Arbitral award re agreement MPC conditions - competence

Date and place: 3 July 2012, Amsterdam

Arbitrators: Mr. R. van der Horst, The Netherlands
Mr. J.M. Wijnen, Belgium
Mr. P. van Pinxteren, The Netherlands

ARBITRAL AWARD

in the matter of:

Claimant

versus

Defendant

I. The proceedings

1. The course of the proceedings is evidenced by:

   - the Interim Arbitral Award of 15 December 2011, together with the underlying documents;
   - Claimant's Statement After Interim Judgment on Arbitration Panel's Competence of 10 February 2012;
   - Defendant's Statement After Interim Judgment on Arbitration Panel's Competence of 26 March 2012.

2. Briefly summarized, the reason for the main action is claims of Claimant that it be ruled that an agreement was concluded between Claimant and Defendant embodied in the purchase order of 5 January 2011, that Defendant failed to fulfil its obligations contained in the agreement,

and that Defendant is ordered to pay to Claimant an amount € 227.669,00 plus interest and costs in accordance with article 8 paragraph 3 of the MPC Conditions of 28 January 2011.

3. Defendant has contested the competence of the arbitrators by reason of the fact that the parties did not conclude an arbitration agreement.

4. By interim judgment of 15 December 2011 the arbitral tribunal admitted Claimant to give evidence that Defendant accepted the purchase order of 5 January 2011 and that Claimant and Defendant have previously contracted on basis of the MPC Conditions.

II. Assessment

5. As proof of its allegation that the parties had previously contracted on basis of the MPC conditions, Claimant has submitted 9 order confirmations (exhibits 9 up to and including 17) concerning transactions that Claimant concluded with Defendant in the period January – October 2010. It appears from the allegations of the parties that it concerns transactions pursuant to which Claimant as seller sold and delivered cheese to Defendant as purchaser (Emmenthal, Cheddar and Gouda). In the present proceedings however both the capacity of the parties and the nature of the sold item are different. Claimant bases its claims in question on the fact that Defendant as seller would have sold consignments of skimmed milk powder to Claimant as purchaser. Even if Defendant had at the time accepted the order confirmations submitted by Claimant and concerning the consignments of cheese, it does not automatically follow from this that the MPC Conditions and MPC Arbitration Regulations also apply to sales of consignments of skimmed milk powder by Defendant to Claimant. Furthermore, it appears from the statement of Mr. Intermediary A. – which will be discussed below – that at the time at which according to Mr. Intermediary A. agreement was reached concerning the essentials of the purchase agreement at issue, Defendant did not have knowledge of the identity of Claimant. In the given circumstances Defendant therefore did not have to foresee that a purchaser of the skimmed milk powder unknown to Mr. Intermediary A. , wished to contract on basis of the MPC Conditions. The arbitral tribunal is of the opinion that the aforesaid order confirmations do not prove that Claimant and Defendant have previously contracted on basis of the MPC Conditions concerning similar transactions so that Defendant did not have to foresee that Claimant wished to purchase the skimmed milk powder from Defendant on basis of the MPC Conditions.

6. As proof of the fact that Defendant accepted the purchase order of 5 January 2011 at issue, Claimant has submitted a statement of Mr. Intermediary A. of 30 January 2012 (see exhibit 19), in which he has amongst others declared the following:

> *"On 4th of January 2011 at 11:37 a.m. in written I confirmed to Defendant the order for 437,825 tons of SMP at 2,00 EUR/kg EXW Hollywood. It was their last price offer*

confirmation. Then in following e-mail dated on 5th of January 2011 at 11:55 I sent to Defendant your company details informing them that the contract price should be 2,03 EUR/kg EXW Hollywood as it containded my commission. I asked them to prepare the contract with that particular price. Mr. X informed me that the contract will be issued on 13.01.2011 the latest as they have to check Claimant with their insurance company to order to get a credit. He informed me that they know Claimant as they worked together before in case of cheese for melting and it should not be any problem with credit. That is why the contract has been confirmed at same time by phone, but still I was asked to wait for the contract as it was prepared by their lawyer. Then the formal contract had been sent to Defendant later still the same day once I informed you .. in my e-mail dated on 05.01.2011 at 12.00 at noon that Defendant will check Claimant with their insurance company in order to get a credit limit and prepare the contract on 13.01.2011 the latest.

On 5th of January 2011 at 12:41 p.m. I sent to Defendant your purchasing contract with FCA Hollywood terms of delivery.
For 99% I am sure that once I had been sent by you the purchase contract with EXW Dubai on 5th of January 2011 at 12:22 I opened document and checked it. I noticed that the delivery terms are not correct – my e-mail dated on 05.01.2011 at 12:27, I informed you about that. Then you sent met following message 05.01.2011 at 12:28: "Dear Mr. Intermediary A. *, wait with sending the contract / I will amend it and sent it again !!!"*
On 5th of January, 2011 at 12:37 I had been resent by you correct purchasing contract, which I resent to Defendant in my e-mail on 05.01.2011 at 12:41.
If you follow all e-mails with exact time of sending / receiving you will see that the contract with delivery terms EXW Dubai could not been sent to Defendant. They received the correct contract only with FCA Hollywood.
For sure I would not have enought time to phone Defendant and discuss with them the wrong contract with EXW Dubai in the meantime. I phoned Mr. X after sending him a purchasing contract to check if the gets the document and if everything is ok according our settlements.
He confirmed that everything is ok, noted and that they would check Claimant with their insurance company just to be able to confirm the payment terms. He confirmed the business by phone.
That is why (after several phone conversations with Defendant in the meantime) in my e-mail dated on 07.01.2011 at 15:58 I confirmed in written that all conditions of the contract have been already confirmed by both: Claimant and Defendant. They never denied in written nor in spoken that something was wrong and they would like to change anything for instance (..)".

