# ITALY

## CHAMBER OF NATIONAL AND INTERNATIONAL ARBITRATION OF MILAN

**Final award in case no. 8416 of 28 November 2017**

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| Arbitrator: | Maria Theresia Roerig (Italy) |
| Parties: | Claimant/Counter-respondent: Supplier (US)<br>Respondents/Counter-claimants: (1) Main Contractor (Italy);<br>(2) Buyer (Italy) |
| Place of arbitration: | Milan, Italy |
| Published in: | Unpublished |
| Subject matters: | – Kompetenz-Kompetenz<br>– separability of arbitration clause<br>– applicable law to arbitration clause<br>– 1958 New York Convention<br>– validity of arbitration clause<br>– Arts. 1341 and 1342 Italian Civil Code<br>– late filing of counterclaim (no)<br>– conformity of goods<br>– breach of contract by failure to pay invoices<br>– *inadempienti non est adimplendum*<br>– standing to sue<br>– joint liability of debtors<br>– arbitration costs in proportion to unsuccessfulness<br>– legal costs in proportion to unsuccessfulness |

*Summary*

*The sole arbitrator granted the claim and denied the counterclaim in a dispute concerning the respondents' failure to pay invoices for the supply of security products by the claimant.* ***Jurisdiction.*** *(1) The arbitrator had jurisdiction over the claim, because (i) the arbitration agreement was valid and (ii) covered the dispute. (i) Valid arbitration agreement: the arbitrator noted preliminarily, first, that an objection regarding the arbitral tribunal's jurisdiction does not prevent the tribunal from deciding on its own jurisdiction, pursuant to the principle of Kompetenz-Kompetenz, which is enshrined in the Italian arbitration law. Second, Italian Law applied. In light of the autonomy of the arbitration clause from the main contract, it could not be assumed that Italian law – the law governing the contract – also applied to the clause; however, the arbitrator shared the prevailing opinion that lacking a choice by the parties the lex arbitri (here, Italian law) applied – an approach which is in accordance with Art. V(1)(a) of the 1958 New York Convention. Both the applicable Italian law and the New York Convention, which should also be taken into account because of the international nature of the present proceeding, require that the arbitration clause be in writing and that the parties agreed thereto. This was the case here, since the clause was contained in the claimant's written Standard Terms and Conditions, which had been signed by all parties. The respondents' claim that Art. 1341 of the Italian Civil Code requires that restrictive (vessatorie) clauses, including arbitration clauses, be separately signed failed: this requirement, apart from not appearing to be applicable to clauses for international arbitration such as the present one, had in any case been complied with since the respondents' signature appeared both on the main contract and at the end of the attached Standard Terms, after the list of possibly restrictive clauses including, expressly, the arbitration clause. (ii) Scope: the claimant's request for payment of outstanding invoices arose in respect of deliveries under the parties' contractual relationship. (2) The sole arbitrator also had jurisdiction over the respondents' counterclaim, which was introduced in a timely manner – within the time limit granted by the arbitrator – and fell within the scope of the arbitration agreement as it concerned costs allegedly incurred as a consequence of the claimant's delivery of non-conform products, its decision to suspend further deliveries and its failure to provide technical assistance, and thus concerned the claimant's contractual liability.* ***Merits.*** *(3) The sole arbitrator determined that a specific Order, rather than an earlier generic order which it had superseded, relevantly governed the parties' relationship. As a consequence, the claimant's contractual obligation was to supply the type of product indicated in the Order, rather than the different product indicated in the generic order. This the claimant had undisputedly done, and the respondents were therefore in breach of their payment obligations under the Order. Further, the respondents failed to prove that there was nonetheless a ground for their non-payment of the relevant invoices. First, they did not prove that the products delivered were not in conformity with the technical requirements of the project where they were to be installed (in fact, they were installed). Second, the respondents could not argue that the principal did not allow the installation of different products than those that had been tested and approved by the principal, even if technically compatible: the respondents could not blame the claimant for implementing their own instructions in respect of the*

*products to be supplied, and it appeared from the record that testing was irrelevant for the payment of supplies and that the respondents had actually used other products in the project that were different from those initially approved. Also, when a party raises the exception of "inadimplenti non est adimplendum", the court or arbitrator must balance the opposing defaults and breaches; here, the claimant's suspension of further supplies was not out of proportion with the respondents' breach of contract. (4) The sole arbitrator denied the second respondent's counterclaim (the first respondent had no standing to file a counterclaim because it was not a party to the specific Order). The claimant could not be held liable: it did not provide non-conform products (for the reasons above); its suspension of deliveries was justified in light of the serious payment default by the respondents; and the respondents did not prove that the claimant was contractually obliged to provide technical assistance. For the sake of completeness, the arbitrator also examined the issue of the quantum of the alleged damages and concluded on the facts of the case that the counterclaim provided insufficient evidence on the amount of the alleged losses. (5) The sole arbitrator granted late payment interest on the outstanding sums at the lower of the interest rates rate indicated in the Standard Terms. (7) The respondents' joint liability clearly emerged from the documents governing the parties' relationship.* ***Costs.*** *(8) The arbitrator directed the respondents to bear the costs of the arbitration and to reimburse the claimant for its legal fees and costs, in application of the principle that costs should be borne in proportion to unsuccessfulness.*

Respondent 1, a company offering system and security solutions, was the successful bidder in a tender put out by Principal, an Italian entity, to provide security technologies for Project X. The necessary products and accessories were to be installed in two locations (Location 1 and Location 2) and in two different contexts within those locations (Context 1 and Context 2). Respondent 1 subcontracted the works to Respondent 2, a related company.

Respondent 2 initially selected Premier/ACME, a non-Italian company,[1] as the supplier of the products and, together, Premier/ACME and Respondent 2 finalized the design for the Pilot installation of Project X in Location 1. Project X was approved by Principal and by the Competent Office within the competent Italian Ministry.

Subsequently, however, Respondent 2 decided that Claimant might be a better supplier, and proposed to Principal to test Claimant's technologies in the Pilot installation. On 11 February Year X, Claimant made an offer to Respondent 2 for the supply of certain products and accessories – in particular, 28 TYPE A Products – for the Pilot installation. On 13 February Year X, Respondent 2 accepted the offer. On 27 April Year X, it sent Claimant General Order

1. All names are fictitious.

no. 075/Year X, in which it indicated in general terms the lot it wished to order for the Pilot (Lot 1), as well as a further four lots for the entire installation.

On 13 May Year X, Claimant, Respondent 1 and Respondent 2 entered into a Partnership Agreement under which Claimant undertook to supply products to Respondents on the basis of specific orders to be placed by Respondents. The Agreement was signed on behalf of both Respondents by Mr Fisher, former president and legal representative of Respondent 1 and managing director of Respondent 2. It stated that the agreement between the parties consisted of the Partnership Agreement itself and the attached Standard Terms and Conditions of Claimant. Clause 10.9 of the Standard Terms and Conditions provided that Italian law, to the exclusion of conflict-of-law provisions and the United Nations Convention on Contracts for the International Sale of Goods (CISG), was the governing law. Clause 10.9 also provided for arbitration of disputes by a sole arbitrator under the Rules of the Chamber of Arbitration of Milan. The seat of the arbitration was to be Milan and the language of the arbitration English.

On 3 June Year X, Respondent 2 ordered the products for the Pilot installation (Lot 1), by means of an email transmitting an order dated 27 April Year X. The products indicated in the order included the 28 TYPE A Products and accessories. The goods were delivered later in June and as the testing of the Pilot installation by Principal and the Ministry was successful, Respondents decided to use Claimant's products for the entire work. Claimant was duly paid for Lot 1.

After installing the products, however, Respondent 2 discovered that the TYPE A Products were not suitable everywhere in the Locations because of their size. Claimant suggested to supply instead TYPE B Products, which were slightly smaller, and sent Respondent 2 an offer for future deliveries of this smaller type. The relevant email, dated 30 October Year X, made reference to an attached Excel file listing TYPE B Products. Respondents argued, however, that the attachment actually contained several Excel sheets, which also listed TYPE A Products.

On 6 November Year X, Respondent 2 sent Claimant Order no. 189/Year X, which requested the supply of, inter alia, 177 TYPE B Products; this Order explicitly annulled and replaced any preceding orders, including General Order no. 075/Year X. Following negotiations between the parties, on 12 November Year X Respondent 2 sent Claimant a revised version, Order no. 189/Year X Rev. 2, which modified the price of the goods and the modalities for payment. On 2 December Year X, Claimant delivered 50 TYPE B Products to Respondent 2 under Order no. 189/Year X Rev. 2.

Respondent 2 immediately contested this delivery, claiming that the products delivered – TYPE B – were not those it had ordered – TYPE A – and that the TYPE B Products could not be accepted because they were substantially different from those approved for Project X by Principal and the Competent Office. The parties corresponded over the following days, and eventually Respondent 2 stated that while it could use the 50 TYPE B Products after seeking permission from Principal, it would not accept any future deliveries of TYPE B Products. Later in December, however, Claimant sent a further 100 TYPE B Products under Order no. 189/Year X Rev. 2.

Respondent 2 eventually used the TYPE B Products to complete the subcontracted work on Project X, allegedly in order to timely meet its own obligations toward Principal. It insisted, however, that using non-conform products required approval of the modified project by Principal and the Competent Office.

Respondent 2 paid Claimant's Invoice no. 7413, which covered the initial supply of 50 TYPE B Products. It did not pay Invoice no. 7389 (for the supply of 200 accessories), and Invoice no. 7564 (for the supply of the further 100 TYPE B Products).

As a consequence, Claimant suspended delivery of the last three lots. It then sought payment of the outstanding invoices on 16 May Year X+1. Respondent 2 replied that the TYPE B Products were unsuitable and not approved for Project X, and contested the entire delivery of TYPE B Products.

Claimant also sought payment from Respondent 1 on 17 June Year X+1. Respondent 1 replied that all payment requests should be addressed solely to Respondent 2 and that Respondent 1 was neither jointly liable under the Partnership Agreement nor bound by the arbitration clause therein.

Settlement negotiations were unsuccessful. Claimant filed a Request for Arbitration with the Milan Chamber of Arbitration (CAM), seeking payment of the unpaid invoices and reimbursement of certain costs. Respondents counterclaimed for costs they allegedly incurred in order to complete Project X notwithstanding Claimant's delivery of non-conform products, suspension of deliveries and lack of technical assistance in the post-Pilot phase of the installation.

By the present final award, the sole arbitrator found that both claims and counterclaims were admissible; that she had jurisdiction over both; that Claimant was entitled to suspend deliveries; that Respondents breached the Partnership Agreement by failing to comply with their joint obligation to pay Claimant's invoices; and that Respondent 1 had no standing to bring a counterclaim. On the merits, she granted Claimant's claim and rejected Respondent 2's counterclaim.

The sole arbitrator first held that she had *jurisdiction over Claimant's claims*, because she found that the arbitration agreement between the parties was valid and covered the dispute.

She dismissed Respondents' objection that the arbitration clause in the Standard Conditions was invalid because (i) it was not separately signed as required by Art. 1341 of the Italian Civil Code for restrictive clauses (which include arbitration clauses), and (ii) because Mr Fisher, who had signed the Agreement on behalf of both Respondents, was an old man who likely lacked a sufficient command of the English language.

The arbitrator noted preliminarily that (i) an objection regarding the arbitral tribunal's jurisdiction does not prevent the tribunal from deciding on its own jurisdiction, pursuant to the principle of *Kompetenz-Kompetenz*, which is enshrined in the Italian arbitration law; and (ii) that Italian law applied to the validity of the arbitration clause.

She reasoned in respect of this latter point that in light of the principle of the autonomy of the arbitration clause with respect to the main contract, it could not be assumed that the choice for Italian law as the law governing the main contract meant that the parties opted for the applicability of Italian law to the arbitration agreement. The arbitrator shared the prevailing opinion that in the absence of an express choice by the parties, the law of the state of the seat of the arbitration (*lex arbitri*) applies. This approach, she noted, is in accordance with Art. V(1)(*a*) of the 1958 New York Convention, ratified by both states of which the parties were nationals, Italy and the United States. According to this provision, lacking a choice by the parties, the validity of the arbitration agreement is determined under the law of the state where the award was made – here, Italian law, since the seat of the arbitration was in Italy. In light of the international nature of the present proceeding, the arbitrator added that the impact of international treaties, in particular the New York Convention, should also be taken into account.

Both Italian law and the New York Convention require the written form and the parties' express agreement for the conclusion of a valid arbitration clause. These requirements were met here, since the arbitration clause was undisputedly in writing and the Standard Terms and Conditions had been signed by Respondents, as well as by Claimant.

Respondents' two objections to the validity of Clause 10.9 failed. First, the claim that Mr Fisher was old and thus unable to understand the English text he signed, was unsubstantiated. No evidence had been filed in support of this argument, and the contracting parties were experienced operators.

Second, the argument that the arbitration clause should have been separately signed was also unsuccessful. Pursuant to Arts. 1341 and 1342 CC, *clausole*

*vessatorie* (restrictive clauses) contained in general conditions of contract require a specific written approval through an additional signature under the list of such clauses generally found at the end of the document. This was precisely the case here. The first page, or cover sheet, of the Partnership Agreement explicitly referred to the attached Standard Terms and Conditions, which contained the arbitration clause (Clause 10.9), and Respondents signed both the first page of the Agreement and the last page of the Standard Terms and Conditions, below an explicit list of all clauses contained in the Standard Terms considered to be restrictive, including Clause 10.9.

In any case, added the sole arbitrator, the double signature requirement of Art. 1341 CC did not even apply. Art. II of the New York Convention provides for a uniform – that is, special – regulation of the formal requirements for arbitration agreements in international contracts, thus preventing the Contracting States from imposing further or more restrictive formal requirements. Italian jurisprudence held on several occasions that Arts. 1341 and 1342 CC do not apply to agreements for foreign arbitration. The exclusion of these Articles was further set out explicitly in the Italian Code of Civil Procedure following the 1994 arbitration law reform also with respect to international arbitration with seat in Italy; although the relevant provision was repealed in the 2006 reform, the prevailing doctrine – which the sole arbitrator shared – holds that this principle holds true, since the repealed Article merely absorbed a principle that jurisprudence and doctrine had previously developed and affirmed. A contrary opinion would also be in contrast with the spirit and the letter of Art. II of the New York Convention.

Finally, the dispute fell squarely within the scope of the arbitration clause in the Standard Conditions attached to the Partnership Agreement, since it arose in respect of deliveries under Order no. 189/Year X Rev. 2, on which Claimant based its request for payment.

The sole arbitrator then held that she had *jurisdiction over Respondents' counterclaim*, which was introduced in a timely manner and was covered by the arbitration agreement.

