assertions (such as "all defects notified" - "no defects notified or, by way of exception, removed by exchange"; "no replacement parts delivered"- "all replacement parts delivered"). However, none of these assertions have been proven, or at best only insufficiently. This has considerably impeded the arbitrator's duty to discover the facts of the case (Art. 14(1) of the ICC Rules of Procedure). Furthermore, it would not have been wise to provoke assertions or denials by the parties through specific questions the truth of which could not have subsequently been proven.

The [seller] then asked for still another extension for the purpose of making a statement concerning the documents produced by the [buyer]. However, this request was unfounded, since the [buyer] had not produced any further documents. Therefore, the arbitrator pronounced the proceedings concluded.

Since none of the reasons of Contract Art. 11(c) are relevant, a termination was only feasible within 6 months. The [buyer] lost its monopoly concerning the first half of 1992 because of the [seller's] action. Therefore, the [seller] is liable for damages. In accordance with Art. 249-252 of the German Civil Code, damages to assets are repairable (Heinrichs in Palandt, Bürgerliches Gesetzbuch, München 1995, preliminary remarks § 249, p. 253, margin number 7). According to Art. 253 of the German Civil Code the reparation includes the lost profit which

could in all probability have been expected in the normal course of business or under special circumstances, especially after the arrangements made and the precautions taken.

In the first 3 1/2 years of the contract, the [buyer] received DM 730,000 worth of goods, including around DM 40,000 in 1990 and DM 200,000 in 1991. In the first 6 months of 1992, the [buyer] bought DM 100,000 worth of goods from the [seller]. The question therefore arises how much more goods [buyer] would have bought if company S had not entered the market as a competitor. A presentation of evidence had been blocked due to a lack of access to the documents of company S. The [seller], too, made no reference to the turnover of company S. Moreover, one has to bear in mind that, on the one hand, the [buyer] had carried out an expensive advertising campaign for I-products with the result that [buyer's] sales of the [seller]'s goods had rapidly increased as shown in one of the diagrams. On the other hand, due to Company S's numerous branches in Spain, Company S probably obtained a turnover of the I-products which the [buyer] could not have achieved.

Therefore, the arbitrator must be free to judge the damages following his own convictions on the basis of the known data and on the assumption of a normal course of business (see Art. 287 of the German Civil Procedural Code). It can be assumed that the turnover of the [buyer] for I-products would have equaled that of its best sales year, namely 1990, yet not surpassed it. In that time, the [buyer] achieved a turnover of DM 400,000 worth of goods. This would mean DM 200,000 worth of goods per six-month period. In the hearing of 24 July 1996, the [buyer] maintained having achieved a net profit on I-products between 18 and 20%, yet without proving these figures. However, the [seller] did not dispute a net profit of no more than 15%. Therefore, the [buyer]'s counterclaim of DM 15,000 arises from the irregular termination of the contract of sole representation.

After 2 July 1992, the [seller] did not accept any further orders from the [buyer] because, in the meantime, there had been no payments by the [buyer] for the above mentioned claims of the delivered goods.

Furthermore, the [buyer] demands a setting off against damages caused by defective machines. In this connection, the [buyer] maintains having notified the defects either immediately in writing or at the date when [buyer] was informed of the defect by [buyer's] customers. However, there are also complaints about defects which had not been taken care of by the [seller]. At this stage, the [buyer] had stopped all correspondence with the [seller] since [buyer] planned to assert the issue in the arbitration. However, the [seller] alleges that it handled every received complaint. These complaints, however, concern only an insignificant part of the range of products.

A list of the 2,265 sold and 51 returned machines had been mailed on 3 December 1992 to the [seller], i.e., five months after the [seller] had refused to accept further orders from the [buyer]. A certificate (dated 16 November 1992) from Notary D had been attached to the list confirming an inventory of the stock delivered by the [seller], also comprising goods in stock to the alleged amount of DM 100,000. The Notary had not judged and was not able to judge whether the goods were defective or not and why they had not been sold. Finally, the [buyer] submitted a file of credit notes totalling 7,693,487 Pesetas, allegedly granted to customers because of defective goods that had been supplied to the [buyer] by the [seller]. This file concerns documents drawn up by the [buyer] only, the authenticity and correctness of which could only be proven through an interrogation of every one of the 105 customers. As shown above, there had been no application for witness interrogation.

Point 5 of the old version of the sales and delivery conditions concerning defects and notice of defects states:

"The existence of defects does not entitle a withholding of payment. There is no set-off for counterclaims. The legal regulation applies to the admission and effectiveness of possible notices of defects.

"Complaints may cause claims regarding warranty only if the buyer can prove the proper use of the delivered machines or tools until the assertion of the notice of defects. Furthermore, he has to allow the inspection of the goods still in stock and the used machines."

