

Seller (France) v Buyer (Germany), Award, CAP Case No. 9971, 14 February 2008

A sale confirmation contained references to both a French state court and the COFREUROP Conditions, which provide for arbitration. The sole arbitrator found that he had jurisdiction because when parties include an arbitration clause in their contract they express their intention to refer disputes to arbitration. If they did not so intend, they would remain silent. On the merits, the arbitrator found in favor of Seller because Buyer failed to object to the quality of the goods within six hours of their receipt as provided for in the COFREUROP Conditions.

The French seller sold a certain quantity of apricots to the German Buyer through a broker. On 8 June 2007, Seller sent Buyer a sale confirmation. The sale confirmation contained the following clause:

“The Commercial Court (*Tribunal de Commerce*) of the sender shall have jurisdiction over all disputes under the present contract. Only COFREUROP sales ...
Strasbourg Arbitration Chamber.”

The COFREUROP (Common European Usages for the Domestic and International Sale of Fresh Fruits and Vegetables) Conditions provide for arbitration of disputes at the International Arbitration Chamber for Fruits and Vegetables (*Chambre Arbitrale Internationale pour les Fruits et Légumes* – CAIFL), [page "39"](#) previously called the Strasbourg Arbitration Chamber (*Chambre Arbitrale de Strasbourg*). On the same day, Seller sent Buyer an invoice for € 8,992.15. The invoice also referred to the COFREUROP Conditions and the *Tribunal de Commerce* of Seller.

The apricots were delivered on 11 June 2007. On 14 June 2007, Buyer sent a fax to Seller, stating that it had been necessary to sort the apricots because some had rotted for lack of ventilation. On 15 June 2007, Buyer informed Seller that the competent German authorities had carried out a sample control of the goods and found several defects. Seller replied by offering Buyer a discount; Buyer did not reply to this offer. Subsequently, Buyer paid about a fourth of the invoice.

When the balance remained unpaid, Seller filed a request for arbitration at the Arbitration Chamber of Paris (*Chambre Arbitrale de Paris*), which manages CAIFL arbitration proceedings. A sole arbitrator was appointed. The arbitration was conducted on documents only and in accordance with the CAIFL Rules of Rapid Arbitration Procedure (*Procédure d'Arbitrage Rapide*).

The sole arbitrator decided preliminarily to accept Buyer's

Author

Albert Jan van den Berg

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(Germany)

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statements – though they were filed after the time limit of five days from the request for arbitration – in order to guarantee the fairness of adversarial proceedings and allow Buyer to present its case.

The sole arbitrator then examined whether he had jurisdiction. Buyer claimed that no arbitration agreement was concluded between the parties; also, the documents in the file contained contradictory forum selection and arbitration clauses. The arbitrator concluded that he had jurisdiction based on the reference in the sale confirmation to the COFREUROP Conditions and the CAIFL. The arbitrator relied on the reasoning in French jurisprudence that parties who do not wish to refer their disputes to arbitration would simply remain silent and that by including an arbitration clause in their agreement they express their intention to refer disputes under their contract to arbitration. It was irrelevant that the sale confirmation referred to the *Chambre Arbitrale de Strasbourg* rather than the *Chambre Arbitrale Internationale pour les Fruits et Légumes*, as the Chamber is now called, as the common intention of the parties to refer disputes to CAIFL arbitration was sufficiently clear. Also, this conclusion was in line with the fact that in international trade in general and in the international trade in fruit and vegetables in particular, arbitration is the habitual means of dispute settlement.

On the merits, the sole arbitrator dismissed Buyer's argument that the German authorities prohibited the sale of the apricots. In fact, the German authorities only requested that the apricots be reclassified as second choice. The arbitrator added that the German authorities examined the apricots four days [page "40"](#) after delivery, when it could not be expected that they were in the original condition.

The sole arbitrator found in favor of Seller, because he held that Buyer failed to object to the quality of the apricots within six hours of receipt and failed to give a detailed description of the defects, as required under the COFREUROP Conditions.⁽¹⁾

Excerpt

(....)