The counterclaim was timely. The Italian Arbitration Act does not set specific requirements for the filing of counterclaims and the Italian Supreme Court recognizes the admissibility of counterclaims filed in the course of the arbitration proceedings as long as the counterparty has a possibility to defend its position and reply thereto. The arbitrator reasoned that absent any indications in the arbitration agreement and in the CAM Arbitration Rules – which only provide that the tribunal shall decide on the admissibility of new (counter)claims taking into account all circumstances – the arbitral tribunal enjoys broad discretional

powers with respect to the decision on whether to admit a counterclaim filed after the (first) statement of defense. In the present case, Respondents stated at the beginning of the proceeding that they would file a counterclaim, and the arbitrator granted them a time limit to do so. Respondents filed their counterclaim within the given time limit, and Claimant was in turn granted the opportunity to reply. The counterclaim was therefore filed timely.

The counterclaim was also admissible, as it fell within the scope of the broad arbitration agreement in Clause 10.9: "Any dispute arising out of or related to the present Agreement, including the formation, interpretation, breach or termination thereof …". The counterclaim sought costs arising in respect of the completion of Project X, allegedly incurred as a direct consequence of Claimant's non-performance (delivery of non-conform products and suspension of deliveries), and therefore concerned Claimant's contractual liability.

However, the sole arbitrator held that Respondent 1 lacked standing to bring the counterclaim. Respondent 1 signed the Partnership Agreement, but the present dispute concerned Order no. 189/Year X Rev. 2, which was issued to Claimant by Respondent 2. Respondents themselves and the evidence also confirmed that Respondent 1's involvement was limited to the subcontracting of installation works to Respondent 2, and that the goods in dispute were ordered by Respondent 2, not by Respondent 1. While the Agreement did provide for a joint liability of Respondents, it did not provide for the joint entitlement of or the possibility for Respondents to act as joint creditors against Claimant in case of breach of contract by the latter.

*On the merits*, the sole arbitrator *granted Claimant's claim*, finding that Respondents breached the Partnership Agreement, and rejected Respondent 2's counterclaim.

The parties disagreed as to whether TYPE A or TYPE B Products had been ordered, and as to the binding contractual document: Claimant argued that Order no. 189/Year X Rev. 2, which referred to the TYPE B Products, was the relevant document; Respondents contended that the relevant document was General Order no. 075/Year X, dated 27 April Year X, which referred to TYPE A Products.

The arbitrator held first that the General Order of 27 April Year X was not the document relevantly governing the parties' relationship. This order concerned the supply of unspecified equipment to be delivered in five lots. It referred to Claimant's offer dated 11 February Year X, which concerned the supply of products for the Pilot installation, including the TYPE A Products, but also contemplated all phases of Project X – the four further lots. The arbitrator held that it appeared that the General Order (which was formulated as a proposal for

a framework agreement between the Parties, rather than as an order in the strict sense) was not sufficient in itself, but necessarily required subsequent and specific orders. It was thus superseded by the subsequent specific orders issued for each lot.

Rather, it appeared from the evidence that Order no. 189/Year X Rev. 2 issued under the Partnership Agreement and providing, *inter alia*, for the delivery of 177 TYPE B Products, was the relevant order for the supply in dispute. It appeared from the cover email that Order no. 189/Year X, its 6 November earlier version, explicitly annulled and replaced all precedent orders, including the General Order. The original Order no. 189 was not accepted by Claimant and negotiations led to a revised version, Order no. 189/Year X Rev. 2. The correspondence and negotiations between the parties clearly disproved in the arbitrator's opinion Respondents' claim that there had been a misunderstanding because Claimant's new offer, dated 30 October Year X, included some Excel sheets which still indicated the TYPE A Products. Further, noted the sole arbitrator, Respondents never sought an annulment of the order due to a significant error. Rather, after having initially requested to stop further deliveries of TYPE B Products, Respondent 2 insisted on the continued supply of such TYPE B Products and actually used all of the material delivered by Claimant for Project X.

Order no. 189/Year X Rev. 2, which like Order no. 189/Year X provided for the supply of TYPE B Products, was therefore the relevant contractual document. Respondents breached their contractual obligations under Order no. 189/Year X Rev. 2 by failing to make the payments thereunder.

While Claimant proved that it made the various supplies under Order no. 189/Year X Rev. 2, which included the TYPE B Products, for which payment was claimed in this arbitration, Respondents failed to prove that there was a ground for their non-payment of the relevant invoices.

Respondents' objection that Claimant did not perform its contractual obligations in accordance with the Partnership Agreement, so that Respondents were not required to pay the amounts outstanding under Invoice no. 7389/Year X and Invoice no. 7564/Year X under Art. 1460 CC, failed. Respondents did not prove that the TYPE B Products were not in conformity with Project X's technical requirements, since these products were in fact installed. Nor was there merit in Respondents' claim that they could not install products different from those that had been tested and approved by Principal and the Competent Office, even if technically compatible: first, Respondents could not blame Claimant for implementing its own instructions to supply TYPE B Products; second, testing was irrelevant for the payment of supplies. The requirement in the original

version of Order no. 189/Year X providing for payment upon testing had been specifically deleted, and it also appeared from the evidence that Respondents actually used products that were different from those approved for Project X.

The sole arbitrator added that Italian jurisprudence requires that where a party raises the *inadimplenti non est adimplendum* exception, the judge must evaluate, compare and balance the opposing defaults and breaches. In the present case, Claimant's suspension of the supply of the outstanding lots ordered by Respondents could not be considered disproportionate in light of Respondents' breach of contract.

Finally, the arbitrator stressed that Respondents' own counterclaim stood in clear contradiction to the reasons underlying this objection. On one hand, Respondents contested the supply of TYPE B Products as they were allegedly not conform to and not in compliance with Project X. On the other hand, they argued that they incurred costs because Claimant failed to complete delivery of the products ordered, including the TYPE B Products.

The sole arbitrator then *denied Respondent 2's counterclaim*. This counterclaim was based on the premise that Claimant defaulted on its contractual obligations by failing to complete delivery and to provide technical assistance for the installation of the Products after the Pilot phase. The counterclaim, held the arbitrator, was unfounded in respect of both the *an debeatur* and the *quantum*.

Claimant could not be held liable because its disruption of any further supply of products for the completion of Project X was justified in light of the serious payment default by Respondents. Also, Respondents did not prove that Claimant was contractually obliged to provide technical assistance in the post-Pilot phase.

Having found that the counterclaim failed to prove Claimant's liability, the sole arbitrator need not examine the issue of the *quantum* of damages. However, she did so for the sake of completeness, and concluded on the facts of the case that the counterclaim provided insufficient evidence on the amount of the alleged losses.

The sole arbitrator then dealt with Claimant's request for *late payment interest* and applied the late payment interest rate provided for in the Standard Terms and Conditions, which corresponded to a choice of the lower of either a rate of 1.5 percent per month or the interest rate under the Italian Legislative Decree implementing Directive 2011/7/UE on combating late payment in commercial transactions – currently, 8 percent on top of the Bce reference rate set forth in the Decree.

The arbitrator then examined whether Claimant had correctly *imputed the advance payments* made by Respondents. On 12 November Year X, Respondents made an advance payment for the supply under the original Order no.

189/Year X, which was applicable at the time. Claimant correctly imputed this advance payment to the amount due under Invoice no. 7389, which was the first debt due and the more onerous, as provided under the Italian Civil Code. In September Year X+1, Respondent 2 paid a certain amount to Claimant, which Claimant correctly imputed to the late payment interest accrued.

On the issue of *Respondents' joint liability*, the sole arbitrator held that it undisputedly emerged from the record that the parties' contractual relationship in general was regulated by a framework agreement, the Partnership Agreement, which explicitly provided for the joint liability of the Respondents. Further, on the same date of the Agreement (13 May Year X), both Respondents also signed as "borrowers" – jointly and severally – a credit application and agreement and a credit line with Claimant in which they again declared to be jointly liable vis-à-vis Claimant.

Finally, the sole arbitrator decided that the *costs* of the arbitration proceeding should be borne in proportion to unsuccessfulness and therefore by Respondents jointly. Legal fees and expenses were also liquidated in proportion to unsuccessfulness, and Respondents were ordered to reimburse Claimant for legal fees and costs and to bear their own fees and expenses. Considering the limited number of hearing days, the evidentiary phase and the nature and complexity of the dispute, the arbitrator determined the legal fees to be reimbursed, jointly, by Respondents on the basis of the medium standard fees.

*Excerpt*

I. THE ARBITRATION AGREEMENT

[1] "Claimant's Request for Arbitration was introduced on the basis of the arbitral clause contained in Clause 10.9 of the so-called 'Partnership Agreement', dated 13 May Year X. Said clause provides as follows:

> 'Governing Law/Arbitration
> This Agreement shall be deemed to have been made in Italy, and shall be governed and construed in accordance with the laws of Italy exclusive of its rules governing choice of law and conflict of law. Accordingly, the provisions of the United Nation Convention on Contracts for the International Sale of Goods, if applicable, shall not apply to this Agreement. Any dispute arising out of or related to the present Agreement, including the formation, interpretation, breach or termination

thereof, including whether the claims asserted are arbitrable, will be referred to and finally determined by arbitration under the Rules of the Chamber of Arbitration of Milan, Italy (the Rules), by a sole arbitrator. The place of arbitration will be Milan, Italy. The language to be used in the arbitral proceedings will be English. The arbitration shall be "*rituale*"[2] and the arbitrators shall decide in accordance with the law. Judgement upon the award rendered by arbitrator(s) may be entered in any court having jurisdiction thereof.'

[2] "On the basis of this clause, Respondents introduced and specified during the proceedings a counterclaim by their 'Brief Authorized about counterclaim'."

## II. THE ARBITRAL TRIBUNAL

[3] "The Arbitral Tribunal, formally constituted in Rome at the premises of the Chamber of Arbitration of Milan in Rome (hereinafter 'the Chamber'), during a designated hearing for its constitution in conformity with Art. 21, para. 1 of the Arbitration Rules of the Chamber which entered into force on 1 January 2010 (hereinafter, the 'Rules'), as indicated in the related Minutes of the hearing and Procedural Order no. 1, is composed of a Sole Arbitrator: Avvocato Maria Theresia Roerig.…

[4] "Maria Theresia Roerig, a German national, also qualified to practice in Italy, was appointed by the Arbitral Council of the Chamber … and confirmed by the Secretariat of the Chamber.

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2. *Note General Editor.* The distinction between *arbitrato rituale* (formal arbitration) and *arbitrato irrituale* (contractual arbitration) is explained by Prof. Piero Bernardini in the "National Report Italy" in ICCA's *International Handbook on Commercial Arbitration* as follows:

"In addition to arbitration regulated by the Code of Civil Procedure (known as the ritual Code: hence the name of *arbitrato rituale* for this form of arbitration), a second type of arbitration, based on the parties' contractual autonomy recognized by Art. 1322 of the Civil Code, has developed since the turn of the [twentieth] century (*arbitrato irrituale* or *libero*) by which the parties entrust the arbitrator with the power to determine their own will. Unlike *arbitrato rituale*, the proceedings under the latter type of arbitration are not subject to the formal requirements set by the Code of Civil Procedure (although the courts tend now to apply various of its provisions also to *arbitrato irrituale*, including the requirement of due process) and give rise to a determination which is only contractual as to its effects for the parties and is not susceptible to acquire executory force. Such a determination may be attacked only on the same grounds for which the invalidity of a contract may be invoked before a national court."

[5] "The Sole Arbitrator having reiterated her consent to act as such in the present arbitral proceedings, acknowledged and directed in particular during such hearing and by means of Procedural Order no. 1 that:

– in accordance with the abovementioned arbitration agreement, the *seat of the arbitration* would be Milan (Italy). The Arbitral Tribunal could decide for any hearing or other procedural order to be made in another place, pursuant to Art. 4, para. 4 of the Rules;
– in accordance with the abovementioned agreement, Italian *substantive law* would apply to the merits of the case, but for the United Nations Convention on Contracts for the International Sale of Goods;
– pursuant to the abovementioned arbitration clause, English should be *the language of the arbitration*. The arbitral proceedings would therefore be conducted in English, and any award(s) or decisions of the Arbitral Tribunal would be drafted in English. All exhibits and other evidence written in a language other than English and/or Italian should be provided together with an English translation. Exhibits and evidence, case law, legal scholarship and statutes/legislation originally drafted in Italian may be filed in the proceedings without a translation;
– the proceedings would be governed by the *Rules* of the Chamber as supplemented by the present Procedural Order no. 1 and, as required, by Italian procedural law on arbitration. Where the latter is silent, these proceedings would be governed by any rules that the Arbitral Tribunal may decide to apply in accordance with Art. 2, para. 1 of the Rules. The Arbitral Tribunal may also seek guidance from, but shall not be bound by, the IBA Rules on the Taking of Evidence in International Arbitration 2010.

The Sole Arbitrator, having consulted the Parties, set a number of specific procedural rules in Procedural Order no. 1, in relation to document production, written submissions, witnesses of facts and expert witnesses, as well as to the (evidentiary) hearings.
[6] "The Tribunal decides the present dispute, as set forth in the arbitration agreement, *according to the rule of law* and '*in via rituale*'."

## III. THE PARTIES

[7] "Claimant … filed a Request for Arbitration with the Milan Chamber of Arbitration against Respondents, seeking outstanding payments of invoices for

the supply of certain Products and related products to be installed in Locations 1 and 2, as well as reimbursements of certain costs. The Request was based on the arbitration clause cited above, contained in the aforementioned Partnership Agreement.

[8] "Respondent 1 offers system and security solutions. Respondent 1 had been awarded a contract for the supply and implementation of technologies for the security of Locations 1 and 2 by Principal. It subcontracted the execution of such works to Respondent 2.

[9] "Respondent 2 offers system and security solutions."

## IV. PROCEDURAL BACKGROUND

[10] "Counsel for both Respondents filed their answer to the Claimant's Request (Defensive Memory), contesting the validity of the arbitration agreement, and in particular its bindingness upon Respondent 1, as well as the Claimant's payment requests, which it deems unfounded because it argues that the products delivered do not comply with those ordered by Respondents.

[11] "Respondents had also requested to single out ('oust') Respondent 1 from 'this arbitration' on the ground that it lacks standing to be sued.

[12] "In accordance with the procedural timetable set by the Arbitral Tribunal in Procedural Order no. 1, and issued during the hearing for the constitution of the Arbitral Tribunal, the Parties exchanged a first set of briefs (Parties' First and Second Briefs, respectively), in which Respondents reserved the right to claim for the damages that allegedly arose due to Claimant's default in delivering conform goods, to faults generated by the goods delivered by Claimant and/or to the Claimant's failure to provide technical assistance.

[13] "By means of Procedural Order no. 2, the Arbitral Tribunal, having acknowledged the Respondents' reserve for a counterclaim and Claimant's objections in this regard (in particular, that any counterclaim would be time-barred and inadmissible), directed in the interests of procedural efficiency that Respondents must introduce and submit counterclaims, if any, by [ten days later] at the latest, also providing reasons for the admissibility of its counterclaims; it further directed that, were Respondents to introduce any counterclaim, Claimant should submit its statements as to the admissibility of the same and its answer thereto, including any objections and related prayers of relief, by [a certain date].

