CHAMBER OF NATIONAL AND INTERNATIONAL ARBITRATION OF MILAN

Award of 2 February 1996

Arbitrators:	Giuseppe Lombardi (Chairman); Massimo Benedettelli; Paolina Testa
Parties:	Claimant: (1) Pharmaceutical company A (Italy); (2) Pharmaceutical company B (Italy) Defendant: Pharmaceutical company C (Italy)
Place of arbitration:	Milan, Italy
Published in:	Unpublished
Subject matters:	– connected contracts – lack of valid arbitration agreement

Facts

In 1993, claimant A and defendant C concluded a contract for the "joint development, sub-licensing and supply" of a new pharmaceutical product. One month before, claimant A had entered into identical contracts with claimant B and another pharmaceutical company, D. All contracts provided that the parties first cooperate in drafting a "file" of the new product, to be submitted to the Italian Ministry of Public Health in order to obtain a marketing licence ("the research phase"), before actually producing the product. The costs of the research phase were to be shared by A, B, C and D. All contracts provided for the settlement of disputes by arbitration according to the National Rules of the Milan Chamber of National and International Arbitration.

Following negative developments in the Italian pharmaceutical market, claimant A decided in February 1994 to terminate the research phase for the new product. In June 1995, claimant A and claimant B filed a joint request for arbitration against defendant C, seeking C's share in the research costs, to be paid "to claimant B, or, if necessary, to claimant A". By its statement of defence, filed in August 1995, defendant C objected that the request for

arbitration was inadmissible, in so far as it concerned B's claim, for lack of a valid arbitration agreement. It also filed a counterclaim, seeking compensation for its research expenses.

Defendant C's preliminary objection of lack of jurisdiction was dealt with by the arbitrators at the first hearing, in October 1995. The arbitrators requested claimant A and claimant B to clarify their position as to their joint claim, and defendant C to submit further arguments concerning its objection. By a statement filed in November 1995, claimant A and claimant B declared that *each of them separately* sought the amount at issue from defendant C; in December 1995, C reiterated that it did not accept the arbitration proceedings with respect to the claim by claimant B, and requested the arbitrators to render a preliminary decision that there was no valid arbitration agreement between B and C.

The arbitral tribunal, deciding on the preliminary objection, found that it had no jurisdiction over the dispute between claimant B and defendant C, for lack of a valid arbitration agreement.[1]

Excerpt

[1] "The Arbitral Tribunal notes at the outset that claimant B is not a party to the joint development, sub-licensing and supply contract concluded by claimant A and defendant C [in 1993], on which contract, submitted by both parties as Annex 1, the present arbitration is based. There is no document before us showing that all parties to the present arbitration intended that the effect of the arbitration clause [in the said contract] be extended to claimant B. Hence, B has neither signed nor otherwise entered into the arbitration clause.

[2] "Nor can we share the appealing opinion of counsel for A and B ... that the three contracts – A/B, A/D and A/C – constitute one multilateral relationship. Leaving aside the fact that the contract at issue (A/C) was concluded more than one month after the conclusion of the first two contracts (A/B and A/D), it must be noted that the three contracts have been concluded by *different parties*. This rules out, in the present case, the existence of one single multilateral contract. It is true that jurisprudence holds that several contracts, also when they are not concluded at the same time, can constitute one single contract. However, this jurisprudence also clarifies that 'we can speak of a single contract or, more generically, a single relationship (as in the case of several structurally distinct but functionally connected relationships),

1. By an award on the merits, rendered on 28 October 1996, the arbitral tribunal dismissed claimant A's claim against defendant C and granted C's counterclaim.

only when the [legal] form in which the original contractual parties elect to express their interest fits into a context in which these parties, and they alone, are the main characters. If, on the contrary, that context either has a broader scope from the beginning or becomes broader during the contractual performance, involving parties to other, independent relationships, we do not speak of a single contract (or relationship), but of a plurality of contracts which are objectively and subjectively distinct.'[2] Hence, since the three contracts were originally concluded by *different* parties, this is per se an indication of a plurality of contracts, which cannot in any way be seen as a single contract.

[3] "Nor does the Tribunal deem that it should adhere to the opinion expressed by claimant A and claimant B, that the legislator implicitly allowed, by Law no. 25 of 1994, that the provisions in the Code of Civil Procedure on litisconsortium and the intervention by a third party in [court] proceedings be applied by analogy to arbitration. In the light of the doctrinal debate on this issue, which has been mentioned by A and B themselves, the fact that the legislator omitted to provide for these means in arbitration, while allowing third party opposition, leads us to hold that the 1994 legislator intended to grant to a third party only the [post-award] legal remedy of third party opposition. Thereby, the legislator affirmed the traditional principle that arbitral proceedings may not be extended to non-parties to the arbitration agreement.[3]

[4] "It is true that, in the present case, the contract between A and B also contains an arbitration agreement which is analogous to the agreement in the contract at issue [A/C]. However, the former agreement binds A and B only, and it does not allow us to extend the effect of the separate arbitration agreement binding A and C, which was not signed by B, to B. Claimant B could only participate in the present arbitration if all the parties agreed thereto,[4] whereas C explicitly disagrees.

