

CISG: 25; 38; 39; 40; 49; 50

Italy: Arbitral Tribunal - Chamber of National and International Arbitration of Milan

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In 2002 a Ukrainian company and an Italian company, entered into a purchase agreement whereby the first was to buy a machinery manufactured by a German firm but overhauled and sold by the Italian company. Soon after the conclusion of the agreement divergences arose between the parties concerning its performance: delivery, starting and operation of the machinery turned to be very problematic.

The buyer complained about the delayed delivery and installation of the machinery, its non-compliance with the technical and quality standards agreed by the parties as well as its running defects.

The contract contained an arbitration clause referring to the Rules of the Chamber of National and International Arbitration of Milan and providing for the application of private international law, including the Vienna Convention on Contracts of international sale of goods 1980 (CISG).

Thus, the buyer began an arbitration in August 2005 under the auspices of the Milan Chamber. It considered the agreement to be terminated for fundamental breach of the seller, thus it claimed reimbursement of the purchase price and compensation for damages due to seller's failure to comply with the agreed obligations, also considering that it did not provide any technical assistance.

The seller objected all these claims; besides, it counter-claimed the reimbursement of a bank guarantee assuming its illegitimate discussion by the buyer.

The Arbitral Tribunal - regularly appointed and constituted according to the Milan Chamber rules - applied the CISG to the merits of the case, in compliance with the parties' will.

The arbitrators, also on the basis of the documentary evidences provided by both parties, found the buyer's assumptions well founded. The Arbitral Tribunal deemed that a breach of the contract actually occurred since at least for one year the buyer could not rely on the performance it was entitled to.

The seller undertook several obligations, particularly concerning the quality of the machinery, its complete overhaul, a definitive test to be carried out, providing also for the proper starting of the said machinery. But it did not perform them in the right way or even at all: all obstacles to execution thereby alleged could be easily overcome. Under the arbitrators' reasoning, at a certain point the seller considered somehow burdensome the agreement and it did not want to be involved any longer.

Moreover, the objections raised by the seller could not be allowed as some of them were based on Italian law (Articles 1491 and 1495 of the Italian Civil Code), which was not applicable to the case, while the other ones - making reference to CISG (Articles 38, 39 and 40) – were groundless.

Nonetheless, in the view of the Arbitral Tribunal, the failure to perform was not fundamental, though serious, (Art. 25 CISG), thus it could not lead to a declaration of termination of the contract.

First, the buyer itself acknowledged a certain operation of the machinery; secondly, a long period of time elapsed before the starting of the arbitration (not a reasonable one, pursuant to Art. 49 CISG); finally, if the buyer really intended to terminate the contract it should have returned the machinery to the seller and it could not go on using it and making profit out of it.

As for the buyer's alternative claim, concerning a reduction of price on account of defects (Art. 50 CISG), the Arbitral Tribunal stated it was grounded in principle and assessed it together with the suffered damages (reducing the sum that the buyer claimed), taking into consideration also a technical report (exhibited in the proceedings) on the condition of the machinery with an estimate of costs for its repair as well as other costs borne by the buyer.

The arbitrators finally denied the counterclaim of the seller.