[14] "The Arbitral Tribunal further asked the Parties to confirm whether they agreed that any witness and expert hearings could be conducted in Italian, even

though the language of the present arbitration is English and, if so, to submit related written declarations signed by their legal representative or authorized counsel. Both Parties submitted such declarations, thus consenting that evidentiary hearings could be conducted in the Italian language.

[15] "Respondents filed a counterclaim (Brief Authorized about Counterclaim) with the Chamber and claimed the reimbursement of various costs allegedly resulting from Claimant's default and breach of contract to the extent quantifiable at that moment.

[16] "Claimant filed its response to the counterclaim (Third Brief), contesting the admissibility of the counterclaim, which is allegedly time-barred under Art. 10 of the Arbitration Rules and in any case would not even fall within the arbitration agreement (raising the objection established under Art. 817 CCP),[3] and in addition would fail to meet the requirements set out in Art. 36 CCP, the counterclaim not presenting any link with its main claim and in any case being unfounded in light of its vagueness and genericity.

[17] "In accordance with the subsequent Procedural Order no. 3 of the Arbitral Tribunal, Respondents submitted their reply to Claimant's Third Brief, in particular regarding the (admissibility of the) counterclaim (Respondents' Fourth Brief).

[18] "Respondents argue that the counterclaim is admissible even though Principal is not a party to the contractual relationship between Respondent 2 and Claimant. Claimant's default would also have effects with respect to Principal, and in accordance with Art. 1218 CC [Italian Civil Code], the defaulting party must pay damages for the losses caused by its default. In addition, Art. 27 of the Arbitral Rules would neither preclude the submission of new claims nor provide for a time limit.

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3. Art. 817 of the Italian Code of Civil Procedure reads:

> "*Objection to jurisdiction*
> Should the validity, content or scope of the arbitration agreement or the regularity of the arbitrators' appointment be challenged in the course of the arbitration, the arbitrators shall decide on their own jurisdiction.
>
> This provision shall apply also in case the arbitrators' powers are challenged in any venue for whatever reason which has supervened in the course of the proceedings. The party that does not object in the first statement of defense subsequent to the arbitrators' acceptance that they lack jurisdiction by reason of the non-existence, invalidity or ineffectiveness of the arbitration agreement, may not challenge the award on this ground, except in case of a non-arbitrable dispute.
>
> The party which, during the arbitration proceedings, fails to raise the objection that the other parties' pleadings exceed the limits of the arbitration agreement may not, on this ground, challenge the award."

[19] "Claimant submitted its counter-reply (Claimant's Fourth Brief) to such reply, lamenting inter alia the irrelevance of Respondents' written witness statements, which allegedly all present the exact same wording and content and would as such be unreliable.
[20] "By Procedural Order no. 4, the Arbitral Tribunal granted Respondents and Claimant a further deadline within which to finally specify their positions on the merits of the counterclaims and to integrate related evidence, as well as a final deadline for submitting related replies and counter-evidence.
[21] "It also scheduled an evidentiary hearing to be held at the Arbitral Chamber's premises in Rome, specifying further procedural issues (e.g. regarding the witnesses, their summons and the hearing in general), and inviting the Parties to submit a list of witnesses to be summoned to the hearing and related arguments.
[22] "The Parties submitted the briefs and reply-briefs granted in Order no. 4 (cfr. Parties' Fifth and Sixth Briefs, respectively) on a timely basis and also submitted their respective pre-hearing briefs, including a list of witnesses to be heard at the hearing and related arguments (Claimant's Pre-Hearing Brief and Respondents' List of Witnesses). Parties also summoned all their respective witnesses to the hearing.
[23] "The Arbitral Council of the Chamber granted a [five-month] extension of the time limit for filing the final award, pursuant to Art. 32 of the Rules.
[24] "Upon Claimant's request, to which Respondent consented, the hearing originally scheduled was postponed and held on the following day (Procedural Order no. 5). The hearing agenda was fixed by the Sole Arbitrator by means of Order no. 6.
[25] "During the hearing, the two witnesses introduced by the Claimant, Mr Smith and Mr Jones,[4] were heard and cross-examined first, in accordance with the procedural rules set by the Tribunal after consulting the Parties. Subsequently, the four witnesses introduced by the Respondents, Mr David Brown, Ms Jane Martin, Mr Hunter and Ms Susan Brown were heard and cross-examined. Thus, the Arbitral Tribunal had admitted all witnesses indicated by the Parties to the hearing, holding that it would evaluate the reliability and the probatory value of Respondents' written witness statements – contested by Claimant – also in light of their oral statements.
[26] "The entire hearing was registered by a registration and transcript service, arranged for upon instruction of the Arbitral Tribunal by the Secretariat of the Chamber. The transcript of the hearing, including the oral witnesses' statements

4. All names are fictitious.

(hereafter referred to as the 'Transcript') is part of the Minutes of the hearing, which were transmitted to the Parties one week later.

[27] "At the end of the hearing, the Arbitral Tribunal, having consulted the Parties, granted both Parties a deadline within which to hold a conclusive post-hearing brief and a final deadline for the related conclusive rebuttal briefs.

[28] "Both Parties submitted their post-hearing briefs but omitted, *inter alia*, the English translation of the Transcript parts that they quoted or to which they referred. By Order no. 7, the Arbitral Tribunal therefore directed the Parties to provide for the filing of an English translation of the parts of the Transcript that they deemed relevant by a certain date. The Parties indeed filed the required translation by such date.

[29] "The Parties filed their rebuttal briefs within the time limits set, together with statements of their costs."

## V. FACTUAL BACKGROUND

[30] "The dispute regards a (private) contractual relationship and a so-called Partnership Agreement, dated 13 May Year X, entered into by the Parties in connection with a public tender for the supply and implementation of technologies for the security and surveillance system of Locations 1 and 2 (the so-called 'Project X').

[31] "Principal had announced said tender and awarded it to Respondent 1, which subcontracted the execution of the works subject to the tender to Respondent 2.

[32] "Respondent 2 had originally selected another company, Premier/ACME, for the supply of certain technologies. According to Respondents' statements – which were not contested in this respect by Claimant – Respondent 2 had implemented, together with Premier/ACME, the final design of the executive project, called 'Project X', in the pilot part of Location 1. Project X was approved by Principal … and the Competent Office within the Ministry.

[33] "Subsequently, Claimant was introduced to Respondent 2 and proposed to install its own products in the Project X pilot phase. Respondent 2 concluded that Claimant's technology and commercial presence would be more suitable than those of the first-chosen company. Respondent 2 thus proposed to Principal to test Claimant's technologies.

[34] "On 11 February Year X, Claimant made an offer to Respondent 2 for the supply of Products and accessories, indicating, inter alia, 28 'TYPE A' Products, which were to be installed for a complete pilot installation (offer for Phase 1). Respondent 2, referring to such offer, sent Claimant a so-called General Order, dated 27 April Year X, indicating various lots that it wished to order during the forthcoming period (only the first lot of which regarded the pilot).

[35] "According to Claimant's description of the facts, before starting any commercial relationships with Respondent 2, it conducted a due diligence on the potential partner, from which it emerged that the economic parameters of Respondent 2 did not match Claimant's requirements. To resolve the problem, the Parties agreed – according to Claimant's allegations, which are however contested by Respondents – upon the joint liability of both Respondents.

[36] "In any event, on 13 May Year X, the Parties concluded a so-called Partnership Agreement (hereafter also referred to as the 'Agreement'), which was signed, on behalf of Respondents, by Mr Fisher, former Chairman (*Presidente*) and legal representative of Respondent 1 and Managing Director of Respondent 2. Said agreement, under which Claimant committed itself to provide Respondents with its products as defined in the Agreement on the basis of the orders placed from time to time by the commercial counterparties, had already been transmitted to Respondents on 10 February Year X.

[37] "Respondents actually contest the binding nature of the terms of said Agreement regarding the Parties' joint liability and the arbitration clause. In this connection, it queries whether Mr Fisher, who was of advanced age, could be considered to have properly understood the agreement drafted in the English language; they also argue that both said restrictive clauses (which it considers to be so-called '*clausole vessatorie*') were not expressly approved by means of a double signature, as required under Art. 1341 CC.[5]

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5. Art. 1341 of the Italian Civil Code reads:

> "*Standard Conditions of Contract*
> Standard conditions prepared by one of the parties are effective as to the other if at the time of formation of the contract the latter knew of them or should have known of them by using ordinary diligence.
>
> In any case conditions are ineffective, unless specifically approved in writing, which establish, in favor of the party who has prepared them, limitations on liability, the power of withdrawing from the contract or of suspending its performance, or which impose time limits involving forfeitures on the other party, limitations on the power to raise defences, restrictions on contractual freedom in relations with third parties, tacit extension or renewal of the contract, arbitration clauses or derogations from the competence of courts."

[38] "Claimant disagrees with the above objections, stating that Respondents' statement as to Mr Fisher's age etc. are patently irrelevant (and in any case untimely), emphasizing that the Agreement was signed on the first page and again at p. 7, immediately below the specific acceptance of certain provisions (among which Clause 10.9). Furthermore, to hold Respondents jointly liable under the Partnership Agreement (cfr. p. 1), no specific approval under Art. 1341(2) CC was required. In addition, such joint liability also clearly emerges from the 'Credit Application and Agreement' and 'Line of Credit Agreement', signed by both Respondents.

[39] "On 3 June Year X, Respondent 2 finally ordered from Claimant the products offered for the testing phase by means of an email transmitting an order for '*Lotto* 1', dated 27 April Year X. The goods ordered for the pilot (among which the 28 TYPE A Products and accessories) were delivered in June Year X (see … witness statement of Ms Brown). The outcome of the testing of the pilot by Principal and the Ministry was successful. Accordingly, Respondents decided to use Claimant's products and Claimant was regularly paid for its first supply for the pilot phase in Year X.

[40] "According to Claimant, immediately after installing the products for the pilot, Respondent 2 discovered that the Products ordered for the pilot part (TYPE A) were not suitable for the entire project due to their size. According to Claimant's description of the facts, once it was informed by Respondent 2 about the size problems, it suggested using another Claimant product, with slightly different accessories (the so-called TYPE B Products – which were slightly smaller than the first ones purchased). These were ordered by Respondent 2 in November Year X.

[41] "Said allegations are however contested by Respondents, who state that even if there was less space in some parts, there was no need (and no option) to change the product, which had already been tested and approved by Principal and the Competent Office.

[42] "In any case, Claimant had sent Respondent 2 a new offer for the following deliveries, dated 29 October Year X, in which TYPE B Products were indicated. The related email, dated 30 October Year X, transmitting the offer, made reference to an attached Excel file.

[43] "At the beginning of December Year X, soon after delivery of, inter alia, 50 TYPE B Products by Claimant, the dispute arose and regarded the question of which type of Products had actually been ordered (the so-called 'TYPE A Products' or the 'TYPE B Products'), and which of the various documents produced actually constituted the binding order document.

[44] "Claimant argues that it delivered exactly what had been ordered and that the relevant order is that contained in Exhibit C 5 (Order no. 189/Year X Rev. 2, dated 12 November Year X), an order which replaced a previous order contained in Exhibit R 2 (Order no. 189/Year X, dated 6 November Year X) and which provides (as did Order no. 189/Year X) for the supply, inter alia, of the so-called 'TYPE B Products'. That would have also been specified in the email correspondence enclosed in Exhibit R 2. According to Claimant, the final version of the order was actually agreed upon after some additional changes had been made regarding the price and the payment modalities.

[45] "Respondents, at a certain point of the proceedings, alleged instead that the only relevant order was the General Order for the 'Total Supply', dated 27 April Year X, and signed by Respondent 2. This order is allegedly the 'cornerstone' of the business documents, specifying the size of the various lots to be delivered (the first lot regarding the pilot), in accordance with the work program agreed upon with the final client, their pecuniary value, and the terms of delivery and payment. This General Order allegedly only refers to the TYPE A Products (and not to the TYPE B Products).

[46] "Claimant contests the relevance of such General Order, stating that it had been rejected and that single orders were requested for each portion of the project (as stated by the witness Mr Jones). In light of the size problem that allegedly arose, Claimant had sent a new offer for TYPE B Products on 30 October Year X and Respondent had clearly ordered 150 TYPE B Products, also expressly indicating the latter typology in the related email correspondence.

[47] "However, during the hearing, Respondents specified that the correspondence attached in Exhibit R 2, which includes Claimant's offer, dated 30 October Year X, referring to an Excel file, actually contained several Excel sheets, which allegedly clearly refer to the originally ordered TYPE A Products, the only ones that had ever been taken into consideration by the Parties since their approval by Principal and the Competent Office.

[48] "The delivery of the 50 TYPE B Products was in any case immediately contested by Respondent 2 on the day of their arrival on 2 December Year X, said Respondent lamenting that they did not conform to those ordered, in particular because of the substantial difference between the type of Products supplied and those approved by Principal and the Competent Office. Over the following days, correspondence was exchanged on this issue. Respondent 2 specified that only 50 Products could be used in certain parts of the Locations after having requested permission from Principal, and that the other TYPE B Products would in any case have to be replaced.

[49] "Nonetheless, further 100 TYPE B Products related to Order no. 189/Year X Rev. 2 were sent by Claimant at the end of December Year X.

[50] "Subsequently, the products delivered by Claimant and contested by Respondent 2 were also used by Respondent 2 to complete the works subcontracted within the end of Year X+1. In this respect, Respondents argue that they had to complete the project within such time limit (beyond which funding from the Ministry would have 'lapsed') and also wished to accommodate Claimant's needs and difficulties in replacing the goods, which were shipped from abroad. They decided to use the non-conform goods to complete the works; however, this would require fresh approval by the Competent Office of the modified project.

[51] "An invoice from Claimant, dated 24 November Year X (no. 7413) – with due date on 24 December Year X – for, inter alia, the supply of 50 TYPE B Products for a total amount of € 000, was actually paid by Respondent 2 on 11 May Year X+1. The further deliveries invoiced (Invoice no. 7389 for € …, dated 18 November Year X, regarding 200 accessories; and Invoice no. 7564, dated 23 December Year X, for a total amount of € … of which € … fell due for the supply of 100 TYPE B Products) have not been paid in full. Claimant asserts that a total amount of € … plus late payment interests is outstanding after the above payment of € 000 and the advance payment of € … made by Respondent 2 in November Year X.

[52] "On 16 May Year X+1, Claimant sent a first demand letter to Respondents, which was answered by Respondent 2 by email, dated 17 May Year X+1, in which the latter raised objections regarding the products ordered and shipped because they were neither suitable nor approved for the final project. Respondent 2 then contested the entire delivery of the TYPE B Products.

[53] "A second demand letter was sent on 17 June Year X+1 to Respondent 1. Respondent 1's counsel replied on 26 June Year X+1, arguing that all payment requests should be addressed solely to Respondent 2 and that Respondent 1 would not be bound by any terms regarding joint liability and the arbitration agreement contained in the Partnership Agreement.

