

X v. Y, Award, CAM Case No. 2810, 11 August 2010

Stefano Azzali, Chamber of Arbitration of Milan;

Benedetta Coppo, Chamber of Arbitration of Milan

Headnote

In X v. Y, the sole arbitrator decided on the validity of the arbitration agreement (11 August 2010)

Digest

X, an Italian Company (the Buyer) and Y, a Spanish Company (the Seller) entered into a contract (hereinafter “the Contract”) for the sale of an industrial machinery. The Contract contained an arbitration clause providing that any dispute should be settled by a sole arbitrator under the Rules of the Chamber of Arbitration of Milan (hereinafter “the CAM”).

After the delivery of the machinery, X notified Y that the delivered machinery was not in conformance with the Contract. This had led to discussions and negotiation between the parties, who finally signed a settlement agreement (hereinafter “the Agreement”) providing for Y to test the machinery and to provide technical assistance to X. In case of positive outcome of the said tests, the Agreement provided for both parties to withdraw any further claims and for X to pay the remaining part of the agreed price reduced by half.

Nevertheless, X filed an arbitration request and requested the arbitral tribunal to hold that the machinery delivered by Y was not in conformance with the Contract and, subsequently, claimed the reimbursement of part of the already paid price, plus punitive damages. On the other hand, Y raised three issues: (a) according to the Italian Civil Code, the claimant's right to rely on non-conformance of the delivered goods had expired; (b) alternatively, the arbitral tribunal has no jurisdiction after the parties had signed the Agreement that did not contain any arbitration clause, nor it made any reference to the one contained in the Contract; (c) or, as a further alternative, the arbitration is not admissible because the conditions stated in the Agreement did not occur, since the parties have not made any agreement with regard to the machinery's tests, and X had never urged to make them.

The sole arbitrator rendered an interim award on the issues raised by the respondent. The arbitrator preliminary stated that the law applicable to the merits of the dispute is the UN Convention on the International Sale of Goods (hereinafter “CISG”), as both Italy and Spain are parties to it (Art. 1.1.a CISG). That being said, the arbitrator rejected the first issue raised by the respondent holding that since the CISG is applicable, the alleged expiration of the claimant's right to rely on the machinery's lack of conformance must be assessed in accordance with Art. 39 CISG. The arbitrator reasoned that the claimant had notified the lack of conformance to the respondent within a reasonable time after its discovery, and in any case, within two years from the handing over of the machinery, so that the claimant's right to rely on the said lack of conformance did not expire.

With regard to the respondent's second argument, the arbitrator found that CISG does not contain any provision regarding novation. The arbitrator, according to Art. 3.3 of the Chamber of the CAM's Arbitration Rules decided to apply the Italian law to the merits of the dispute. According to the Italian Civil Code (Arts. 1230 and 1231), as well as the Italian Supreme Court's case law, novation implies two requirements: an objective incompatibility between subsequent agreements, the former being replaced by the latter; and then an explicit intention of the parties' “animus novandi”. The arbitral tribunal did not find such requirements in the case at hand, and considered the Agreement as supplementary to the Contract. Therefore, the arbitration clause contained in the Contract is valid and applicable.

As for the respondent's third argument, the arbitrator rejected the argument considering that none of the parties performed their respective duties under the Agreement. Therefore, and in line with the Italian case law, it could be inferred that the parties had no interest in fulfilling those obligations. Parties: unknown, case no: unknown, by a sole arbitrator, Italy.