

# X v. Y and Z, Award, CAM Case No. 8803, 24 February 2006

Stefano Azzali

## Headnotes

*Arbitral Tribunal defined the limits of a Memorandum of Understanding and affirmed jurisdiction over pre-contractual liability claims.*

## Summary

The dispute arose out of a Memorandum of Understanding (MOU) among the parties, providing for a transfer of the entire corporate stock owned by the defendant X and the defendant Z, in favor of the Claimant Y. Negotiations continued in order to define the content of the Share Purchase Agreement (SPA). When the deadline provided in the MOU approached, Y sent to the counterparty the draft of an addendum to the MOU requesting an extension of its duration and invited the defendants to convene in front of a notary to start executing the transfer. X/Z did not appear. Accordingly, the claimant Y filed a request for arbitration based on the arbitration clause contained in the MOU. The MOU and the SPA stated that the Italian law is the governing law and the arbitration panel shall consist of three arbitrators appointed in conformity to the Rules of the Chamber of Arbitration of Milan. The claimant requested the arbitrators to declare that the respondents, each for its part, have an obligation to sell to Y the shares representing the entire legal capital of the SPA, to declare that the ownership of the controlling participation of the corporation's stock is to be transferred in one or multiple transactions (Art. 2932 Italian Civil Code – C.C. – specific enforcement of obligation to make a contract), and to condemn the Defendants to pay damages considering that the claimant was willing to acquire all the outstanding shares of the SPA independently, regardless of whether the conditions specified in the MOU had occurred. The respondents requested the rejection of all the claimant's requests.

The majority of the Arbitral Tribunal deemed that the MOU signed by the parties cannot be considered a preliminary contract within the meaning of Art. 2932 C.C., but rather a record on the deal's terms, which the parties have negotiated and agreed on. In other words, the MOU is a document that simply records the outcome of the negotiations. The conclusion reached by the arbitrators was in consistent with the text of the MOU where the intent of the parties implied in the on going negotiations (*the parties were still negotiating a SPA*). The majority of the panel acknowledged that the buyer and the seller respectively agreed to "*undertake to purchase and to sell*", but considered that the fundamental elements of the contract, on which an agreement must be reached in order for a preliminary contract to be formed, were still subject to future negotiations. The tribunal determined the put and call options, the ability to obtain a license from a third party, the regulation of guarantees, the clause concerning the governance of the corporation during the interim period, to be economically essential elements for that contract to be completed. The absence of these elements, in particular the issue of the guarantees, affects the determination of the price, which is an essential element of the concerned contract. That was also confirmed by the rule of interpretation stated in Article 1362 Para. 2, C.C., (intent of the contracting parties) in relation to the parties' behavior, subsequent to drafting the MOU. An examination of the SPA draft showed that the claimant itself proposed amendments to the MOU, which confirmed the MOU to be unequivocally partial.

The arbitrators next considered whether a breach of the pre-contractual duty of good faith during negotiations occurred in the final period of the MOU. The arbitrators were competent to decide on the pre-contractual liability of the parties based on the language used in the arbitration clause, which provides that "*any disputes arising*" would be subject to arbitration. Article 1337 C.C. requires an autonomous obligation of good faith in the negotiation process, thus the breach of such obligation is subject to arbitration. On this issue, the Arbitral Tribunal held that the X/Z objectively breached their duties. The majority of the arbitrators opined that the Defendants violated Art. 1337 C.C., because of an insufficient and untimely disclosure of the defendants' intention not to extend the duration of the MOU, which led the claimant to believe that the pause in the

## Author

› Stefano Azzali

## Jurisdiction

› Italy

## Organization

› Chamber of Arbitration of Milan

## Case date

› 24 February 2006

## Case number

› CAM Case No. 8803

## Parties

› Claimant, X  
› Defendant, Y  
› Defendant, Z

## Key words

› Memorandum of understanding  
› Damages  
› Reliance interest  
› Pre-contractual liability

› Italian Civil Code

## Source

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negotiation process was necessary in order to finalize the licensed matter related to the third party. Pre-contractual liability provides for allocation of damages limited to the reliance interest, which embraces the expenses incurred based on the promise and the loss of opportunities. However, the majority of the tribunal rejected the argument that damage resulted from the loss of opportunities throughout the negotiation process on the basis that (a) there was no proof of serious reliance by the defendants that the negotiations will generate a positive outcome, (b) both parties accepted a short term for the MOU and (c) the defendants declared the issue of a third party's license to be decisive for the ongoing negotiations. Furthermore, the tribunal found that the MOU was about to expire, when the defendants raised a strong disagreement regarding the draft proposed by the claimant. The tribunal found it genuinely impossible to affirm an objective opportunity to enter into the contract, and similarly impossible to affirm the existence of any relevant damage linked to the losses. The tribunal condemned the defendants for not having maintained transparency in their dealing and for having delayed a legitimate decision not to extent the MOU, but found no evidence of a breach of contract.

**Full text**

The full text of this decision is not available, as the decision has not been made publically available.

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