[54] "Subsequently, settlement negotiations took place, which included a meeting on 16 September Year X+1 to agree upon a payment plan; however, these had no positive outcome.

[55] "During the arbitration proceedings, Respondents raised 'the exception of infringement proceedings under Art. 1460 CC[6] which by itself excludes the payment obligation required by Claimant'.

[56] "While Claimant deems such objection meritless in view of its supply of the Products ordered by Respondents and the partial payment already received therefor, Respondents observe that Claimant cannot argue to have delivered exactly the products ordered – i.e. conform products – since it was perfectly aware of Respondents' needs, being directly involved with Principal's project. Respondents stress that although Claimant's involvement in the project with Principal was never formalized, it is undeniable that the needs of Principal were essential, because Claimant's supply was closely linked to the contract with Principal and Claimant was well aware of this from the outset of the business relationship. Respondents produced, inter alia, a 'Project X' report dated 14 December Year X, drafted by Claimant; and a related email, dated 15 December Year X, from Claimant to Mr Brown, to prove Claimant's involvement in the project and the non-conformity of its delivery. Furthermore, Claimant would have been obliged to provide assistance to the commissioning and testing of the facilities, which however it failed to do.

[57] "Claimant contests the existence of any direct relationship, obligation or link with respect to either Project X or Principal. It admitted to have been directly contacted by Principal for assistance, but only against consideration, and to have recently sent an offer for its services.

[58] "Respondents further allege that fulfilment of the payment obligations depends on the previous successful completion of the Principal's project (i.e. final and positive testing of the works) and the Competent Office's approval, i.e. that Claimant had agreed to postpone the payments. This would also be clear from an email, dated 15 December Year X, from Mr Brown to Respondent 1.

[59] "These allegations are contested by Claimant (who emphasizes not even being among the addressees of the 15 December Year X email). Respondents' allegation is, according to Claimant, disproved by the payments made by Respondent 2 itself for the delivery of 50 TYPE B Products. The report enclosed

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6. Art. 1460 CC reads:

> "In contracts with mutual obligations, each of the contracting parties may refuse to comply with its obligation if the other party does not comply with, or does not offer to comply simultaneously with, its own obligation, unless different terms for performance have been determined by the parties or follow from the nature of the contract.
>
> However, performance may not be refused if under the circumstances refusal is contrary to good faith."

with the 15 December Year X email would only demonstrate Claimant's cooperative conduct and its attempt to find an amicable solution.

[60] "In any case, after the disruption of the relationship, Respondent 2 provided – according to its description of the facts – autonomously for the completion of the works, using the items so far received from Claimant, as well as products and services provided by third parties, including ACME (the first supplier), White Company, Blue Company, Red Company and Black Company, redesigning and modifying the project.

[61] "Respondents state that Respondent 2 had to procure additional equipment to complete the work as a consequence of Claimant's default and lack of support, and that to date Respondent 2 has had to bear costs for supply, external assistance and additional labor forces amounting to € … (excluding VAT). After having initially reserved its right to specify a claim in this regard, Respondents presented, with its Brief Authorized about counterclaim, a counterclaim for these expenses, including the costs of the ACME products and manpower costs for the re-elaboration of the project submitted to Principal and the Competent Office, amounting to a total of €….

[62] "According to Claimant, Respondents remain liable for all costs claimed by them, and cannot shift the risk to Claimant, the latter not being part of the contractual relationship with Principal. The evidence submitted would be irrelevant: the costs for ACME products arose in Year X-3, i.e. prior to its own delivery and engagement by Respondent 2; other invoices would also be irrelevant, as it has not been proved that the materials indicated therein were actually ordered and installed in the Locations; likewise, no evidence would have been provided regarding the labor costs and their relevance to Claimant.

[63] "Respondents further state to be unable to proceed with the final inspection and testing of the plant and contractual object. The systems provided by Claimant could not be activated because they would generate faults on the network of Principal, compromising the operation of other security systems. The Products would be the only non-testable device, which would expose Respondents vis-à-vis the customer to a considerable risk of liability for damages; in this regard, Respondents reserve the right to present a claim in further, separate, proceedings.

[64] "Furthermore, in view of the faults, Principal allegedly imposed the intervention of a third party, which led to further increases in the costs.

[65] "In light of Claimant's defaults in performance and delivery and the disruption of supply and assistance, its payment requests are allegedly unlawful. According to Respondents, Claimant was not only obliged to supply the correct

goods, but also to make sure that they complied with the requirements of the customer, especially after having delivered the wrong goods.

[66] "Claimant contests being under any obligation to provide services and assistance after delivery. According to Claimant, its only duty consisted in the delivery of the goods ordered, also because Respondents had never bought an assistance package and officially requested Claimant's intervention. Indeed, Respondents allegedly never provided any evidence in this regard. Claimant further stresses that Respondents had failed to provide any relevant evidence for any alleged faults preventing the completion of the tests, faults which were in any case only insufficiently and generically described, such that Claimant cannot even defend itself in this respect. It emphasizes that Respondents' witnesses affirmed that most of the problems allegedly caused by the Products seemed to have been resolved simply by using a new system by Claimant. Claimant underscores that the system – which it would not be obliged to provide – … has no impact on or relationship with the Products. In any case, the system would easily be available free of charge from the Claimant website.

[67] "According to Claimant, Respondents, by not complying with their payment obligations, have breached the Partnership Agreement, reason for which they should be jointly ordered to pay the overdue amount plus late payment interests.

[68] "During the already mentioned settlement negotiations between the Parties, the sum of € 10,000.00 was in any case paid by Respondent 2. Claimant alleges that such amount must, under Art. 1194 CC, be exclusively allocated to late payment interest, which according to Claimant amounted on 19 September Year X+1 to € … (i.e. after deducting the payment of € 10,000.00). Respondents contest this allocation, having long assigned such payment to the capital, showing Respondent 2's seriousness with respect to the payment proposal of monthly installments. According to Respondents, Claimant cannot ask for interest (and the related imputation of the amount) on sums not presently payable.

[69] "Respondents also lament that Claimant has initially claimed payment of € … and in the following briefs of the amount of € …, without giving evidence for the increase in its claim."

## VI. RELIEF SOUGHT BY THE PARTIES

[70] "According to para. 2.1 of its Conclusive Brief (Post Hearing Brief), Claimant requests that the Arbitral Tribunal render an award by which it:

(i) dismisses counterparty's claims, objections, and arguments;
(ii) dismisses the counterclaim introduced by Respondents because it is inadmissible and/or ungrounded;
(iii) ascertains that Respondent 1 and Respondent 2 breached the Partnership Agreement of 13 May Year X entered into with Claimant due to their non-compliance with their joint obligation to pay the invoices, issued by Claimant, as detailed below;
(iv) orders Respondent 1 and Respondent 2, jointly, to pay in favor of Claimant the outstanding invoices for the total amount of € …, plus late payment interests due until the full payment pursuant to Legislative Decree no. 231 of 9 October 2002 that, as of 19 September Year X+1, amount to € …;
(v) in the unlikely event that the counterclaim is wholly or partially grounded, compensates the amount Claimant would be condemned to pay with the amount it is entitled to be awarded pursuant to the main claim;
(vi) orders Respondent 1 and Respondent 2, jointly, to reimburse in favor of Claimant the legal fees (including both the Sole Arbitrator and Claimant's fees as well as the Chamber of Arbitration of Milan's fee), out-of-pocket expenses, general expenses, plus mandatory social security contributions and VAT.'

[71] "In its last brief, the Final Rebuttal Brief, Respondents request that the Arbitral Tribunal render an award by which:

(i) it rejects the request for payment made by Claimant for the reasons given in this conclusive brief and the previous brief;
(ii) Claimant be ordered to pay the total sum of € … (excluding [VAT]) in their favor for the reasons explained in this conclusive brief and the brief about counterclaim, subject to further request for separate judgment;
(iii) subordinately, in the event that Respondent 1 and Respondent 2 have been condemned to pay the sums requested by Claimant, it compensates the respective claims;
(iv) in any case, the costs of the arbitration to be the sole responsibility of Claimant as well as legal fees.

[72] "In their first briefs, but not in their final relief sought, Respondents also requested that the Arbitral Tribunal issue:

– Preliminary rulings declaring the inapplicability of the arbitration clause (Art. 10.9 Partnership Agreement) as not subject to a specific subscription;

– 'As regards Respondent 1 it asks [that it be ousted from] this arbitration as lacking standing to be sued and in any case it is rejected the request for payment made by Claimant for the reasons given in the narrative'.

[73] "These requests have thus apparently been abandoned by Respondents."

## VII. JURISDICTION AND ADMISSIBILITY OF CLAIMS

[74] "Claimant's demands are upheld to the extent indicated in this award, except for Claimant's objections regarding the admissibility of Respondents' counterclaim and the related Arbitral Tribunal's jurisdiction. Respondents' demands and objections against the Claimant's claim, as well as their admissible counterclaim, are rejected because they are unfounded."

### *1. In Respect of Claimant's Claim*

[75] "At the beginning of the proceedings, Respondents raised an objection as to the Arbitral Tribunal's jurisdiction to decide this dispute, alleging that the arbitration agreement contained in the Partnership Agreement, dated 13 May Year X, was not validly signed and approved by means of a proper double signature of the Respondents' legal representative, as required under Art. 1341 CC. In addition, the legal representative of both Respondents at the time, Mr Fisher, an old man, would probably not have been able to understand the agreement, which was drafted in the English language.

[76] "At the end of the proceedings, Respondents appear to no longer insist on their objection regarding the validity of the arbitration agreement, and indeed have apparently abandoned the related request in their final relief sought (Final Rebuttal Brief). The Tribunal, for the sake of clarity and in view of important Italian case law according to which non-compliance with formal requirements leads to 'absolute' nullity,[7] which can also be invoked *ex officio* (although the Italian Supreme Court has recently held that nullity ensuing from the absence of

7. "See, e.g., Supreme Court, Civil Section (hereafter 'Cass. Civ.') no. 547/2002; Cass. Civ., Plenary Session, no. 5292/1997, in Riv. arb. 1997, p. 759; Arbitral Tribunal, Milan, 2 September 2009, in Riv. arb. 2010, 2, p. 375 et seq."

specific written approval of an oppressive clause is rather a 'relative' nullity, to be invoked only by the adhering party)[8] wishes nonetheless to emphasize the following.

[77] "An objection regarding the Arbitral Tribunal's jurisdiction does not prevent the Arbitrator from deciding on her own jurisdiction, pursuant to the well-known principle of *Kompetenz-Kompetenz*, which since the entry into force of the arbitration reform (see Legislative Decree no. 40/2006), is also enshrined in Art. 817(1) CCP, applicable to international arbitrations with seat in Italy, such as the present one. According to Art. 817(1) CCP:

> 'Should the validity, content or scope of the arbitration agreement … be challenged in the course of the arbitration, the arbitrators shall decide on their own jurisdiction.'

[78] "In the present case, the arbitration agreement is valid and the Arbitral Tribunal is competent to decide on Claimant's claim for the following reasons."

*a. Validity and written form of the arbitration clause*

[79] "Before deciding on the validity of the arbitration clause initially contested by Respondents and its bindingness on Respondents, the law applicable to the arbitration agreement must be determined. This issue appears to not have been explicitly provided for in the arbitration agreement itself and/or in the Rules governing the present arbitration.

[80] "In light of the principle of the autonomy of the arbitration clause with respect to the main contract, it cannot be simply assumed – when determining the governing law of the contract – that the Parties have opted for the applicability of Italian law, under exclusion of its conflict of law and choice of law rules and the UN Convention on Contracts for the International Sale of Goods (CISG), also with regard to the arbitration clause, being the latter a separate and autonomous agreement.

[81] "Although widely discussed in both scholarship and jurisprudence, it is generally held – an opinion shared by the Arbitrator – that in the absence of an express choice by the Parties, the law of the state of the seat of the arbitration (*lex*

8. "See Cass. Civ. no. 14570/2012 – under reference to an earlier decision (Cass. Civ. no. 11213/1991), which expressed the same opinion – held that: 'the specific approval in writing of restrictive clauses (including clauses referring the dispute to arbitrators) pursuant to Art. 1341(2) CC is a condition for invoking these clauses against the adhering party, who is the sole party who can rely on the lack of that approval. This interpretation is particularly relevant for the present case, Respondents having not reiterated their objection regarding the specific approval in their final relief sought.'"

*arbitri*) applies. This approach is in conformity with the provision in Art. V(1)(*a*), second part, of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 (the New York Convention), ratified by both states of which the Parties are nationals. According to this provision, in the absence of a choice by the Parties, the validity of the arbitration agreement is determined under the law of the country where the award was made – here, Italian law, since the seat of the arbitration is Milan, Italy, taking however into account, in light of the international nature of this proceeding, the impact of international treaties, in particular the New York Convention.

[82] "The valid conclusion of an arbitration clause requires in any case the parties' agreement. Both an international treaty (Art. II(1)-(2) of the New York Convention) and the applicable Italian law on arbitration (Arts. 807 and 808 CCP) require that it must necessarily be in written form, to ensure that the contracting parties are aware of the decision to refer a dispute to arbitration.

[83] "In this case, the arbitration clause is certainly in writing and the document containing it has also been signed by the legal representatives of Respondents.

[84] "In this regard, also Respondents' vague implication that the person who signed the conditions on Respondents' behalf may not have validly signed them, being old and thus unable to understand the English text undersigned, must be disregarded. The advanced age of a person does not in itself mean that he/she does not know the English language and no evidence has been filed to support this statement. Furthermore, the nature of the contracting Parties (all limited companies), the position of Mr Fisher as legal representative and member of the company's boards of both Respondents (corporations) at the relevant time, and the type of contract (regarding the international commercial supply of goods) render untenable the assumption that the contracting Parties were not fully experienced with negotiating contracts and signed a contractual text they did not understand or were not able to provide for a translation thereof. In conclusion, Respondents' objection is so vague and generic that it cannot be taken into consideration."

*b. Specific approval requirements*

[85] "The arbitration clause at issue is however contained in Claimant's Standard Terms and Conditions, which are part of the Partnership Agreement. In light of such Terms and Conditions, Respondents have, at least in the first phase of these proceedings, objected that contrary to Claimant's opinion, the arbitration clause did not govern the relationship between the Parties, because it had not been properly approved by Respondents in writing in accordance with Art. 1341, para. 2 CC, i.e. by a double signature.

[86] "Pursuant to Arts. 1341 and 1342 CC,[9] the so-called *clausole vessatorie* [restrictive clauses] (which include arbitration clauses) contained in general conditions of contract require not only the written form but also a specific written approval (through an additional signature under the list of such clauses generally found at the end of the document, as was also provided for in the Standard Conditions here).