Concerning warranties, the new version of the sales and delivery conditions states:

6.1 "Notices of mechanical defects, false delivery and incorrect number of delivered goods detected by reasonable inspection of the goods must be made in writing within 8 days of arrival of the goods at the final destination. In the case of a later detection of the defect, the notice must be made after its

discovery without delay. If the goods are no longer in the condition of delivery, the buyer has to prove that the defects had been existent at the moment of delivery. Any essential interference or modification of the goods will exclude notices of defect, which will also be excluded if there has been an express or tacit waiver to inspect the goods."

6.2 "Our right of plea for delay will not be waived by negotiations."

Regarding the old version (concerning admission and effectiveness of the notices of defect) as well as the new version (concerning the content of the notices of defect), Art. 39(1) of the CISG subsidiarily applies. Accordingly, the buyer has to notify the supplier of the defect within a reasonable delay at the time of actual or possible detection, thereby specifying the breach of contract.

In the proceedings, too, the [buyer] did not maintain or prove any defects of precisely designated goods. It is therefore of no importance which of the goods are covered by the old version of the sales and delivery conditions. No claim for damages by the [buyer] will arise due to defects of delivered goods, especially since the [buyer] neither alleged nor proved a reasonable excuse for the omission of the required notice (Art. 44 CISG). Therefore, the question of a valid setting off in the old version of the sales and delivery conditions is unfounded.

The [buyer] urged several times the delivery of replacement parts for the goods delivered and sold by the [seller]. In [buyer]'s letter dated 16 July 1991 it is stated:

"Replacement Parts for Machinery"

"Despite our repeated request, there has been no delivery; on the contrary, we were forced to remove them from new machines in order to provide our customers with the expected service. In doing so, new difficulties were caused: we cannot sell those machines as long as you do not deliver the replacement parts.

"You have to take into consideration that R has not yet claimed the replacement parts to which it is entitled in several cases under the conditions of the warranty.

"There had also been changes of the machinery parts without forewarning. Furthermore, you did not send any current sketches with performed or planned changes.

"You have advised that the replacement in our stock is cancelled for machines of previous types; the machines we asked you to send on 23 April 1991 have not been delivered.

"Likewise, the parts ordered by Mr. H from C 91 have not been delivered. For instance: the new front and back rollers of the shaper ST 67 in order to bring up to date your, at this time, fresh delivery of the old type machinery. Otherwise, this delivery would become obsolete, unless you prefer to have this sent back as well.

"Ultimately, you have announced a break in delivery . . . and, as announced on the phone and hereby confirmed, we do regret to inform you that we will hold back payment of a certain outstanding part until we receive the missing up-to-date material ordered on 23 April 1991.

"Finally, your Mr. H promised to fulfill the order -- at least as far as the replacement parts are concerned -- in order to prevent further damages to our customers because of the poor service you have rendered so far. And, up to this very moment, you have not kept this promise either . . ."

The arbitrator has no doubts concerning the authenticity of this letter. However, the translation of the Spanish original regarding the last two lines of the penultimate paragraph is not quite suitable. It seems that the [buyer] means to hold back the payment for certain deliveries until delivery of the ordered replacement parts as well as the up-to-date machinery.

Apparently, the [buyer] has always believed in the [seller]'s obligation to continue delivering replacement parts for the sold machinery. At the oral hearing on 24 July 1996, the [seller] acknowledged the obligation to deliver

replacement parts for the delivered goods for another seven years, and stated that [seller] would have carried out those deliveries if the [buyer] had paid the numerous outstanding invoices. Regarding machines no longer produced by the [seller], the [seller] stated that replacement parts are still specially made and stored in a warehouse in order to provide customers with corresponding replacement parts.

In accordance with literature and jurisprudence concerning Art. 433 of the German Civil Code, the producer of series-produced automobiles, machines and technical equipment has a collateral obligation to have replacement parts ready for delivery even if there has been no special agreement, but only for a certain period of time. In most cases, this results from the principle of good faith according to Art. 242 of the German Civil Code; but also, in a few cases, according to Art. 26(2) of the Law governing Competition Limitation (see amongst others: Kühne, *Der Betriebsberater* 1986, pp. 1527). In the present case, neither of the following issues are relevant: whether the enumeration of the seller's obligations in the CISG is final and therefore excludes the national law (including the national jurisprudence), or whether the obligation to deliver replacement parts is a question not expressly settled by the CISG and hence to be judged by the applicable national law. Since the provisions of Art. 7(1) CISG concern only the interpretation of the Convention, no collateral obligation may be derived from the "promotion of good faith" (as foreseen by Loewe, *Internationales Kaufrecht*, Vienna: Manz (1989) p. 33, notably the American, but also the German, literature on the CISG supports a different view, e.g., v. Caemmerer/Schlechtriem, *Kommentar zum Einheitlichen UN-Kaufrecht*, 2d ed., Munich: Beck (1995) pp. 90-92, margin numbers 17-26, likewise Herber/Czerwenka, *Internationales Kaufrecht*, Munich: Beck (1991) p. 48, margin number 6; however, they do not go so far as to regard every collateral obligation derived from Art. 242 of the German Civil Code as covered by Art. 7(1) CISG; essentially reduced to "interpretation" Enderlein/Maskow/Stargardt, *Kaufrechtskonvention der UNO*, Berlin: Staatsverlag DDR (1985) p. 47, margin number 5).

