

Italian seller v. an Indian buyer, Award, CAM Case No. 5706, 22 February 2008

Benedetta Coppo, Chamber of National and International Arbitration of Milan;

Stefano Azzali, Chamber of National and International Arbitration of Milan

The arbitrator in this case held that the agreed seat of arbitration in the contract is binding upon the parties and applied the CISG articles to the dispute.

In February 2005 the parties (an Italian seller and an Indian buyer) entered into a sale contract to purchase machines. The contract was regulated by Italian Law and provided for any disputes to be submitted to arbitration in Milan, under the Rules of the Chamber of National and International Arbitration of Milan. The goods were regularly delivered and installed at the buyer's premises, and the first installment of the agreed price was paid, whereas a return plan was set for the balance.

A dispute arose concerning the payment of the purchase price and the Italian company filed a request for arbitration with the Chamber of Milan to recover the sum allegedly due by the Indian buyer. A sole arbitrator was appointed pursuant to the Rules of Arbitration. The Indian buyer - as respondent - generically rejected claimant's arguments and raised an objection against the sole arbitrator's jurisdiction grounded on the fact that the dispute had no connection with the seat of the arbitration, but rather with the place where the contract was performed, which is India.

In his final award, the sole arbitrator rejected the respondent's argument considering that the agreed seat of the arbitration in the contract was binding upon the parties. Furthermore, the arbitrator addressed the point of the law applicable to the contract, and considered that the agreement signed by the parties was an international sale contract, and consequently it was subject to the United Nations Convention on Contracts for the International Sale of Goods (CISG) ((According to CISG articles, Italian substantive law on the international sale of goods is the law applicable (Art. 1 par. 1 b CISG)). The arbitrator further stated that the agreement shall be subject to Italian substantive law where the CISG Convention is silent.

As for the merits, the sole arbitrator considered the claimant's arguments to be well grounded. The arbitrator found that a valid contract existed between the parties and no termination had been properly declared. Yet, he stated that the crucial point was to determine whether, at the time of rendering the award, the amounts that the seller claimed were fully or only partially due for payment (given that only five installments of the purchase price had become due, not the entire balance).

In the parties' exchange of letters, the arbitrator found evidence that the respondent anticipatory breached the contract. The arbitrator found that the buyer had made an initial down payment only and afterwards it stated unambiguously that it would not pay any further installment. In addition, the respondent had clearly invited the claimant to take back the delivered machineries, alleging their malfunctioning.

As Articles 54-59 of CISG do not address this issue, the sole arbitrator reverted to Art. 1186 of Italian Civil Code (debtor's loss of benefit of time limit). According to this provision, the arbitrator stated that the claimant was entitled to recover the full outstanding purchase price balance, and not only the payments concerning the due promissory notes, on the basis that the respondent had expressed its clear intention not to perform.

Finally, the arbitrator found that the claimant had properly performed its primary contractual obligations as well as the remedial services necessary to tackle the technical difficulties arose at the respondent's site (Art. 48 par. 1 CISG). Based on that, the claimant was not charged with any lack of proper performance (*exceptio non adimpleti contractus*). Also, the arbitrator found that the respondent was not entitled to declare the avoidance of the contract on the grounds of such technical problems. Therefore, the arbitrator held that the respondent's conduct failed to comply with Art. 49 par. 2 (b) 2 of CISG, as the declaration of avoidance was manifestly late and the technical difficulties did not amount to a material breach of contractual obligation as provided by Art. 49 par.1 a CISG. Based on all the above, the arbitrator ordered the respondent to pay the outstanding purchase price (Articles 53, 61 par. 1 a, 62 CISG).