Chamber of Arbitration of Milan Award No. 7813**, rendered on 10 October 2014**

Headnote

A Sole Arbitrator rules on early termination of contract and exclusion of liability clauses.

Summary

Facts of the case

In June 2013 Claimant – an Italian company – commenced an arbitration against Respondent – a German company – seeking its condemnation to the restoration of alleged damages suffered as a consequence of an asserted breach of the technology transfer, manufacturing and supply agreement entered into by the parties in 2011 and further amendments. Italian substantive law applied to the agreement.

Arguments of the Parties

According to Claimant, Respondent was unable to package a given quantity of the agreed product within a fixed time limit (the end of December 2012) according to Claimant's order. The said order was intended for one of the Claimant's customers, which had planned to lunch into new markets where the product was to be commercialized, and Respondent was aware of such a circumstance when undertook its duties. As a consequence of the alleged incapacity of Respondent to fulfill its contractual duties within the expected time limits, Claimant claimed that it had lost its customer which decided to stop its project and canceled the orders already issued to Claimant. As a result, Claimant terminated the contract and claimed *inter alia* to be entitled to a refund of the price it had paid to purchase the ingredients used to manufacture the goods provided to Respondent in order to receive the final product packaged by the latter, as well as for its sales loss towards its costumer.
Respondent objected to Claimant's claims as lacking any factual and legal grounds, and as a counterclaim requested to condemn Claimant to pay in its favor the costs incurred to purchase the packaging materials. Respondent argued *inter alia* that it had not been informed about the new time limits for the delivery of the packaged product, as agreed between Claimant and its customer, nor the orders contained any information in this respect. On 4 and 6 December 2012 Respondent wrote emails to Claimant underling that it would have done its best to get the product ready for shipment but that a timely delivery seemed very difficult since the goods arrived late, thus not confirming such dates as final; in particular, the goods to be packed by Respondent arrive on 4 December (while the parties originally agreed for the goods' delivery at Respondent of 13 November) by a third party selected by Claimant; furthermore, it noticed that the goods showed defects during the packaging process and immediately informed Claimant and took action to overcome the problems within three working days, offering manual and semi manual packaging, which, however would have required additional time and involved higher costs, but such a proposal was rejected since the cause of the problems seems to be in the quality of the goods and not in the packaging process. Also, Respondent pointed out that no equivalent goods had been made available upon its request for its packaging trials prior to the starting of the commercial packaging, hence it could not be held responsible for any lack of quality compliance. As for the alleged lack of loss of Claimant, Respondent objected it should not be found liable as the agreement expressly so excluded. Finally, Respondent claimed for compensation for the invested efforts and time for packaging, and reimbursement of the costs and expenses incurred to the execution of the technology transfer to establish Claimant as manufacturer of the product.
Claimant rebutted that any noncompliance of the goods used in the packaging product remained Respondent's fault only. Claimant grounded such an allegation on the fact that another company

could package the very same products with the very same goods on the basis of the identical specifications and manufacturing process followed by Respondent. Also, Claimant argued that the exclusion of liability clauses contained in the contract were vexatious, since it did not approve them expressly pursuant to Article 1341 of the Italian Civil Code, and as a consequence no limitation of liability should apply.
On this last point, Respondent argued that the agreement had been negotiated by the parties and not prepared as a standard form, so Article 1341 should not apply.
The parties further developed their respective arguments along the case, their legal representatives appeared before the Sole Arbitrator, oral witnesses were admitted, and an expert witness in the field of the case was appointed to verify in particular the mechanical properties of the goods delivered to Respondent with specific reference to their suitability for a standard automated packaging process. The expert found the parameters of the goods to be inadequate to the packaging process, and he reported also that in the field of the case at hand, beyond and above any rule or procedure, where packaging operations are performed for the first time an adequate trial is required.

Judgment of the Court

The Sole Arbitrator found that Respondent behavior was in compliance with the standard good faith acceptable in the circumstances and taking into account both parties' contractual obligations. In fact, on the basis of the evidence presented by the parties and of the expert's report, the Sole Arbitrator deemed that while Respondent proved to have made its best efforts to try and package the goods, Claimant did not demonstrate that it actually performed the activities which were necessary to put Respondent in the condition to package in case of urgency, not only pursuant to the agreement but also according to the standard practices of the field. First of all, considering the provisions of the parties' agreement, Claimant's orders should have state the expected delivery dates, while they did not; furthermore, Claimant should have made all reasonable efforts to ship the goods to Respondent timely, while no evidence is provided in this regards, though Claimant repeatedly underlined urgency on the delivery date. On the contrary, the goods to be received by Respondent arrived late, this is undisputed between the parties, and no proper trial to ascertain the packaging was performed. Claimant was perfectly aware of the delay in the delivery of the goods. On the contrary, Respondent was not proved to be aware that the packaging was due within the end of December in order to allow Claimant's customer to launch on new markets, in spite of Claimant's allegation: there was no evidence that Claimant informed Respondent before starting the packaging process of the time limit for the delivery agreed between Claimant and its customer. But above all, there was no evidence that the parties modified the deadline agreed upon in theirs contract, while the fact that Respondent wrote emails saying that it would have done its best to get the product ready for shipment does not entail an amendment to the said contract and its obligations. Hence, the Arbitrator held that the late delivery of the goods to be packaged was Claimant's responsibility, as the third company which manufactured and delivered the goods was selected by Claimant and followed Claimant's instructions, which should then bare responsibility in this respect. Also, on the basis of the expert's report, the Arbitrator considered that Claimant had not put Respondent in the condition to verify, before the commencement of the packaging operations, whether its standard automated machines and tools were suitable for the packaging of the provided goods. In the Arbitrator's opinion, Claimant was aware of the risks connected to a lack of trial, and that was the reason why it accepted to put in the contract an exclusion of liability for Respondent. The fact that a third company succeeded in packaging the goods after the problem with Respondent occurred is not relevant, in the Arbitrator's view, to change the set of responsibilities, as confirmed by a witness who clarified that the goods packaged were not the very same.

All the above considered, the Sole Arbitrator held that Respondent was not liable for the failure to package the goods it received, since it did not wave any contractual obligation, while it acted in good faith, as it accepted to package in the conditions described with the aim to help Claimant in its case of urgency and offered alternative solutions when problems arose. As a result, Claimant decision to terminate the contract as a consequence of the failure of Respondent to package the goods was not grounded, so that all claims of restoration of damages made by Claimant shall be rejected, since such any failure remained in Claimant's exclusive responsibility.

On the other hand, the Arbitrator consider Respondent's counterclaims to be well grounded as a matter of principle, pursuant to Article 1281 of the Civil Code, because of the unfair termination of the agreement by Claimant.