[87] "In this case, however, Respondents did specifically approve the arbitration clause. By signing both the cover sheet (first page) of the Partnership Agreement and its immediately enclosed Standard Terms and Conditions, which actually constitute the core of the Agreement, at the last page the Parties clearly expressly accepted all clauses of the Partnership Agreement, which encompasses Claimant's Standard Terms and Conditions in force, including the arbitration clause; indeed, the Parties stated in the cover sheet (which was signed by Respondents) that the Agreement itself consists of such cover sheet, the Standard Terms and Conditions and other documents. Respondents placed their signature not only at the top of the Partnership Agreement (generally referring to the Standard Terms) but also on the last page (at the 'end') of the Standard Terms and Conditions themselves, which actually specifically list all clauses contained in the Standard Terms considered to be restrictive by citing their respective numbers: 'Parties expressly accept the following provisions 3.2, 3.3 …, 9.5, 10.5, 10.6., 10.7, 10.8, *10.9* (emphasis added), 10.10.,10.11. Respondent 1…, Respondent 2….'

[88] "Italian case law recognizes that the signature placed under a list of oppressive clauses indicated by number or title is sufficient to comply with the requirements of Art. 1341 CC (cfr. Italian Supreme Court, Civil Section, Cass. Civ. no. 12708/2014; see also Cass. Civ. no. 15278/2015 and no. 18525/2007, with further ref.). The Supreme Court has even stated that in contracts which do not require the written form (as in the present case) the written approval (i.e. by one signature), of the sole oppressive clauses alone is sufficient (Cass. Civ. no. 12708/2014).

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9. Art. 1342 CC reads:

> "*Contracts Made by Means of Forms or Formularies*
> In contracts made by subscribing forms or formularies prepared for the purpose of regulating in a uniform manner certain contractual relationships, clauses added to the form or formulary prevail over those of the form or formulary when they are incompatible with the latter, even if the latter have not been deleted.
> The provision of the second paragraph of the preceding article shall also apply."

[89] "Among the Standard Conditions integrated into the Agreement at issue, the signatories indeed particularly highlighted Clause 10.9, which contained the arbitration agreement, to such an extent that they specifically referred to it and accepted it expressly and separately. In particular, the 'double' reference made in the text (first on the cover page, 'en bloc' to the Standard Terms and Conditions as a whole, and then 'specifically' to clause 10.9, containing the arbitration clause) makes it clear that the signatories had been made duly aware of the existence of the arbitration agreement. It cannot therefore be disputed that a 'double signature' in the meaning of Art. 1341 CC exists and that the Respondents were sufficiently aware of the arbitration agreement in Clause 10.9, and thus gave their full and informed adhesion to the derogation from state court jurisdiction.

[90] "Clause 10.9 concerns and regulates only the 'Governing Law' and 'Arbitration', as also expressly indicated in the heading of such clause, which is well emphasized by bold and underscored type that is easily and immediately recognizable to the reader, i.e. the contractual partner, thereby ruling out any 'surprise' effect. It is actually rather usual, when regulating a (national or international) supply and license relation, for parties to negotiate and specifically agree, in the manner described, upon the conditions and terms drafted by one of them (generally, as in the present case, the seller/supplier). Finally, we cannot avoid emphasizing that, in the present case, Respondents acted within the ambit of their entrepreneurial activity, moreover through their legal representative and member of the company's board, who was certainly not unaware of the contractual elements and dynamics usually arising in respect of such relations.

[91] "Finally, even if one would disagree with this analysis and interpretation, in the present case, the specific writing requirement set forth by Art. 1341 CC should actually not even apply, for the following reasons.

[92] "Pursuant to the speciality principle enshrined in Art. 2 of the Italian Statute on Private International Law (Law no. 218 of 1995), it is deemed that the 1958 New York Convention, in particular its Art. II, provides for a uniform – that is, special – substantive regulation of the formal requirements for arbitration agreements in international contracts, thus preventing the Contracting States from imposing further or more restrictive formal requirements upon arbitration agreements.

[93] "The prevalence of uniform law has been broadly discussed in Italy, in particular with respect to the application of Arts. 1341 and 1342 CC in light of

the provision of Art. II of the New York Convention; following this discussion, jurisprudence has held on several occasions that Arts. 1341 and 1342 CC do not apply to agreements for foreign arbitration.[10]

[94] "On this issue, we must note the opportune pertinent clarification made by the Italian legislator, specifically in respect of international arbitration (with seat in Italy), through Art. 833(1) CCP, which was introduced by the 1994 arbitration reform:

> 'The arbitration clause contained in general conditions of contract … is not subject to the specific approval provided for in Arts. 1341 and 1342 of the Civil Code.'

This provision was subsequently abrogated following the 2006 arbitration reform.

[95] "Although Art. 833 CCP has been repealed, it must be deemed, together with the opinion prevailing in scholarship,[11] which is to be shared, that there are no valid reasons for holding that the opinion expressed by jurisprudence before the 1994 reform[12] must be relinquished. Art. 833 CCP (now repealed) merely absorbed a principle that jurisprudence had already developed and affirmed. Further, a contrary opinion would be in unavoidable contrast with the spirit and

10. "The [1958 New York Convention] establishes a uniform discipline; hence, in order to ascertain the validity and efficacy of a foreign arbitration clause in a contract to which an Italian citizen or legal entity is a party, Art. II Convention must be exclusively applied. [Art. II] deems it sufficient, as to the form of this clause, that the clause is contained in an agreement signed by the parties or in an exchange of letters or telegrams; it is irrelevant that the law of the place where the contract is concluded (in the present case, Italy) has stricter formal requirements. Cass. Civ. no. 1765/1986 [reported in Yearbook XII (1987) pp. 497-498 (Italy no. 93); no. 1234/1984 [reported in Yearbook X (1985) pp. 480-482 (Italy no. 80)]; no. 563/1982 [reported in Yearbook IX (1984) pp. 423-426 (Italy no. 59)]; no. 4746/1979 [reported in Yearbook VI (1981) pp. 230-232 (Italy no. 38)]; no. 8499/1987 [reported in Yearbook XIV (1989) pp. 675-677 (Italy no. 97)]; and Cass. Civ., Plenary Session, no. 5601/1995 [reported in Yearbook XXI (1996) pp. 610-611 (Italy no. 141)]."

11. "See F. Bortolotti, *Il Contratto internazionale – Manuale Teorico Pratico*, p. 133 (CEDAM, 2012); Benedettelli, Consolo and Radicati di Brozolo, *Commentario breve al diritto dell'arbitrato nazionale ed internazionale*, Sect. 2, Title II, p. 602 (CEDAM 2010), quoting P. Bernardini,'Ancora una riforma dell'arbitrato in Italia', in D. com. int. 2006, p. 230, and F. Portento, 'La clausola compromissoria nelle condizioni di contratto internazionale dopo la riforma dell'arbitrato', in Commercio Internazionale, 2007, p. 50. All authors opine in favour of the non-applicability of Arts. 1341 and 1342 CC."

12. "See Cass. Civ. no. 1765/1986 [reported in Yearbook XII (1987) pp. 497-498 (Italy no. 93)]; no. no. 563/1982 [reported in Yearbook IX (1984) pp. 423-426 (Italy no. 59)]; and no. 4746/1979 [reported in Yearbook VI (1981) pp. 230-232 (Italy no. 38)]. See, among many, Cass. Civ. no. 8499/1987 [reported in Yearbook XIV (1989) pp. 675-677 (Italy no. 97)]; and Cass. Civ. no. 5601/1995 [reported in Yearbook XXI (1996) pp. 610-611 (Italy no. 141)]."

the letter of Art. II of the New York Convention. We must also take into account that the stated aim of the 2006 reform, which the *Legge delega* (law delegating to the Cabinet the power to pass a legislative decree) expressly sought to pursue, was to bring the new arbitration framework broadly in line with that (already) provided for international arbitration in the earlier 1994 reform.[13]

[96] "It is irrelevant that the pre-1994 reform jurisprudence concerned disputes relating to agreements for foreign arbitration. There are multiple and concordant considerations, supported by the authoritative and prevailing scholarship, supporting the conclusion that the provisions of the New York Convention, particularly said Art. II, must be deemed applicable also to agreements for international arbitration, such as that at issue in this case, with seat in Italy and contained, obviously, in international contracts (which contain elements extraneous to the Italian legal system); in conformity with the jurisprudence mentioned above, this leads to the inapplicability of Arts. 1341 and 1342 CC.

[97] "As to the scope of application of Art. II of the New York Convention, it was pointed out that while Art. I on the recognition and enforcement of awards applies only to foreign awards, the Convention is silent in respect of Art. II, which concerns arbitration agreements, not awards. Thus, it is acknowledged that Art. II is a self-sufficient part of the Convention, not a mere auxiliary norm aimed at the application of the Convention's norms on the recognition and enforcement of the award. The prevailing scholarly opinion, which the Arbitrator follows, deems therefore that Art. II of the Convention clearly applies, as to formal requirements, also to agreements for international (and not only foreign) arbitration.

[98] "We should further note that Art. 4(2) of Law no. 218 of 31 May 1995 provides in respect of foreign arbitration simply that: 'Italian jurisdiction may be derogated from by agreement in favour of a foreign court or foreign arbitration if there is *written proof of the derogation* and the dispute concerns rights of which the parties may freely dispose [*diritti disponibili*].' (Emphasis added.)

[99] "Based on the considerations above and taking into account the interests of the parties involved in an international arbitration, there are no reasonable grounds, in this Arbitral Tribunal's opinion, to hold that the formal requirements for an arbitration clause for international arbitration (with seat in Italy) must be deemed to be more restrictive than those provided for arbitration clauses for foreign arbitration (concerning an Italian party and contracts governed by Italian

13. "See Art. I(3)(b) of Law no. 80/2005, which indicates as its directing principle: 'The suppression of the Chapter dedicated to international arbitration, *with the extension in principle of its discipline to domestic arbitration*, save the necessary adaptations, with exclusion of the provision of Art. 828 CCP.' Thus, by abolishing the title on international arbitration, the legislator meant in principle to internationalize domestic arbitration.'

law) or for clauses derogating from the Italian jurisdiction in favor of the court of another State. Also, arguing that the provisions of the New York Convention and in particular its Art. II do not apply to agreements for international arbitration, as described above, would mean being at odds with the historical interpretation of the Convention, which regulates international arbitration independently of the arbitration's seat. In sum, it can be concluded even today that an arbitration clause for international arbitration (with seat in Italy) is valid also without specific approval as envisaged by Arts. 1341 CC et seq.

[100] "The more recent Italian case law regarding (international) arbitration clauses in the times subsequent to the abrogation of Art. 833 CCP appears to not yet have expressed any clear position as to the applicability of Art. 1341 CC. In any case, to date, no contrasting position has been taken with respect to the interpretation described above, which contests the applicability of the strict requirements of form in the international context."[14]

*c. Scope of arbitration clause*

[101] "The arbitration agreement is, as stated, contained in the Standard Conditions of the Partnership Agreement which together form the framework agreement that exclusively regulates the Parties' contractual relationship relating to the supply of Claimant's products and solutions comprised of hardware and licensed material (see preamble and first page of the Agreement and the definitions and Clauses 3.1, 3.2 of the Agreement, and written witness statements of Mr Smith and Mr Jones, confirmed during the oral hearing).

[102] "It therefore also governs any dispute arising out of all orders for products or services issued by Respondents vis-à-vis Claimant for the duration of their contractual partnership, among which the controversial Order no. 189/Year X (Rev. 2) on which Claimant has based its payment request."

14. "In a recent decision of the Italian Supreme Court (Cass. Civ. no. 21550/2017 [reported in Yearbook XLIII (2018) pp. 481-483 (Italy no. 193)]), the examination of the applicability of Arts. 1341 and 1342 CC was actually avoided. In that case, the Claimant (*ricorrente*) had stressed that Art. II of the New York Convention of 10 June 1958 would be the only applicable provision governing requirements of form. The Supreme Court apparently recognized that there might be some arguable issue in this regard, in particular in light of the abrogation of Art. 833 CCP, but did not actually take a position, simply stating that the question was not relevant for rendering the decision at issue."

*d. Conclusion on jurisdiction*

[103] "Conclusively, having been the arbitration agreement in the present case validly approved in writing and being the dispute covered by the scope of the arbitration agreement (which is not contested by Respondents), the Sole Arbitrator considers herself competent to decide the dispute regarding Claimant's claim. Finally, it is significant in this regard that Respondents themselves did not even insist on their initial objection as to the validity and bindingness of the arbitration agreement in the final relief they sought. They actually even filed a counterclaim with the Arbitral Tribunal, basing it on the same arbitration agreement upon which Claimant's claim was based, evidently considering the Sole Arbitrator competent to decide on the latter."

*2. In Respect of Respondents' Counterclaim*

[104] "The Arbitral Tribunal is also competent to decide on Respondents' counterclaim, which was introduced in a timely manner and is covered by the scope of the arbitration agreement at issue. Claimant's objections in this regard are groundless and are dismissed."

*a. Late filing of the counterclaim (no)*

[105] "The Italian Arbitration Act does not establish any specific requirements for the filing of counterclaims (covered by the scope of an arbitration agreement) during arbitration proceedings, other than compliance with the adversarial principle, the principle of due process and that of fair and equitable treatment.

[106] "The Italian Supreme Court has actually recognized the admissibility of counterclaims filed in the course of the arbitration proceedings as long as the counterparty has a possibility to defend its position and reply thereto (Cass. Civ. no. 10910/2003).

[107] "Absent any further indications in the Arbitration Rules and the arbitration agreement itself, the Arbitral Tribunal enjoys broad discretional powers with respect to the decision on whether to admit a counterclaim filed after the (first) statement of defense.

[108] "Claimant asserted in its Second Brief, that Respondents were time-barred under the terms of Art. 10 of the Rules from raising counterclaims in the proceedings.

[109] "The Arbitral Tribunal has already clarified, in its Order no. 2, that according to Art. 7, para. 1 of the Arbitration Rules, the expiration of a time limit set by the Rules or by the Arbitral Council, the Secretariat or the Arbitral Tribunal shall not entail the lapse of a party's rights, unless so determined by the

Rules or by the order setting said time limit. It underscored that the Rules do not actually provide that the respondent's right to submit a counterclaim shall elapse and thus be time-barred in the relevant arbitration if the counterclaim was not submitted with an answer to the request for arbitration under Art. 10 of the Rules.

[110] "A limit for filing is established only by Art. 27 of the Rules, according to which the Arbitral Tribunal shall decide on the admissibility of new claims (including counterclaims), taking into account all circumstances, including the stage of the proceedings.

[111] "In the case at hand, in light of Respondents' reservation (expressed from the beginning of the proceedings) to specify a counterclaim during or even out of the proceedings and in the interests of procedural economy, the Tribunal had granted, by means of Order no. 2, the Respondents a final term within which to present and provide reasons for their counterclaim, however allowing Claimant the possibility to reply. When rendering this decision, the Tribunal has considered the stage of the proceedings, the fact that an oral and evidentiary hearing had not yet been fixed, that a significant part of the facts underlying the counterclaim are actually linked to Claimant's main claim and that the inclusion of the counterclaim would not significantly prolong the proceedings.