Nevertheless, regarding the relationship between the parties, a prompt delivery of replacement parts had become normal practice as defined by Art. 9(1) of the CISG by which the [seller] was bound.

In accordance with Art. 33(c) of the CISG, the seller has to deliver the goods within a reasonable time after the conclusion of the contract. From Art. 7(2) it can be derived that the obligation to deliver subsequent replacement parts would have to be fulfilled within a reasonable time after receiving the buyer's order. The letter of 16 July 1991 gives evidence of the [seller]'s failure to meet this obligation, or at least not within a reasonable time period. In fact, this failure appeared before the [buyer] was in arrears for payment justifying a nonperformance according to Art. 71(1)(b) of the CISG. Therefore, in accordance with Art. 74 of the CISG, the [seller] is liable to pay damages equal to the loss including the loss of profit since the [seller] ought to have foreseen damages as a possible consequence of [seller's] breach of contract.

Considering the arbitrator's lack of reliable documents concerning the number and value of the machines for which [buyer's] customers did not pay because of nondelivery of replacement parts, the arbitrator must judge the damages according to his own conviction having taken into consideration the circumstances of this case.

After all, the [buyer] maintains (page 2 of the statement of defense) having suffered such damages only in 1991. The letter of 16 July 1991 can only concern the first six months, i.e., in total DM 100,000 worth of machines. Conceding that a quarter of those goods have become worthless, the loss of the [buyer] amounts to DM 25,000 plus 15 % loss of profit, thus DM 28,750 in total.

The [buyer] is also requesting Pesetas 5,410,428 (equivalent to DM 60,000) spent on canvassing of customers. Furthermore, the [buyer] complained of having lost numerous customers (having built a clientele of 1,100) due to the [seller]'s nondelivery of the requested replacement parts. This loss had also been foreseeable to the [seller]. Nevertheless, the [buyer] had to take into consideration that the delivery by the [seller] could not have been everlasting and that [buyer] would lose certain customers due to the nondelivery of the replacement parts for I-products. The advertising costs for the final third of 1991 and for 1992 must, however, be deducted from the total advertising costs, which are divided into yearly totals. Concerning the delivery of whole machinery, this deduction already results from the lack of liability (not provided for in the contract of representation either) to accept sales offers (see Art. 18(3) CISG) and, concerning component parts, from the expiry of the aforementioned usage which includes the immediate payment for the replacement parts. In either case, there has been no need for a statement in accordance with Art. 71(3) CISG despite the promise of delivery dated 8 January 1992.

The thus excluded advertising costs amount to Pesetas 1,500,000 or DM 17,000. It also can be assumed that the [buyer] has lost a quarter of its clientele established through advertising costs of DM 43,000 and therefore DM 10,750 of the expenditure on advertising.

With respect to the bringing up to date of the delivered machinery mentioned in the letter of 16 July 1991, no reason is to be found obliging the [seller] to bring machinery up to date or to pay damages for failure to do so.

The justified claims of the [seller] will be reduced by a set off of DM 54,500 to a total sum of DM 107,058.82.

The [seller] demands that this amount is to be charged at a rate of interest of 13.25% from 1 October 1992. Art. 78 CISG provides "If a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it . . ." Some invoices were due prior to 1 October but the arbitrator cannot grant interest prior to that date as the [seller] has not asked for it. The demand, recognized by the [buyer], for interest on arrears totalling DM 4,128.55 from earlier purchases is excluded from the general payment of interest because this would lead to interest on interest, which is prohibited in Art. 78 CISG, and which, through Art. 289 of the German Civil Code and Art. 353 of the German Commercial Code, is expressly not provided for. This demand is the first to be included in the setting off because, according to the basic principle of German law, the consequences of the setting off should be backdated to the moment when the demands were first made (Heinrichs in Palandt, loc cit, Art. 389, p. 453, margin number 1).

The sales and delivery conditions of the first version designate an interest rate of 2% above the rate of the [seller]'s bank, whereas the conditions of the second version establish the rate which banks use for current accounts on condition that it is at least 2% above the respective discount rate of the central bank of the State in question. The [seller] has not supplied any evidence of these rates of interest within the granted period of grace and there is no obligation for the arbitrator to investigate this matter. Any certificate provided by the bank can no longer be taken into consideration after the end of the extension. Because Art. 78 CISG does not, for obvious reasons, define the interest rate, the law applicable to this matter, in certain circumstances the monetary law, comes into force. Both are part of German law which, in Art. 352 of the Commercial Code concerning trade transactions, fixes the interest rate at 5%.

The [seller] won two-thirds of the total claims, the [buyer] one-third. The [buyer] therefore must compensate [seller] \$3,333.33 for the costs of arbitration and DM 2,333.33 for the costs of [seller] for his participation in the proceedings.