[5] "Further, the Tribunal does not agree with the arguments submitted by claimant A and claimant B in order to justify the standing of B in the present arbitration. As to the argument that B is the mandator of A and, as such, may

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2. The Arbitral Tribunal referred to a decision by the Italian Supreme Court of 20 January 1978 no. 260.
3. "See Carnacini, 'Arbitrato rituale', in *Novissimo Digesto Italiano*, Vol. I, 2, p. 895 et seq.; A. Piergrossi, 'Tutela del terzo nell'arbitrato', in *Studi in onore di Liebman*, Vol. IV, p. 2570 et seq.; Italian Supreme Court, 11 February 1988 no. 1465, which reasons that 'participation in the proceedings before the arbitrators must be deemed ... precluded to the third who is not a party to the arbitration agreement, by which agreement the parties define the subjective and objective scope of the proceedings ...'."
4. "See Carnacini, op. cit., p. 896."

participate in the present proceedings according to Art. 1705(2) CC,[5] we note, first of all, that this argument was raised only in the final statement ... and, leaving aside any consideration as to the existence of such a mandate, it contradicts the manner in which the claims have been filed by claimant A and claimant B. A and B were explicitly invited by the Arbitral Tribunal to explain how the claims in their request for arbitration referred to both of them, and they explained ... that they filed these claims in arbitration *separately*. Thereby, they referred to the autonomous standing of each company in the arbitration, rather than to the standing of a mandator and/or mandatary. Also, the claims themselves are expressed in a manner which cannot be easily reconciled with an alleged mandate without representation between A and B. Both companies requested [the arbitrators] that defendant C be directed to pay the sum claimed 'to claimant B or, if necessary, to claimant A'. It is beyond doubt that, in a relationship where the mandator is not mentioned, the [debtor] can only pay in the first place to the mandatary. The manner [in which the parties expressed their claims] does not support the allegation of the existence of a mandate.

[6] "In any case, a decisive consideration [on this issue] is that, since Art. 1705 CC, on which counsel for A and B relies, explicitly concerns a mandate without representation, an arbitration clause in the contract between a third party and the mandatary, where the mandator is not mentioned at all, cannot be the basis on which the mandator brings a claim against the third party in arbitration, taking into account the above-mentioned principle that only the parties who have signed the arbitration agreement may participate in the arbitration.

[7] "As to the allegation that the contract between A and C is a contract in favour of a third party, this allegation is disproven, in the case at issue, by the lack of the elements qualifying such a contract (Art. 1411 CC).[6] According to

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5. Art. 1705 of the Italian Civil Code reads:

"*Mandate without representation*. The mandatary who acts in his own name acquires the rights and obligations arising from his transactions with third parties, even if the latter knew of the mandate.

Third parties have no relationship with the mandator. However, the mandator may substitute for the mandatary and act upon the rights arising under the mandate, provided that the mandatary's rights under the following Articles are not jeopardized."

6. Art. 1411 of the Italian Civil Code reads:

"*Contract in favour of a third party*. A stipulation in favour of a third party is valid where the stipulator has an interest therein.

Lacking an agreement to the contrary, the third party acquires the right with respect to the promisor by effect of the stipulation.

jurisprudence, a contract in favour of a third party requires that the parties stipulating the contract intend, when concluding the contract, to benefit a third party directly, in the sense that they consider the performance in favour of the third, who is not a party to the contract, to be *an element of the mutual contractual performance*.[7] This is not the case of the contract between A and C, with respect to a hypothetical benefit for B as a structural element of that contract.

[8] "As to the nature of the present award, the Tribunal notes that 'an agreement, providing for the referral to arbitrators of the disputes arising out of separate and unconnected contracts between the *same* parties, leads to separate arbitration agreements, although formally contained in a single document'. In such a situation, 'an award, which settles the disputes under one of these relationships, and postpones the settlement of the others, is a final, rather than a partial, award'.[8] The Tribunal deems this jurisprudence to be correct, fully agrees with it and finds that it particularly applies here, where:

> – claimant A and claimant B have requested separately that their respective claims against defendant C be granted;
> – defendant C has objected to the admissibility of the claims filed by claimant B;
> – it appears that B was not a party to the arbitration agreement on which the present arbitration is based.

Thus, we must terminate these proceedings by a final award, concerning the claims submitted by claimant B and related objections.

[9] "The costs follow the outcome of the case, and are determined exclusively with respect to the settlement of the preliminary issue concerning the claims submitted by claimant B.

[10] "The Arbitral Tribunal finds and holds that it lacks jurisdiction over the claims submitted by claimant B against defendant C, because there is no arbitration agreement between them; it finds and holds, consequently, that any

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However, the [stipulation] may be revoked or modified by the stipulator, as long as the third party has not declared, also with respect to the promisor, that he intends to profit from it. If the stipulation is revoked or the third party refuses to profit from it, the performance is in favour of the stipulator, unless the intention of the parties or the nature of the contract shows otherwise."

7. The Arbitral Tribunal referred to a decision of the Italian Supreme Court of 11 June 1983 no. 4012, and to the Court of First Instance, Florence, 3 January 1961, published in Foro Padano 1962, Vol. I, pp. 277 et seq.
8. "Supreme Court, 28 June 1994 no. 6206."

claim brought by B against C falls, as it appears from the acts and documents submitted in the present arbitration, within the jurisdiction of the State courts."

(....)