

Italian supplier v. Greek distributor, CAM Case No. 7211, 23 September 2013 ”

Stefano Azzali, Chamber of Arbitration of Milan;

Benedetta Coppo, Chamber of Arbitration of Milan

Headnote

The validity of an arbitration clause entered into by incorporation of the general terms and conditions into the contract.

Summary

Facts of the case

In 2005 the parties (an Italian supplier and a Greek distributor) entered into a distribution agreement. The distribution agreement was regulated by the Business Terms and the General Commercial Conditions. The contract was regulated by Italian law and it provided for any disputes to be resolved by arbitration under rules of the Milan Chamber of Arbitration, and identified Milan as the seat of arbitration. The arbitration agreement was contained in the General Commercial Conditions. The agreement was duly performed between 2005 and 2008, while in 2009 and 2010 the distributor failed to pay for the goods received. Consequently, in 2011 the supplier filed a request for arbitration to obtain the payment of the outstanding amount. While the arbitration clause originally provided for a panel of three arbitrators, once the dispute arose the parties amended it in favour of a Sole Arbitrator.

Arguments of the Parties

The Greek party objected inter alia that arbitration agreement was null and void because (a) the General Conditions containing the arbitration agreement were not applicable to the present relationship, and (b) Mr X - the signatory on behalf of Respondent - was not authorized to sign the General Conditions under Greek law.

Judgment of the Court

The Sole Arbitrator examined the Respondent's objections on the basis of the Kompetenz-Kompetenz principle (Article 817 of the Italian Code of Civil Procedure, ICCP) and dismissed them.

The Sole Arbitrator first ruled on the validity of the arbitration agreement under Italian Law --the applicable *lex arbitri* as per Article 2 of the New York Convention, NYC. Italian Law was applicable pursuant to Articles 10.1, 3.1 and 10.3 of the EU Regulations 593/2008 (Rome I) as the arbitration agreement in this case made reference to arbitration for “any dispute or exception in relation or in connection to the present agreement”, thus including those affecting the validity of the arbitration clause. Here, the written form requirement of the NYC (Art. 2) and ICCP (Art. 808) was respected, and the parties' agreement to arbitrate was expressed without ambiguity in the arbitration clause.

The Arbitrator held that there was evidence that Respondent expressly accepted Claimant's General Conditions since the the Business Terms were subject to the acceptance of the General Contions. Furthermore, the Business Terms made an explicit reference to Article 21 of the General Conditions which provided for the Arbitration Clause.

The Sole Arbitrator decided that the arbitration agreement was validly concluded per *relationem* (see Article 7.6 of the UNICTRAL Model Law, as well as international case law, and international as well as Italian scholars) under the *lex arbitri* since the Business Terms, which were accepted by both parties in written form, were supplemented and integrated by the General Conditions (Article 21 provided for the arbitration agreement).

Furthermore, the Sole Arbitrator excluded that Articles 1341 and 1342 of the Italian Civil Code apply (imposing a specific written acceptance by the contracting party entering an unfair clause contained in standard terms and conditions), since such application would be in violation of Art. 2 NYC by requiring more onerous conditions (the Arbitrator's approach is consistent with Italian case law on the recognition of international and foreign arbitral awards).

Additionally, as per Respondent's objection on (b) the power of Mr. X to sign the General Conditions on behalf of the company, the Sole Arbitrator recognized that Mr. X had the authority to enter into the arbitration clause. The Arbitrator first identified, which law applied to the capacity of the signatory party to agree on arbitration, as well as to the signatory's power to represent the Respondent party. The NYC (Art. V, (1),(a)) refers to, in relation to the capacity of the signatory parties, “the law applicable to

them”, and this is considered to be the national law of the individual. The law applicable to the capacity to enter into a valid arbitration agreement under the law applicable to the agreement itself, is identified by the lex arbitri: here, Art. 808, Para. 2 ICCP provides that the authority to enter into the contract includes the authority to agree to the arbitration clause. According to Greek Law, Mr X was a representative of the Respondent and had the power to enter into contracts not on the basis of a specific power of attorney, but on the grounds of general powers given by the Board of Directors to negotiate and enter contracts and conditions, including arbitration agreements, as well as to buy and sell goods, sign on behalf of the company, use its stamps and patent etc.. Hence, Mr X had the power to act on behalf of Respondent, and he had the capacity to sign the contract with the Italian supplier. Consequently, as per Article 808 ICCP, he had the capacity to enter the arbitration agreement.

The dispute concerned the breach by the Greek party of not paying the full amount of the supply. As for the merits, the Sole Arbitrator found Respondent liable to pay the outstanding sums.

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