School of International Arbitration, Queen Mary, University of London

International Arbitration Case Law

Academic Directors: *Ignacio Torterola*
*Loukas Mistelis**

METAL VM J.S. v. JANINA
(ARB/01/11)
AWARD

Case Report by Luljeta Plakolli**
Edited by Ignacio Torterola ***

An Award rendered on December 15, 2011, under the Kosovo Law on Obligations and in accordance with the Arbitration Law of the Republic of Kosovo, and the Kosovo Arbitration Rules 2011.

Tribunal: Mr. Bajram Miftari LL.M. (Sole Arbitrator)

Claimant's counsel: Mr. Skender Limani, Attorney from Preshevo, Serbia

Defendant's Counsel: Mr. Behxhet Mehmeti, Manager, JANINA

* Directors can be reached by email at Ignacio.torterola@internationalarbitrationcaselaw.com and loukas.mistelis@internationalarbitrationcaselaw.com .

** Luljeta Plakolli is an attorney at First Legal Solutions LLC specializing in commercial law. She can be reached at luljeta.plakolli@fls-ks.com or +377 44 147 825

*** Ignacio Torterola is co-Director of International Arbitration Case Law (IACL).

INDEX OF MATTERS DISCUSSED

Digest

1. Facts of the Case

On April 22, 2009, Claimant "Metal VM" from Preshevo/Serbia, registered under the laws of the Republic of Serbia, as the seller, and Respondent "Janina" from Lipjan/Kosovo, registered under the laws of the Republic of Kosovo, as the buyer, entered into sales contract regarding electric boilers of type TEK/10 KW and type TEK/12 KW to be used for central heating system. Under the contract, the seller agreed to provide the buyer with electric boilers for central heating, whereas the buyer agreed to pay a price of € 260,00 per electric boiler when it re-sells each electric boiler bought from the buyer.

On May 4, 2009, the seller delivered 100 electric boilers to the buyer. On August 12, 2010, the seller sent a written notice to the buyer asking for payment of the agreed price, and notified the buyer that in the contrary, it will commence legal proceedings.

Respondent claimed that the parties had an oral agreement in the meantime, where they both agreed that buyer can meet its contractual obligations by paying the agreed price at the agreed bank account, or alternatively, delivering to the seller substitute goods produced by buyer. Further, Respondent argued that it had already delivered to Claimant substitute goods amounting to € 5.470,00, thus reducing the total amount of the contract to € 20.530,00.[1]

On July 21, 2011, Claimant "Metal VM" initiated legal proceedings before the Permanent Tribunal of Arbitration attached to the Kosovo Chamber of Commerce (hereinafter referred to as PTA), against Respondent "Janina" for the compensation of € 26.000,00. Article 11 of the Sales Contract provided for arbitration clause according to which, the parties agreed to refer their disputes to the Kosovo Permanent Tribunal of Arbitration in Pristina.

2. Legal Issues Discussed in the Decision

(a) Jurisdiction

The Tribunal decided that it had jurisdiction over Claimant's claim under the Kosovo Arbitration Rules 2011. Article 11 of the Sales Contract provided for the arbitration clause according to which parties agreed to refer to arbitration before the Permanent Tribunal of Arbitration attached to the Kosovo Chamber of

[1] Award ¶ 5

Commerce any dispute arising out of the contract. The arbitration tribunal confirmed that the seat of arbitration is Pristina, an the language of arbitration is Albanian.

(b) Form of contract

The Tribunal found that any terms contained in the contract signed between the parties in dispute could have been amended only with the prior written agreement between the parties. Respondent's claim was based on the Kosovo Law on Obligation which provides, *inter alia*, that parties can terminate, supplement or amend the existing contract with an informal agreement i.e. oral agreement[2]. Based on this Article, Respondent argued that there was an oral agreement between the parties according to which Respondent could meet its payment obligation by delivering other goods to Claimant rather than paying it the agreed price. In its counter-claim submitted on October 6, 2011, Respondent argued that it had delivered goods (water pipes) to Claimant valued at € 5.470.00, thus reducing its debt towards Claimant from € 26.000,00 to € 20.540,00.

The Tribunal interpreted the Law on Obligations, and the Sales Contract between the parties and concluded that the contract did not contain any clause that would enable the buyer to pay its obligation by delivering other goods. According to Tribunal's interpretation, the Law on Obligation leaves at party's discretion to choose whether they want to enter into an informal or formal contract. If the parties have agreed over a special form of the contract, any later amendments to that contract will be considered invalid, unless they are agreed upon in writing and signed by both parties to the contract. The Sales Contract concluded between the parties in dispute is categorized as a special contract under the Kosovo Law on Obligations[3]. Accordingly, the Tribunal found that any amendments to the contract can be made only in writing and signed by both parties, and any other oral agreement would be therefore considered invalid as parties explicitly agreed in the contract for this.

(c) Terms of payment

After the consideration of whether there was a valid oral amendment to the written contract between the parties, the Tribunal further found that Respondent did not fulfill its contractual obligations by delivering substitute goods to

[2] Kosovo Law on Obligations, Art. 69

[3] Kosovo Law on Obligations, Art.454

Claimant. According to the findings of the tribunal, Respondent did not prove that these goods were actually delivered to Claimant. The evidence showed that the goods were delivered to another enterprise "Fluidi" with whom Claimant had no business relationship, and this transaction was in no way related to that which existed between Claimant and Respondent.[4] Respondent also failed to prove any benefit incurred by Claimant from the delivery of Respondent's goods to "Fluidi" enterprise. Even, if Respondent would have proved such a link, Article 307 of the Law on Obligations provides that the debtor cannot substitute its obligation in money by delivering goods in the value of the agreed price, and the creditor cannot ask this from the debtor, either.

By not paying the agreed price, Respondent breached the contract according to the Tribunal.

(d) Penalties

Tribunal considered Claimant's request for payment of penalties. The Tribunal decided that penalties should be calculated from July 21, 2011 until the payment of the last contractual obligation. This conclusion was based on tribunal's analysis of the question as to when was the payment due. Article 3 of the sales contract provided that Respondent was obliged to pay to Claimant by the end of the month when Respondent re-sold each electric boiler. Time of performance was not fixed but it was dependent on the occurrence of an event which was certain to occur.[5] The certain event in this case was the re-selling of each electric boiler by Respondent. Claimant failed to persuade the tribunal that Respondent was late with payment earlier than July 21, 2011, and in the absence of such an evidence, tribunal decided that the penalties should be calculated from the day when the request for commencement of arbitral proceedings was submitted to PTA. The Tribunal also ordered Respondent to pay procedural costs.

3. Decision

The Tribunal decided that "Janina" breached the contract by not paying the agreed price. It further decided that Respondent should pay penalties calculated based on the criteria determined by the European Central Bank, with the norm of 1% of the total debt amounting to € 26.000,00 calculated from July 21, 2011. The Tribunal also ordered "Janina" to pay procedural costs amounting to € 1.900,00.

---

[4] Award ¶ 23.

[5] Award ¶ 30.