[1] “[Defendant] filed its statements ... four days before the date on which the case would be decided. Art. 4(3) of the PAR Rules⁽²⁾ provide that the defendant submit its case file at the latest five days before the notified date of examination of the case. However, the Arbitral Tribunal deems it equitable, in order to guarantee the fairness of adversarial proceedings and to allow the defendant to present its case, to accept [Defendant's] statements.”

I. Jurisdiction

[2] “In its observations ... Defendant contests the jurisdiction [of the Arbitral Tribunal], arguing in particular that the parties did not reach an agreement on jurisdiction, that Art. 8 of the COFREUROP Conditions provides for a specific jurisdiction and that bilateral agreements allow for clearer relations between the parties than laws and usages.

[3] “Since Defendant contests the jurisdiction [of the Arbitral Tribunal] and there are allegedly contradictory clauses, the Arbitral Tribunal must interpret these contradictory clauses in order to

ascertain whether it has jurisdiction.

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[4] “The jurisdiction of the Arbitral Tribunal follows in this case from the arbitration clause at the foot of the sale confirmation, which refers to the application of the COFREUROP Conditions, which [Conditions] provide for the jurisdiction of the International Arbitration Chamber for Fruits and Vegetables (*Chambre Arbitrale Internationale pour les Fruits et Légumes*).⁽³⁾ The COFREUROP Conditions are also mentioned in the invoice at issue.

[5] “The Arbitral Tribunal notes that although the sale confirmation contains a written agreement reading ‘COFREUROP Strasbourg Arbitration Chamber [*Chambre Arbitrale de Strasbourg*]’ and also states that ‘The general conditions of sale are those established by COFREUROP’, it also mentions the Commercial Court [*Tribunal de commerce*] of [Seller]. Other documents are supplied in the proceedings which, though not contractual, contain different jurisdiction clauses. This is especially the case of the invoice at issue – which states that the ‘goods [are] sold under the COFREUROP Conditions’ and refers to the *Tribunal de commerce* of [Seller] – or the letters on Buyer’s stationery referring to a German civil court.

[6] “The Arbitral Tribunal, faced with such contradictions, notes that contradictory clauses cancel each other out in favor of the application of general law [*droit commun*]. However, it appears from the examination of the documents that the parties intended to have their dispute decided by an arbitral tribunal rather than a state court, in conformity with the usages of the trade codified in the COFREUROP Conditions.⁽⁴⁾

[7] “Where there is a contradiction between an arbitration clause and a forum selection clause, we must refer to constant jurisprudence, according to which: *page "42"*

‘an ambiguous arbitration clause must be interpreted taking into account that had the parties not wished to refer their disputes to arbitration they would have simply remained silent on the possibility of taking recourse to arbitration; ... by including an arbitration clause in their agreement they have expressed the intention to refer the difficulties arising under the contract to the arbitral jurisdiction mentioned’.

(Court of First Instance [*Tribunal de Grande Instance*], Paris, 1 February 1979; Court of Appeal [*Cour d'Appel*], Paris, 16 October 1979.)

[8] “The sale confirmation refers to the *Chambre Arbitrale de Strasbourg*, which is now called *Chambre Arbitrale Internationale pour les Fruits et Légumes*, whose seat is in Strasbourg but whose Secretariat is run since December 2004 by the Paris Arbitration Chamber. The confirmation, as well as the invoice at issue, also refers to the COFREUROP General Conditions, which provide in Art. 8, which in turn refers to Annex 4 (Rules of Arbitration), that the parties to the contract must agree in writing on a specialized arbitral tribunal or any other arbitral tribunal indicated by them. This is the case here. The sale confirmation, which was returned by Defendant by fax with only one reservation regarding the quality of the goods,

expressly indicates the *Chambre Arbitrale de Strasbourg*. This arbitration clause, [though] the denomination is incorrect, appears sufficiently to reflect the common intention of the parties to refer [disputes] to arbitration, and indicates the competent arbitral tribunal.