7. From the statement of Mr. Intermediary A. the arbitral tribunal understands that Mr. Intermediary A. sent an email to Defendant on 5 January 2011 at 11:55 a.m. In this email he provided the name and additional particulars of purchaser Claimant. He furthermore requested Defendant to draft a contract on basis of the sales price of Euro 2.03 per kg EXW Hollywood. In his statement Mr. Intermediary A. has declared that Mr. X of Defendant informed him on 5 January 2011 – prior to drafting the contract - that Defendant first wanted to verify with its credit insurer whether this insurer was prepared to provide a credit limit for Claimant. Depending on the decision of the credit insurer Defendant would issue the contract by 13 January 2011 latest. Mr. Intermediary A. has furthermore declared that he sent the purchase order of Claimant at issue to Defendant by email of 5 January 2011 (sent at 12:41 p.m.), that after the sending of this email he rang Mr. Z of Defendant and asked him whether he had received the purchase order in good order and that Mr. Z acknowledged receipt hereof.

Mr. Intermediary A. has not declared that in his emails of 11:55 a.m. respectively 12:41 p.m., or during the telephone conversations with Mr. Z, he spoke about applicability of the MPC Conditions and the arbitration clause contained therein. He has also not declared that Defendant has accepted the purchase order and/or applicability of the MPC Conditions.

It appears from the statement of Mr. Intermediary A. that he had agreed with Defendant that Defendant would draft the contract (depending on the outcome of the discussions with the credit insurer). This also appears from the email of Mr. Intermediary A. to Claimant of 4 January 2011 (exhibit 3 application for arbitration).

"(..) *In the meantime please send me all your details so that I could pass them to the supplier. Then he will be able to prepare the contract for you.* (..) "

As a result it is an established fact that Defendant and Claimant have agreed that Defendant as purchaser would draft the contract. It does not appear from the statement of Mr. Intermediary A. that Defendant has - in derogation from the previously made agreement that Defendant would draft the contract - explicitly accepted the purchase order of Claimant. In the light of the foregoing Claimant's position that Defendant would tacitly have consented to the purchase order and the MPC conditions declared applicable therein, is untenable. Now that Defendant would draft the contract, it did not stand to reason that a contract would be concluded on basis of the delivery conditions of Claimant. Based on the foregoing the arbitral tribunal does not consider to have been proved that Defendant has accepted the purchase order of Claimant of 5 January 2011 containing the reference to the MPC Conditions and the arbitration clause. The arbitral tribunal has therefore not come to the conclusion that Claimant and Defendant have agreed to arbitration on basis of the MPC Conditions.

III. The costs of the proceedings

8. As the party against whom judgment has been given in the procedural issue, Claimant will be ordered to pay the costs of these proceedings, which costs, having regard to article 20 of the MPC Arbitration Regulations, are fixed at Euro 13,250. Claimant has paid administration costs to the secretariat of the VGM in the amount of Euro 750 and has placed Euro 12,500 on deposit for the fee and disbursements of the arbitrators, secretary and registrar.

9. The costs of legal assistance of the parties are for the own account of the party that requested legal assistance, now that in the opinion of the arbitral tribunal there are no special circumstances as meant in article 20 sub 1 of the MPC Arbitration Regulations.

IV. Decision

10. Making an award based on reasonableness and fairness, the arbitration tribunal judges as follows in the motion contesting jurisdiction and in the main proceedings:

    a) declares itself incompetent to hear the claims in the main proceedings;
    b) fixes the costs of this arbitration (including the filing of the arbitral judgment at the court registry of the district court of Amsterdam) at Euro 13,250 (IN WORDS: THIRTEENTHOUSAND TWOHUNDRED AND FIFTY EURO);
    c) decides that the costs of this arbitration are borne by Claimant;
    d) directs that these costs shall be set off against the administration costs of Euro 750 (IN WORDS: SEVENHUNDRED AND FIFTY EURO) and deposit of Euro 12,500 (IN WORDS: TWELVE THOUSAND FIVEHUNDRED EURO) both paid by Claimant;
    e) dismisses all other applications.

Pronounced at Amsterdam on 3 July 2012 and drawn up in quadruplicate, of which one copy for claimant, one copy for the defendant, one copy for the secretariat of the VGM and one copy for filing at the court registry of the district court of Amsterdam.

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R. van der Horst	J.M. Wijnen	P. van Pinxteren

H.K.P. Ex (secretary and registrar)