[112] "Respondents have formally presented their counterclaim in compliance with the Sole Arbitrator's Procedural Order no. 2 by …, and therefore on a timely basis."

*b. Inadmissibility of the counterclaim (no)*

[113] "In its Brief, Claimant further contested the admissibility of the counterclaim as (i) not falling within the boundaries of the arbitration agreement (costs arising for the completion of the project vis-à-vis Principal would not relate to the Agreement between Claimant and Respondents containing the arbitration clause), (ii) being vague and generic (i.e. not complying with the requirements of Art. 36 CCP) and (iii) not being connected with Claimant's demands (as required by Art. 36 CCP).

[114] "In this regard, it is emphasized that according to Art. 817 CCP, the Arbitral Tribunal decides upon its own *Kompetenz* also in cases where the *extent* of the arbitration agreement is contested.

[115] "The scope of the arbitration agreement (Clause 10.9) is formulated in very broad terms: '*Any dispute arising out of or related to the present Agreement*, including the formation, interpretation, *breach* or termination *thereof*, including whether the claims asserted are arbitrable, will be referred to and finally determined by arbitration …' (emphasis added).

[116] "There can be no doubt that any dispute relating to a breach of the Agreement, whether by Respondents or Claimant, is to be covered by the arbitration clause at issue according to the Parties' express will.
[117] "The Arbitral Tribunal thus holds that the counterclaim falls within the scope of the arbitration agreement although it regards costs allegedly borne by Respondent 2 for the project Respondents were required to complete for a third party, Principal, which is not a contractual party to the Partnership Agreement.
[118] "Respondents indeed claim the reimbursement of costs and expenses which allegedly arose as a direct consequence of the asserted non-performance by Claimant of the orders issued under the Agreement. Respondents in fact claim damages due to an alleged breach of contract and failure by Claimant to deliver conform goods (with an adverse impact on Respondents' own contractual duties vis-à-vis Principal, cfr. Respondents' Fifth Brief). The counterclaim thus regards Claimant's *contractual* liability as per Art. 1218 CC, which states that: 'The debtor who does not exactly render due performance is liable for damages …' that, pursuant to Art. 1223 CC, have to be compensated: 'Compensation for damages arising from non-performance or delay shall include the loss sustained by the creditor and the lost profits insofar as they are a direct and immediate consequence of the non-performance or delay.'
[119] "After all, the so-called *causa petendi* and *petitum* emerge from Respondents' statements such that the claim is sufficiently described, at least for the purpose of examining and establishing the Tribunal's competence. Another question, which regards the merits and will be ascertained in these proceedings, is whether the costs and damages and their causation by Claimant have been sufficiently described and proved, as well as the further question of whether both Respondents actually have standing and entitlement to bring proceedings against Claimant for damages allegedly arising due to its default on complying with concrete contractual obligations.
[120] "According to Italian case law, unless an arbitration agreement provides for specific limits, the (counter)claims regarding damages and the consequences of contractual non-performance are covered by the scope of arbitration agreements regulating disputes concerning the fulfillment and termination of a contract (cfr. Cass. Civ. no. 15068/2012).
[121] "This interpretation also conforms to Art. 808-*quater* CCP, which establishes a principle 'of favor' for arbitration (also contained in Art. 806 CCP): 'In case of doubt, the arbitration agreement shall be interpreted in the sense that the arbitral competence is extended to all controversies which derive from the contract or the relationship to which the agreement makes reference' (provision introduced by the reform of the arbitration statute in 2006, which however only

applies in case of doubt. In the present case, the Arbitral Tribunal deems that such doubt does not exist; cfr. also Cass. Civ. no. 3464/15; Cass. Civ. no. 13531/2011).

[122] "In light of the above Respondents' counterclaim is – beside being sufficiently precise (at least) to examine and establish the Tribunal's competence – also linked to the Claimant's main claim for payment of the performance contested by Respondents.

[123] "Even if the requirements stressed by Claimant that allegedly derive from Art. 36 CCP were applicable (description of the basis of the claim and connection with the main claim),[15] their compliance would have to be affirmed in the case at issue. Apart from this, Art. 36 CCP is a procedural provision of Italian statute law that is not immediately applicable to the scrutiny of a counterclaim within a pending arbitration proceeding, and is thus irrelevant here.

[124] "In conclusion, the Arbitral Tribunal is also competent to render a decision on the counterclaim and on Respondents' secondary request to set-off their counterclaim with Claimant's main claim. In this respect, it is emphasized that Art. 817-*bis* CCP actually states: 'The arbitrators shall be competent to decide on the objection of set-off, within the limits of the value of the main claim, also if the counterclaimed amount does not fall within the scope of the arbitration agreement.'"

## VIII. LACK OF STANDING OF RESPONDENT 1

[125] "Respondent 1 lacks standing to sue, and thus the entitlement to bring proceedings (*legittimazione attiva*) against Claimant with respect to the counterclaim for damages.

[126] "While it is true that Respondent 1, jointly with Respondent 2, has signed the Partnership Agreement, thus obtaining the right to buy Claimant's products and services thereunder (and resell in the Italian territory) by means of separate purchase orders (see Clauses 2 and 3.1.f of the Standard Terms and Conditions within such Agreement), it is also true that in the specific controversy, Respondent 1 is not the subject that has directly issued vis-à-vis Claimant Order no. 189/Year X Rev. 2, whose goods are in dispute (the same can be said with respect to previous orders).

[127] "This implies, from a legal point of view, that the purchase agreement under the relevant order (here, no. 189/Year X Rev. 2, as will be illustrated *infra*, see para. 149 et seq.) was concluded only between Claimant (as supplier)

15. "See Cass. Civ. no. 27564/2011."

and Respondent 2 (as buyer) (indeed, the latter appeared vis-à-vis Claimant to not act outright 'on behalf' of Respondent 1).

[128] "The purchase orders are regulated by Claimant's Standard Terms and Conditions, which 'shall prevail over any different or additional terms set forth in Partner order' (see Clause 3.2). As in fact usually occurs when regulating such types of supply relationships, the Parties had specifically agreed on the concrete supply conditions and terms (i.e. price, quantity and quality of the goods, terms of delivery, etc.) in single purchase orders and refer, for others aspects, to the Standard Conditions of Claimant, the latter being an integral part of the Partnership Agreement. The Agreement, in its cover sheet and in Clause 10.11 of the Standard Conditions (as will be further illustrated *infra*, para. 270 et seq.), provides vis-à-vis Claimant for the joint and several liability of each Partner (i.e., in the present case, of Respondent 2 and Respondent 1) for any breach of covenant or warranty committed by any Partner. Instead, the Agreement does not provide for the joint entitlement of or the possibility for Respondents to act as joint creditors against Claimant in case of breach of contract (including orders) by the latter.

[129] "Consequently, Respondent 1 has no entitlement to claim payment of the damages incurred by Respondent 2 allegedly arising out of Claimant's default in performing the disputed purchase order made by Respondent 2.

[130] "Standing to sue and the related entitlement to bring proceedings (*legittimazione attiva*) are linked to the general principle according to which nobody can claim for and enforce in proceedings another party's rights, except in the cases expressly set forth by law (e.g. where to surrogate). Said entitlement is a condition of the legal action and grants the (active) right to bring proceedings with the scope of rendering a judgement on the merits of a dispute involving a substantive legal relationship, independently of the actual existence of the effective title and/or grounded demand of the claimant. The possibility that a claimant could bring proceedings against the counterparty, if he hypothetically had the right, is sufficient. In fact, the entitlement to bring proceedings is determined on the basis of the sole statement and allegation that the claimant him/herself provides with respect to his/her right. Another question is the ascertainment of the effective title with regard to the disputed relationship. Such question, indeed, regards the merits of the case and the concrete requirement for upholding the demand as grounded. This interpretation of the requirement of entitlement is shared by the majority of Italian case law.[16]

[131] "In the case at issue, ever since the beginning of the proceedings (and even before), the Respondents asserted that Respondent 1's involvement was limited

16. "Cfr. *ex plurimis* Cass.Civ. no. 21925/2015."

to the assignment to Respondent 2 of installation services and thus that the goods in dispute were ordered by Respondent 2 and not by Respondent 1.
[132] "This also clearly emerges from the records (cfr. letterhead of Order no. 189/Year X Rev. 2, but also letterhead of Order no. 189/Year X) and conforms with the internal contractual modalities apparently agreed upon between Respondent 1 and Respondent 2 (… Project X Contract Principal) in relation to the supply by Claimant. According to such document, 'Respondent 1 shall buy through Respondent 2' (and thus not directly) the residual Products for Context 1 and Context 2 in the Locations from Claimant. Respondent 2 shall thus issue the order to Claimant, and at the same time, Respondent 1 shall issue the corresponding order to Respondent 2 (see e.g. Respondent 1's order no. XXX Year X, dated 6 November Year X, to Respondent 2 … corresponding to Respondent 2's Order no. 189/Year X to Claimant of the same date). Respondent 2 shall then issue for each invoice from Claimant the related invoices to Respondent 1, which shall pay the same in due time, permitting Respondent 2 to pay Claimant on a timely basis. Accordingly, Respondent 1proves, according to its own statement, to be '*ex actis*', i.e. to not have any own (positive) title under the contract in dispute to enforce and file claims in light of Claimant's alleged contractual default (vis-à-vis Respondent 2). Further, it has not specified any right under tort law.
[133] "Conclusively, Respondent 1 has no standing to sue and no entitlement to raise the counterclaim against Claimant."

## IX. MERITS

[134] "Claimant's claim for payment is grounded and upheld to the extent and in the amounts indicated in this award while Respondents' related objections as well as their counterclaim are rejected."

### *1. Claimant's Claim*

[135] "Claimant has sufficiently alleged and proven the contractual basis for its claim as well as Respondent's breach of contract. Respondents' objections against the Claimant's claim are dismissed. They are ungrounded and/or irrelevant."

*a. The Partnership Agreement and the pilot phase (phase 1) of Project X*

i. The Partnership Agreement

[136] "It undisputedly emerges from the records that Parties' general contractual relationship arising in the context of Project X is regulated by a framework agreement, the so-called Partnership Agreement. This agreement, governing every single order from Respondents (see Clause 3.2 of the Standard Terms and Conditions), is binding on both Respondents, the joint liability of which cannot reasonably be contested (as will be further detailed *infra*, para. 270 et seq.).

[137] "By email dated 10 February Year X, Mr Jones from Claimant sent Mr Hunter from Respondent 2 (with c.c. to Mr David Brown and Ms Jane Martin) a copy of such Partnership Agreement, which was to govern the Parties' future commercial relationship as well as the 'credit application' for the Pilot. In such email, Mr Jones suggested to start the partnership immediately and to do so by focusing on the first phase (i.e. the pilot testing).

[138] "Accordingly, on 11 February Year X Claimant presented to Respondent 2 a 'proposal for the supply of Claimant's hardware and software for solution for Location 1, phase 1'. The offer actually included two options: 'Option A. Complete Pilot Installation' (providing, *inter alia*, for the supply of 28 TYPE A Products and 2 TYPE C Products) for a total amount of € …, and another 'Option B. Pilot on 50 percent of Option A' for an amount of €…. Under point iii of the proposal ('iii. Terms and conditions'), some special terms and conditions of payment for the supply were indicated and an express reference was made to the Partnership Agreement which should apply.

[139] "On 13 February Year X, Respondent 2's Managing Director, Mr David Brown, confirmed by a letter sent by email that the materials indicated in Claimant's offer 'Option A' were necessary for the realization of the pilot (phase 1) of Project X. Respondent 2 however specified that the related order would be issued only after '*collaudo positivo con la committente … con le condizioni di pagamento già concordate di BB 90/120/150. A seguire verranno ordinati … tutti i restanti materiali per il completamento dell'opera … prevista secondo gli attuali programmi di Principal entro l'anno corrente*'.[17] Respondent 2 also specified that the 'Partnership Agreement' would be sent in the next days after performance of an internal check. However, the Agreement was actually only sent several months later (it

17. "Translation: 'positive testing with the customer, … with the payment conditions already agreed BB 90/120/150 at the end of the month after invoice issue date. Subsequently, all remaining material for the completion of the work will be ordered … as provided for by the current Principal programme within the current year.'"

was finally signed by Respondents on 13 May Year X, and thus before Order no. 189/Year X Rev. 2 was issued)."

ii. The General Order of 27 April Year X

[140] "It further emerges from the records that on 28 April Year X (and thus still prior to the signature of the Partnership Agreement), Respondent 2 sent the so-called 'General Order' no. 075/Year X, dated 27 April Year X, to Claimant. According to Respondents, this Order prevails over any other correspondence and is the only relevant order to be performed by Claimant. However, this statement cannot actually be confirmed in the light of the written and oral evidence produced.

[141] "Examining such Order, we understand that it concerns the supply of unspecified equipment … for Location 1 – Project X, for a total amount of € … to be delivered in 5 lots (the first of which regarding the pilot with a value of € … and the following lots having a value of € … each).

[142] "Said Order no. 075/Year X makes reference to Claimant's offer, dated 11 February Year X …, which actually regarded the supply of products (including the TYPE A Products) for the pilot, i.e. the 'phase 1'. Nonetheless, the General Order contemplates all phases of Project X.

[143] "Claimant has contested the relevance of the General Order and its acceptance, basing its allegation in particular on the witness statement of Mr Jones, who affirmed that Claimant required for any supply the issuance of prior single orders for each lot: 'This is the reason why, following this one, a new order was issued for the first phase only, the one we basically called pilot' (cfr. Transcript … and Post-Hearing Brief).

[144] "Indeed, such statement appears to be confirmed by another specific order, dated 27 April Year X, filed by Respondents themselves and bearing again the order number 075/Year X. However, this time, in addition to the words '*Lotto* 1'. This order, which was transmitted only on 3 June Year X, is signed by David Brown on behalf of Respondent 2 and, contrary to the 'General' one, it precisely indicates the materials, their quantity ordered (among which 28 TYPE A Products and 2 TYPE C Products) and the related unit prices, which correspond exactly to the price indicated for the pilot in Option 'A' of the Claimant offer, dated 11 February Year X, referred to in the same order.

[145] "Moreover, from the attachment '*Consegna Ordini*' itself, forwarded by Respondent 2's email, dated 28 April Year X, it clearly emerges that the General Order (which was formulated as a proposal for a framework agreement between the Parties, rather than as an 'order') is not sufficient in itself, but necessarily required subsequent and specific orders. The General Order is thus superseded

and prevailed upon by the subsequent specific orders issued for each lot, which were, with respect to the second project phase, anyhow made in respect to a new offer from Claimant, dated 29 October Year X, and subsequent amendments, specifically regarding such second phase (as stated, the first offer, dated 11 February Year X, concerned instead the pilot, i.e. the first project phase).

[146] "Significantly, the Partnership Agreement signed on 13 May Year X, and thus subsequently to the General Order, expressly provides as follows: 'By signing below, Respondent 1 and Respondent 2 … agree that this agreement is the complete and exclusive statement of the agreement between us and supersedes all proposals or prior agreements, oral or written, and all other communications between the parties relating to the subject matter hereof including any terms contained in any order unless Claimant's written acceptance of such order explicity provides otherwise', and such an acceptance does not emerge in the file.