[9] “Furthermore, in international trade in general and in the international trade in fruit and vegetables in particular, arbitration is the habitual means of dispute settlement since the creation in 1964 of the *Association Internationale des Fruits et Légumes*, which manages the *Chambre Arbitrale* and the COFREUROP Conditions. A dispute arising under a contract containing an arbitration clause and concluded between professionals in the international trade in fruit and vegetables can only be settled by arbitration, unless the parties agree otherwise.

[10] “It appears from these elements that Seller correctly seized the *Chambre Arbitrale Internationale pour les Fruits et Légumes* and that this Arbitral Tribunal has jurisdiction over the dispute.

[11] “We must also remember that pursuant to Art. 4[(1)] of the PAR Rules,⁽⁵⁾ which [Rules] apply here, this Arbitral Tribunal decides as *amiable compositeur*. This implies by definition a dispensation, provided for by the law itself, from the strict application of the rules of law, as well as the power to apply different criteria of interpretation and judgment, in particular equity, trade usages and the arbitrator’s conscience.

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[12] “Since this dispute implicates international commercial interests, it is an international arbitration.

[13] “The parties have not asked to be heard and the Tribunal has [all] the elements allowing it to decide on documentary evidence only.”

II. Merits

[14] “On the merits, it appears from the circumstances of the case that according to the sale confirmation of 8 June 2007, Seller sold to Buyer, through Broker, 272 boxes of quality A apricots and 272 boxes of quality B apricots. On the same day, Seller issued the corresponding invoice for a total of € 8,992.15.

[15] “The goods were delivered to Buyer on 11 June 2007.... On 14 June 2007, that is, three days after delivery, Buyer sent a fax to Broker stating that it had been necessary to sort the goods because some apricots had rotted for lack of ventilation. On 15 June 2007, Buyer sent a fax to Broker, which forwarded it on the same day to Seller, communicating that the competent German authorities had carried out a control of the goods that same morning: of the 99 boxes that were [at the market], 5 boxes containing a total of 344 fruits were examined. One hundred and twenty-four fruits were found to be smaller in size than indicated, 17 showed skin defects, 56 had marks, 3 were bruised and 4 showed signs of mildew. In its accompanying letter, Buyer claimed that it had in stock 226 out of the 272 boxes of category A apricots it had received and 459 boxes of category B apricots out of the 272 that were delivered to it [sic]. It also stated that it was awaiting the final sale of the goods to communicate the result to Seller.

[16] “Also on 15 June 2007, Seller instructed Broker to offer a discount of € 813.00 on the invoice to Buyer ... under reservation that the offer be accepted immediately. This offer was forwarded to Buyer on the same day by fax. On the same day Buyer replied thanking Broker for the offer but did not communicate its decision.

[17] “On 22 June 2007, Buyer offered to pay € 2,125.44 out of the invoice of € 8,992.15, a sum it did in fact pay on 2 August 2007. On 24 October 2007, Seller sent a formal demand for payment to Buyer, requesting payment of the balance of € 6,053.71 [and stating] that it would commence arbitration at the Paris Arbitration Chamber. On 5 November 2007, Buyer sent Seller a refusal fax to which it again attached the control certificate [issued by the German authorities] on 15 June 2007. The balance of the invoice of 8 June 2007 remaining unpaid, Seller filed a request for arbitration with the Paris Arbitration Chamber. *page "44"*

(....)

[18] “Buyer argues in its observations ... that the goods were stopped by the authorities because of their aspect; this led to a sale prohibition. However, the German authorities intervened on 15 June 2007, that is, four days after receipt of the goods. Because of its very fresh nature, this product cannot remain the same in this period as on the day of delivery. The Tribunal can only be surprised that the test was made on only five boxes of category B apricots and that the stock was bigger than the quantity delivered. The Tribunal also remarks that the German authorities requested that the goods be reclassified as second choice; this cannot be deemed a sale prohibition.

[19] “At any event, after having received delivery on 11 June 2007, Buyer did not react until 14 June 2007, that is, three days after delivery, and it did so without giving a detailed and exact description of the defects it had recorded, as required by Art. 6.1.6.[2] of the COFREUROP Conditions.

