X v. Y, Award, CAM Case No. 2310, 4 May 2011

Benedetta Coppo, Chamber of Arbitration of Milan;
Stefano Azzali, Chamber of Arbitration of Milan

Headnote

In X v. Y, the sole arbitrator rendered an extensive interpretation of an arbitral clause in order to determine the competent institution and the applicable law to the merits of the dispute (4 May 2011)

Digest

In 2009 Claimant (Italy) and Respondent (Switzerland) concluded a contract for the supply of solar panels and an arbitration agreement for the future disputes. A dispute arose on alleged defects of the panels, and in 2010 the Italian company (as the buyer) filed its request for arbitration before the Milan Chamber of Arbitration (CAM), while Respondent remained absent.
The arbitration clause provided that (i) the contract is regulated by the laws of United Europe (leggi dell'Europa Unita); (ii) any dispute arising out of the contract or with regard to its performance is to be settled amicably; (iii) if the amicable settlement fails, the dispute shall be referred to "arbitrage" (arbitraggio) under the rules and procedures of the Milan Chamber of Commerce, and the arbitration decision is considered final and binding.
The case was referred to a sole arbitrator (French national) appointed by the CAM's Council. The arbitrator ruled on three preliminary issues concerning the interpretation of the arbitration agreement: (a) the identification of the arbitral institution; (b) the nature of the dispute resolution tool chosen by the parties and; (c) the definition of the rules applicable to the merits.
Firstly, the arbitrator ruled that the institution chosen by the parties to administer the case is the Milan Chamber of Arbitration, since the agreement made reference to the Milan Chamber of Commerce where the CAM is established and offers ADR tools exclusively by providing sets of rules and procedures. Secondly, the arbitrator affirmed that the word "arbitrage" contained in the clause is intended as "arbitration". When interpreting the will of the parties, the arbitrator considered that arbitration is a way to settle disputes, while "arbitrage" is meant to supplement an incomplete contractual agreement between the parties. In the clause at stake, the parties agreed to attempt an amicable solution first, but, in case of failure, they set for a dispute resolution mechanism that would define their dispute by a final and binding decision. Consequently, in order to respect the will of the parties, the clause shall be interpreted so that any dispute is submitted to arbitration. Finally, the arbitrator turned on to the interpretation of the will of the parties with regard to the rules of law applicable to the merits. The clause provided that the applicable law to the contract would be the "United Europe". The arbitrator considered that the will of the parties was expressed generically, and shall be constructed in good faith and in accordance with a literal and systematic reading of the clause. In the arbitrator's view, the parties made a common choice, though vaguely, to depart from their respective national laws and select a transnational set of rules shared by member countries of the European Union (inappropriately cited as United Europe). The arbitrator determined that such a choice shall be referred to the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG), which entered into force in Italy in 1988 and in Switzerland in 1991. Furthermore, the arbitrator clarified that the interpretation of the clause could not lead to the application of the 1955 Hague Convention (of which both Italy and Switzerland are contracting States) because of the characteristics of the contract at hand, as the parties had their legal seats in two different Countries. The Hague Convention's international scope (applying to any international sale of goods contracts) is broader than the CISG's one, as the latter applies to contracts of sale of goods being international on the ground that the parties have their places of business in different states. Furthermore, the arbitrator considered the nature of the CISG material rules, which apply without resorting to any conflict of law rules. The arbitrator dismissed the Claimant's assertion that the Swiss law should apply on the base of the "tronc commun" doctrine. The

arbitrator noted that the doctrine operates in the absence of any choice made by the parties and it determines the applicable law by applying the common provisions of the parties' respective national laws. Moreover, in the arbitrator's view, the parties of the contract did make a choice on the substantive law, although inaccurate, and the choice was stated in the arbitration agreement, therefore, the tronc commun" doctrine is not applicable. Parties: unknown, case no: unknown, Sole Arbitrator under the Rules of the Milan Chamber of Arbitration, Italy.