[147] "The Agreement again requires, in the Standard Terms and Conditions attached thereto and forming an integral part of the same Agreement, that the supply of products and services shall occur only upon presentation of *an order with specific* indications. These requirements are, as seen, not met by the (in any case precedent and thus superseded) General Order itself.

[148] "In light of these considerations, the General Order cannot be considered the decisive document for scrutinizing Claimant's claim which relates exclusively to the second project phase."

*b. Project phase 2: Order no. 189/Year X of 6 November Year X, and Order no. 189/Year X Rev. 2 of 12 November Year X*

[149] "From the documents and evidence produced, it emerges that the Order no. 189/Year X Rev. 2 issued under the Partnership Agreement and providing, inter alia, for the delivery of 177 TYPE B Products, is the relevant order for the supply in dispute.

[150] "From the record it becomes clear that on 6 November Year X, Mr David Brown (Respondent 2) forwarded to Mr Jones (Claimant) an email transmitting an order on the basis of Claimant's new offer, dated 29 October Year X … as '*Conferma Ordine Acquisto*', *which annuls and replaces any precedent orders*, i.e. including the so-called 'General Order' (see text of the email attached in Exhibit R 2).

[151] "Such new order to Claimant, which appeared to be attached to Respondent 2's email, is filed in the same Exhibit R 2, and bears the order number 189/Year X. It is dated 6 November Year X and refers to the '*Commessa* [Commission]: Principal – Project X'. Payment conditions read '10 percent

Order and 90 percent positive testing'. It provides for the delivery of a first lot (composed of 200 'TYPE D' Products for € …; 150 TYPE B Products for € …; 20 TYPE C Products for € …) by 16 November Year X for a total price of € … and of a second lot (composed of 56 TYPE D Products for € …; 22 TYPE B Products for € …; 56 TYPE C Products for € …) for a total amount of € … to be delivered by 26 November Year X.

[152] "In said email, dated 6 November Year X, Respondent 2 also communicated that it had made a down payment equal to 10 percent of the total price for the first lot; indeed, a payment of € … was made in Claimant's favor, which is exactly 10 percent of the amount indicated in Order no. 186/Year X for the first lot.

[153] "Furthermore, in the internal email transmitted on 2 November Year X from Mr Nicholls – who worked for Respondent 2 at the relevant time as the head of the administrative office (as confirmed during the hearing) to Respondent 2 as well as (by c.c.) to Mr Brown, the TYPE B Products were expressly mentioned among the goods ordered (while no TYPE A Products were mentioned in such email). In none of the order versions regarding the second project phase and the related correspondence produced was the TYPE A Product actually indicated, except for one Excel sheet (cfr. infra, para. 159 et seq.).

[154] "In addition to Respondent 2's order, Respondents themselves also filed the related (identical) Order (no. ZZZ) from Respondent 1 to Respondent 2, also dated 6 November Year X, and again indicating the TYPE B Products (and not the TYPE A Products).

[155] "From the records it also emerges that Claimant did not accept Respondent 2's Order, dated 6 November Year X, in the proposed form, and started negotiations with Respondents in the following days. This is even confirmed by Respondents' witness, Mrs Susan Brown. The negotiations, which took more than one week (at least from 6 to 18 November Year X), led to modifications and integrations of both Claimant's version of their offer (from version 4 to version 5) and the related order from Respondent 2.

[156] "The result of the various revisions is the final order made by Respondent 2, i.e. Order no. 189/Year X Rev. 2, dated 12 November Year X, sent to Claimant on 18 November Year X. This order refers to the 'Claimant Offer 12 November Year X – *Version 5*' (emphasis added), and indicates a slightly increased total price of the first lot equal to € …, while the price for the second lot is reduced to € … in respect to Order no. 189/Year X. In the revised order, payment conditions were modified with respect to the previous order: '10 percent order – 90 percent upon delivery of the material 30 days (i.e. at the end of the month after invoice issue date)'.

[157] "The modified and final order was sent to Claimant by email, dated 18 November Year X, by Mr David Brown, Managing Director of Respondent 2, himself, with the following words: '*Buongiorno, come da accordi, Vi rinviamo l'ordine con i prezzi aggiornati secondo Vs. documentazione inviata come da email in cronologia. Cordialmente, David Brown*' (translation: 'Good morning, as agreed we send you again the order with updated prices according to your documentation transmitted …'). Furthermore, Mr Brown, heard as a witness during the hearing, after having examined both Exhibit R 2 (containing Order no. 189/Year X), which he called the 'basic order' ('*ordine base*'), and Exhibit C 5 (containing Order no. 189/Year X Rev 2), confirmed that 'questa è una revisione dell'ordine. E' stata fatta una revisione 2 all'ordine, *infatti c'è scritto "revisione 2", dove sono state* cambiate le condizioni di pagamento.… *Perché prima era 10 all'ordine e 90 al collaudo, così come faceva riferimento* l'ordine base che io avevo fatto.… *Poi qui è stata fatta una forzatura, forse delle condizioni economiche, ed è stata accettata praticamente questa condizione qua, che era quella del pagamento alla consegna dei materiali*.'[18] (Emphasis added.)

[158] "The intensive correspondence and negotiations involving Mr Brown also directly disprove Respondents' insinuation according to which they might be a victim of a misunderstanding, Claimant having misleadingly enclosed within its new offer, dated 29/30 October Year X, some Excel sheets which still indicated the TYPE A Products.

[159] "During the hearing, it was explained that the attachment to Claimant's offer, transmitted by email, dated 30 October Year X, contained one sheet relating to the TYPE A Products and another one referring to the TYPE B Products (this circumstance had been confirmed by various witnesses, cfr. statement of Ms Brown, and in particular Mr Brown, but was put in doubt by Mr Jones). It is not however convincing that such single sheets should be decisive. Even in light of these potentially misleading Excel sheets, it is indeed not credible that Mr Brown, as managing and technical director of the company, and thus well aware of the technical requirements of Project X, which had been drafted by himself (see witness statements of Ms Brown, Ms Martin, and of Mr Hunter), and thus of the difference between TYPE B and TYPE A Products (see also witness statement of Ms Brown), did not realize that the Products indicated in all correspondence, in its own Order no. 189/Year X, in Respondent 1's

18. "Translation: 'this is a revised order. A revision 2 has been made to the order, indeed there is a written "revision 2", where the payment conditions have been changed … because first there were 10 in the order and 90 in positive testing, just as the reference made to the basic order I have made.… Then there was some stretching, maybe of the economic conditions, and this condition here has been essentially accepted, which consisted in the payment of the material upon delivery.…'"

corresponding order and in the modified Order no. 189/Year X Rev. 2, were the TYPE B Products and not the TYPE A Products.

[160] "As confirmed by the witness Mr Hunter, the orders from Respondent 2, after having been discussed with the technical department, are and had to be approved by Mr Brown in person which actually disproves the latter's statement that he was not directly in charge of administrative issues in the matter (a statement which is in any case irrelevant, having Mr Nicholls also acted vis-à-vis Claimant on behalf of Respondent 2).

[161] "Any contrary statements by witnesses are unconvincing. In this regard, it shall finally be stressed that Mr Hunter, who is a technician, affirmed to have never been involved in the order procedure and indeed stated as follows: '*No, della parte degli ordini non me ne sono occupato*.' (Translation: 'No, I was not involved in the part relating to orders.').

[162] "Ms Brown's statement, in which she asserted that the total amount of the order in the Excel sheet indicating the TYPE A Products would clearly show that this was the correct order, is also unpersuasive and is actually incorrect. Indeed, not the total number indicated for the TYPE A Products, '186', but the number indicated in the Excel file for the TYPE B Products ('150'), was actually ordered with the order issued on Respondent 2's (and Respondent 1's) letterhead as lots for the second phase, and 10 percent of the total order amount for the first lot indicated in Order no. 186/Year X (including TYPE B Products) was paid as advance (see above). In addition, from Ms Brown's oral statement, it indeed emerges that she was not directly involved in the order procedure in discussion (and at the relevant time was not working in Respondent 1's nor Respondent 2's administration offices). She knew about it only subsequently, and declared that there was a direct relationship between Claimant and Respondent 1 that was handled by Mr Nicholls, consultant of Respondent 2, who was however performing Respondent 1's instructions and did not have the necessary technical know-how. She actually provides her own opinion on the matter, interpreting Mr Nicholls's conduct, and does not report facts known to her directly: '*Mr Nicholls ha recepito l'offerta fatta, allegata a questa email, e nell'offerta chiaramente si faceva riferimento ai rapporti precedenti. Per cui è ovvio che lui ha dato, secondo la mia opinione, per scontato che l'offerta corrispondesse in toto a quello precedentemente offerto, e quindi al progetto. Cioè non poteva immaginare che non fosse conforme al progetto*.'[19]

19. "Translation: 'Mr Nicholls has received the offer made, attached to this email, and in the offer clearly reference was made to the prior relationship. Therefore, it is obvious that he has assumed, according to my opinion, that the offer would entirely correspond to what has been offered previously, and thus to the project. Thus he could not imagine that it did not conform with the project.'"

This statement actually rather confirms an internal misunderstanding and error within Respondents' sphere (cfr. also Ms Martin's statement).

[163] "Indeed, subsequent to the witness examination held during the evidentiary hearing, Respondents' Counsel concluded the following in his oral closing statement: '*È emerso, invece, che ci sono stati sicuramente degli equivoci, e comunque dei documenti non ben indicati, che hanno probabilmente condotto a porre in essere un ordine sbagliato, ma in buonafede*.'[20]

[164] "However, Respondents never sought an annulment of the order due to a significant error. Consequently, a possible lack of consent in the form of an error cannot have any relevance for the decision to be made by the Sole Arbitrator in the present proceedings. The outlined 'error' indeed could, if the requirements established by law were met, be influential in an action for annulment of the contract pursuant to Art. 1427 CC et seq. by the contractual partner whose will is vitiated. Such an action has however not been introduced in the present arbitration, not even by means of an objection. Accordingly, the Arbitral Tribunal is not held to further investigate this point, last but not least also in the light of a further fact, which will be seen in the following paragraphs.

[165] "From the records it indeed emerges that, after having initially requested to stop further deliveries of TYPE B Products, Respondent 2 soon insisted on the continued supply of such TYPE B Products and actually used all of the material delivered by Claimant for Project X, although it did not fully pay for it.

[166] "On 18 December Year X, Mr Brown in fact sent an email *inter alia* to Claimant communicating to have found an agreement with Principal on the use of all initially contested Products and thus invited Claimant to send them also the residual TYPE B Products and to be cooperative.

[167] "Respondents also admitted to have installed in Location 1not only the first 50 TYPE B Products delivered by Claimant (which were subsequently even entirely paid – although with delay), but also the other 100 Products delivered (see the witness statement of Mr Hunter, of Ms Martin, and of Ms Brown). Ms Brown even confirmed that Respondent 2 had been paid by Principal for the second phase.

[168] "After all, there can be no doubt that Respondent 2 issued Order no. 189/Year X Rev. 2 and that such order together with the Agreement are the relevant contractual basis for Claimant's claim."

20. "Translation: 'It emerged instead that there have been misunderstandings, and in any case documents that were not well identified, which probably led to a wrong order, but in good faith.'"

*c. Missing signature on Order no. 189/Year X (Rev. 2)*

[169] "In their Conclusive Brief, the Respondents actually drew attention to the fact that Orders no. 189/Year X (original version as of 6 November Year X) and no. 189/Year X Rev. 2, dated 12 November Year X, had not been undersigned (such order 'was not even signed by Respondent 2 … not even … by Respondent 1'). This circumstance is irrelevant. The contract concluded by means of the acceptance of the final order regards the sale of products, and does not require the written form *ad substantiam* under Art. 1350 CC. The lack of any signature is thus irrelevant. It is instead decisive that the same Respondent 2 had sent such document to Claimant, as clearly emerges from the evidence produced and analyzed above."

*d. Respondents' contractual payment obligation and their breach of contract*

[170] "Claimant has proven that it actually made the various supplies (including the TYPE B Products) under Order no. 189/Year X Rev. 2, for which payment is claimed in this arbitration.

[171] "A first supply regarded the delivery of 200 TYPE D Products for which invoice no. 7389 was issued on 18 November Year X, indicating a price equal to € … (… + … for transport), due by 18 December Year X.

[172] "Claimant has shown that this material was delivered to the carrier for transport to Respondent 2 on 22 November Year X. This was in accordance with the contractual terms established under the Partnership Agreement, Clauses 3.4 and 3.5, and pursuant to Art. 1510, para. 2 CC, in any event sufficient to comply with Claimant's supply obligation. A second supply under Order no. 189/Year X Rev. 2 regarded the delivery of 50 TYPE B Products and 10 TYPE C Products, delivery for which Claimant filed an invoice, no. 7413, dated 24 November Year X for a total amount of € …, due by 24 December Year X. From the documentary evidence produced, it emerges that this material was also delivered to the carrier for transport on 26 November Year X and that the related invoice had actually been paid by Respondents on 11 May Year X+1.

[173] "Again with reference to Order no. 189/Year X Rev. 2, a third supply of 100 TYPE B Products and 56 TYPE C Products for a total price of € …, due on 22 January Year X+1, was made, for which Claimant issued on 23 December Year X invoice no. 7564. From Claimant's Exhibit C 23, it is clear that this material was delivered to the carrier for transport on 5 January Year X+1, but the related invoice has undisputedly not been paid by Respondents.

[174] "With respect to Order no. 189/Year X, Respondent 2 had, as stated, made an advance payment equal to € … on 12 November Year X, amount that had been deducted from the amount claimed under invoice no. 7389.

[175] "Apart from having been delivered, the abovementioned goods were also used by Respondents (see above)."

*e. Respondents' objection of non-performance by Claimant ex Art. 1460 CC*

[176] "Respondents have raised the objection, based on Art. 1460 CC, that Claimant did not perform its contractual obligations, reason for which they are allegedly not required to pay the amounts outstanding under invoices no. 7389/Year X and no. 7564/Year X, and seek the rejection of Claimant's requests. The reasons on which their objection are based were partly modified during the proceedings and can be summarized as follows.

[177] "Initially, the Respondents stated that on 6 November Year X, Respondent 2 made an order for Products and accessories (regarding the second phase of the project). The related delivery by Claimant had however been contested, because the products delivered did not conform and were not identical to those that had been tested and approved for the pilot. Respondents themselves produced the Order no. '185/Year X', dated 6 November Year X, and the emails, dated 2, 3 and 4 December Year X, in which the delivery was immediately contested.

[178] "Although the Order filed in Exhibit R 2 regards various quantities and types of Products and related accessories (TYPE D Products; TYPE C Products; TYPE B Products), the objection of non-conformity regards exclusively the TYPE B Products, in lieu of which Claimant was, according to Respondents, supposed to deliver the TYPE A Products, as the only type of Products that had been used in the pilot and indicated in the project approved by Principal and the Ministry.