[20] “In case of contestation, the parties are obliged to respect the rules for the delivery of the goods established in the COFREUROP Conditions. The COFREUROP [Conditions] provide at Art. 6 (‘Damage Claims’) and more particularly at Art. 6.1.2.2 that ‘The claim is to be raised immediately in all cases. For goods of category I [in the list of perishable goods], the claim is to be made within 6 hours as from time of delivery (see annex 2).’ Annex [2] of the COFREUROP Conditions – ‘Classification of products according to the rules of perishability’ – puts apricots in the category of very perishable products. According to Arts. 6.1.4.2 and 6.1.5 of the same Conditions, this claim for damages must be made or confirmed in writing (fax or telex).

[21] “There are no elements in the file showing that following the delivery on 11 June 2007 Buyer made a written claim for damages within the time limits and according to the forms required by the COFREUROP Conditions.

[22] “The Tribunal also notes that pursuant to Art. 6.2.1, the buyer had the burden to request an expert report after making a claim for damages under Art. 6.1. Buyer failed to do so.

[23] “Since Buyer neither complied with the procedure established by the COFREUROP [Conditions], having failed to raise its claim for damages in writing within six hours of the delivery of the goods, nor

did it pay the balance of the invoice, Buyer owes € 6,866.71 to Seller under the invoice of 8 June 2007.

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[24] "Based on the above, reaching the same result under the law and in equity, the Tribunal decides to grant Seller's claim and to direct Buyer to pay the sum of € 6,866.71 to Seller plus interest at the legal rate applicable in France as of 8 June 2007, the date of issuance of the invoice, until complete payment.

[25] "Seller also claims € 1,500 for damages for unjustified refusal [to pay] and interest thereon. In virtue of its powers as *amiable compositeur*, the Arbitral Tribunal deems that Seller has no ground for claiming this sum.

[26] "Seller claims € 1,500 as indemnification of non-reimbursable costs related to the proceedings. In the circumstances of the case, it does not appear inequitable to have Claimant bear the costs it made that are not included in the expenses. The Tribunal decides there is no ground on which to grant this claim.

[27] "Finally, Seller asks the Tribunal to direct Buyer to pay the entire costs and fees of the present arbitration. It is justified that Buyer, who loses this case, bears the costs of the arbitration." (...)

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¹ This award was refused enforcement in Germany by the Munich Court of Appeal on 23 November 2009; this decision was affirmed by the Federal Supreme Court on 16 December 2010. Both decisions are reported in this Yearbook XXXVI (2011) at pp. 273-276 (Germany no. 136).

² Art. 4(3) of the PAR (*Procédure d'Arbitrage Rapide* – Rapid Arbitration Procedure) Procedural Rules of the International Arbitration Chamber for Fruits and Vegetables (*Chambre Arbitrale Internationale pour les Fruits et Légumes*) reads:

"The defendant is invited to deposit his case file at the Secretariat at the latest five days before the date of the hearing which will have been notified to him."

³ Art. 8 of the COFREUROP [Common European Usages for the Domestic and International Sale of Fresh Fruits and Vegetables] Conditions reads:

"8.1. A special arbitration court will be competent for the settlement of any disputes between the contracting parties (see the enclosed rules of arbitration, annex 4). The competence of an arbitration court must be expressly agreed in writing between the contractual parties.

8.2. The contractual parties are advised to agree on the following written arbitration clause:

8.3. "The parties hereby agree to accept the binding decision of the *Chambre Arbitrale Internationale pour les Fruits et Légumes*, in the case of any dispute which may arise as a result of this contract."

⁴ Article 1.2 COFREUROP Conditions reads:

“1.2. These conditions reflect the current commercial custom and usage of the trade.”

⁵ Art. 4(1) CAIFL PAR Rules reads:

“The First Degree Arbitral Tribunal shall rule on the dispute as mediator in an amicable settlement and, unless it decides otherwise, on the basis of the documentary evidence produced.”

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