[179] "Claimant has instead underscored that, also in view of the text of the Order (Exhibit R 2), they 'supplied exactly what Respondents ordered' (see their First Brief). Claimant further stressed that, according to what had been referred by Respondent 2's technicians, the TYPE A Products could not even be used for the entire project due to their size.

[180] "In light of such arguments, the Respondents stated in their Second Brief that such version of the facts 'does not correspond to reality: the order issued, sent and signed' by the Respondents was only 'the General /Doc 13 R … which calls for the provision of the entire amount of TYPE A Products' (see Respondents' Second Authorized Brief). The aforesaid specification was also repeated by the Respondents in their Sixth Brief.

[181] "Respondents' 'objection of non-performance' under Art. 1460 CC is however unfounded and cannot justify a suspension of their own payment obligations under the contract for the following reasons."

i. Non-conformity with the General Order of 27 April Year X

[182] "Respondents' objection that the goods delivered are not conform with the General Order is meritless. As stated above, the supply in dispute is not governed by such General Order.

[183] "As illustrated, the TYPE B Products have instead been delivered on the basis of the Order no. 189/Year X Rev. 2, dated 12 November Year X (see above) and that order indeed provided for the delivery of TYPE B Products."

ii. Non-conformity of the goods with Project requirements

[184] "As mentioned above, Respondents have initially based their argumentation referring to Order no. 189/Year X and lamented the substantial difference between the type of Products supplied by Claimant in the test phase approved and tested by Principal/the Competent Office (TYPE A) and the type of Product supplied (TYPE B) in the second phase.

[185] "In this regard, it shall be mentioned that no complete documentation about Project X, testing by Principal or approval by Principal/the Competent Office has been filed by any of the Parties to the present arbitration."

(1) *TYPE B Products not conform to Project X (technical) requirements*

[186] "As for the conformity with the final technical project requirements, however, analyzing the few documentation made available in these proceedings, the alleged difformity of the TYPE B Products appears to not have been confirmed from a technical point of view.

[187] "Some details of the so-called 'Project X' actually emerge from Exhibit R 24, dated 24 October Year X+1, headed '*Project X – Informativa Tecnica*' and drafted by Mr David Brown and Chartered Engineer Jane Martin, of Respondent 2. The document, addressed to the competent Directorate of the Ministry, is a 'variation' upon Project X (hereafter also 'Variation') (see the statement of the witness Ms Brown). On page 2 of the document, it is expressly stated that a 'Final Project' ('*Progetto Definitivo*') had been approved by the Directorate by means of Resolution no. … in *Year X-3* (i.e years before Claimant's engagement), and that the present '*Informativa Tecnica*' illustrates a variation (proposal) that is connected with the implementation of some new technological solutions, to replace those originally approved for the Final Project.

[188] "From an analysis of such 'Variation' (the origin and content of which has not been contested by Claimant), it emerges that the relevant Final Project provided for the installation of … a TYPE Y Product. The witness Mr Brown confirmed, during the hearing, that the TYPE Y Product, that was approved by

Principal/the Competent Office corresponds to the 'TYPE A' Product that was used in the pilot and subsequently approved.

[189] "The 'Variation' and Claimant's technical report enclosed in Exhibit R 7 clearly show – even taking into due account the fact that Respondents had obviously tried to convince Principal and the Competent Office to approve the variation – that from a technical and performance point of view, the TYPE B Products correspond to the specific functioning requirements verified for the TYPE Y Products, which according to Mr Brown correspond to the TYPE A Products, even had improved characteristics and in any case complied with … 'the technical aspects and physical encumbrances … the project requirements already defined and approved for the Final Project'). Respondents' witness Mr Hunter, a technician, indeed confirmed that the 'problem with the TYPE B' actually did not regard the effective compatibility of the products but rather the formality that it had not been approved. In conclusion, apart from the product name, trademark and shape, the TYPE B Products, conforming to the relevant Order (no. 189/Year X Rev. 2), also appear to perfectly correspond to the actual technical characteristics of Project X. And, in fact, it emerged that the Products supplied were actually installed and used."

*(2) TYPE B Products not conform to products tested and approved*

[190] "Respondents object that, in any case, they could not install and use Products different from those that had been tested and approved by Principal and the Competent Office, even if technically compatible.

[191] "In this regard, they actually seem to base their objection on an *aliud pro alio* delivery. They indeed argue that the TYPE B Products delivered under Order no. 189/Year X Rev. 2, did belong to a completely different type of Product from the Products used in the pilot phase (TYPE A), which were the only type of Products that had been tested, approved and envisaged by the Project X approved by the Competent Office. According to Respondents, the non-conformity of the TYPE B Products to the type of products chosen for Context 1 by the Final Project impeded any kind of their use.

[192] "Claimant, the supplier, was (or had to be) well aware of this fact according to Respondents, because it had participated in the pilot and received the relevant technical project documentation. Although never formalized, it would be undeniable that the requirements of Principal were essential, because the supply of Claimant was closely linked to the Principal contract and Claimant was well aware from the outset of the business relationship.

[193] "Respondents' argumentation cannot convince. First they cannot reasonably base their objection on the fact that the TYPE B Products were not a

product that had been tested by Principal or on the absence of approval by the Competent Office. Respondent 2 cannot blame Claimant for implementing its own instructions and order which has been upheld and not been annulled. Respondent 2 itself was well aware of the formal requirements and nonetheless ordered the TYPE B Products as shown above (ignoring the alleged requirements itself and insisting even on further supply).

[194] "The TYPE B Products were indeed delivered upon a precise order from Respondent 2, which was negotiated and subject to various revisions. The fact that the supplier might be aware of the project documentation and the circumstance that the project envisaged the use of TYPE A Products for Context 2 is therefore irrelevant. Respondent 2 is at least itself responsible for the decision to make the order. Considering Respondent 2's and Mr Brown's overall attitude in the relevant period Claimant also had no objective reason to doubt the seriousness of the instructions given by Respondent 2. And by virtue of all this, any default (willful misconduct and negligence) as well as non-performance by Claimant can be excluded.

[195] "Furthermore, it became clear that testing is irrelevant for the payment of the supply under the relevant Order no. 189/Year X Rev. 2. Indeed, the previous order providing for payment upon testing had been revised to change this payment condition specifically: while Respondents had indicated in the previous version of the order that payment was due upon testing and approval, the revised order accepted by Claimant provided for a payment of 10 percent upon ordering and of the remaining 90 percent upon delivery 30 days, i.e. at the end of the month after the invoice issue date. Even under the 'General Order' prior testing was no payment condition.

[196] "Apart herefrom, from the evidence filed, it is actually possible to derive a circumstance that appears to contradict the Respondents' allegations regarding the 'approval requirement' and which even reinforces Claimant's good faith in the whole matter. In fact, examining the Variation documentation, it emerges that already during the testing phase (and the following phase), the Respondents actually used devices that were different from those approved for the Final Project by means of the Directorate Resolution, dated … Year X-3 (i.e. made long before Claimant's involvement). It is in fact significant that, in the Variation, Respondents seek the approval of the replacement not only of the Products for Context 1(disputed here) but also of those in Context 2 (not in dispute).

[197] "The Final Project approved provided for the installation *in Context 1* of *'TYPE Y Products*' (and not the so-called TYPE A Products). The witness Mr Hunter also specified that the Products approved in the Final Project were the Premier products. The witness Mr Brown confirmed that the Products named

TYPE Y correspond in any case to the 'TYPE A' Products that had been approved and tested by Principal/the Competent Office and used in the pilot.
[198] "For the Products *in Context 2*, the Final Project approved provided for the installation of [a certain YYY product]. The product model instead proposed in Year X+1 in the Variation for installation in Context 2 was the different 'TYPE C' Product, from Claimant. Notably, the 'TYPE C' Products were ordered, used and accepted during the pilot by Principal (see Order 75/Year X – *Lotto* 1, dated 27 April Year X). They were further indicated in Order no. 189/Year X and in Order no. 189/Year X Rev. 2, dated 12 November Year X, although the Products authorized in the Final Project for installation in Context 2 were evidently still the so-called YYY products (see 'Variation').
[199] "With regard to the type of Products *in Context 2* (the TYPE C Product), the Respondents however never raised any objections vis-à-vis Claimant. If the Respondents installed and used in Context 2 different products from those indicated in the Final Project that had been approved without any complaints, the question indeed arises as to whether the choice of a different product from that indicated in the Final Project (here in Context 1), as long as conform and compatible, actually has such a significant impact.
[200] "Furthermore, it must be stressed that according to Claimant's report on Project X, dated 14 December Year X, the variation of the project (in particular consisting in the replacement of the TYPE A Products with the TYPE B Products) was necessary due to space problems, as emerged during an inspection in October Year X, as reported by Respondent 2 to Claimant.
[201] "This was also confirmed by the witness statement of Mr Jones and even Respondents' witnesses Ms Martin and Ms Brown admitted that there was a space problem; while the latter deny the need to replace any Products for this reason, however, at a certain point in the proceedings, Mr Brown himself admitted the existence of a space *problem* (*'Visto che avevamo quel problema di occupazione* …' (translation: 'Given that we had this occupation problem …') thus contradicting Respondents' allegations.
[202] "The circumstance that space was *de facto* less in some parts and that the TYPE B Products were used in these parts is also confirmed by written evidence (cfr. email, dated 2 December Year X, from Mr Nicholls to Mr Jones): Respondent 2, having received the first lot of 50 TYPE B Products on 2 December Year X, did not require the recall thereof but only sought to annul the following deliveries of TYPE B Products under Order no. 189/Year X Rev. 2:

'*Buonasera ing. Jones, A seguito della conversazione telefonica con Brown e con lei, vengo a confermare che i TYPE B vanno unicamente installati dove lo spazio è minore.*'[21]

[203] "By a subsequent email, dated 3 December Year X, Mr Nicholls and Mr Brown stated that the TYPE B Products could not be used in Context 1 because every modification of the project approved by the Ministry must be tested and approved by the same entity, a procedure which normally takes 10/12 months.

[204] "This statement appears however in evident contradiction to the following one, in which they state that he succeeded (actually in less than 24 hours and thus evidently without having presented a variation on the project, its testing and approval from the Ministry), to obtain from Principal the authorization to install 50 TYPE B Products, i.e. exactly the number delivered on 2 December Year X), '*esclusivamente dove lo spazio è minore di quanto previsto*' (Translation: 'exclusively where the space was less than that believed'; see also email from Mr Brown, dated 17 May Year X+1). The witness Ms Brown confirmed as much: '*abbiamo cercato di andare incontro tentando di collocare in qualche modo quella prima fornitura a Principal.... E ci siamo riusciti. Infatti la fattura è stata emessa, e anche pagata. Però fa parte sempre poi dell'approvazione finale che noi dobbiamo avere da the Competent Office.*'[22]

[205] "In any case – and by virtue of this, all related objections become irrelevant – Respondents used all of the goods delivered for Project X, although it did not fully pay for them (cfr. statements of Mr Hunter, and of Ms Brown). While Respondents initially asserted to have refused the delivery of the residual 100 Products (see the email correspondence cited above, and also the statement of Ms Brown), it becomes clear from the subsequent correspondence and the very fact that Claimant was asked to submit a technical report supporting the approval of the TYPE B Products, that Respondents at a certain point in December Year X decided to proceed with the TYPE B Products for the entire project (cfr. also statement of Ms Brown and Mr Brown's email dated 18 December Year X), and apparently considered the alleged 'difformity' of TYPE B Products to no longer to be an obstacle to the completion of the project, 'difformity' which does not even appear to have been subject to complaints from Principal or the Directorate to date (at least no document has been filed in which non-conformity is lamented by the latter).

21. "Translation: 'Good evening Eng. Jones, following the telephone conversation with Brown and you, I confirm that the TYPE B Products will be exclusively installed *where there is less space* ...' (emphasis added)."

22. "Translation: '... we tried to meet needs by attempting to place the first delivery with Principal somehow.... And we succeeded. In fact, the invoice was issued, and also paid. But it is always part of the final approval that we have to obtain from the Competent Office.'"

[206] "However, evidently Respondent could not agree with Claimant as to the revision of the payment modalities, which according to Order no. 189/Year X Rev. 2 were not linked to any testing and final approval by Principal or the Competent Office."

iii. Alleged agreement to postpone payment

[207] "Respondents further seem to assert that they had agreed with Claimant in December Year X – once they had discovered the delivery of allegedly 'wrong' Products – to complete the works with the TYPE B Products, but to postpone payment to Claimant until final testing and approval. They base their assertions especially on an email, dated 15 December Year X, from Mr Brown to Respondent 1, where Respondent 2 reported an agreement with Mr Jones to Principal and Respondent 1, but Mr Jones was actually not copied in the correspondence.

[208] "However, from this internal email – which was neither addressed nor circulated by 'c.c' to Claimant – it cannot, in the absence of further evidence, be concluded that Claimant accepted a postponement of payments, which would also not be plausible in light of the just revised Order no. 189/Year X Rev. 2.

[209] "No other evidence filed nor the oral witness statements confirm the conclusion of such an agreement subsequent to the disputed delivery of the TYPE B Products. Rather, it became clear that this issue was discussed but had not been accepted by Claimant. It is true that Respondent 2 reported in its email, dated 18 December Year X, on payment conditions allegedly agreed upon with Principal (postponed until positive outcome of new testing of the alternative Products) but this alone cannot prove that these payment conditions also apply to Claimant and that the latter accepted such conditions. The existence of such an agreement conditioning the payment of Claimant's invoices upon the positive outcome of the test carried out by Principal (or the Competent Office approval) is actually disproved by the partial payments de facto made by Respondent 2 on 11 May Year X+1 for the delivery of 50 TYPE B Products delivered on 2 December Year X."

iv. Relevance of Claimant's suspension of further supplies

[210] "Italian case law requires that where a party raises '*l'eccezione inadimplenti non est adimplendum*', the judge must evaluate and compare possible opposing defaults and breaches having regard to their respective relation (proportionality) to the economic-social function of the contract and their respective impact on the synallagmatic balance, the Parties' position and their interests. If the breach committed by a party is not serious and not important in relation to the

counterparty's interest under Art. 1455 CC, it is held that the latter's refusal to perform is contrary to the principle of good faith and thus not justified under Art. 1460, para. 2 CC.[23]

[211] "Claimant has, as seen, provided evidence for the contractual basis of its claim, its (partial) performance (delivery in three *tranches*), for which outstanding payments are requested, and that Respondent 2 has collected and used the goods delivered.

[212] "Nonetheless, it must be analyzed whether its own disruption of outstanding supply and cooperation in the light of the default on payment by Respondent, can be considered disproportionate in the light of the circumstances and therefore has an impact on the right to claim payment.

[213] "In consideration of all circumstances of the case, the fact that Claimant did not perform the entire order, suspending the supply of the outstanding lots ordered, cannot be considered to be disproportionate in light of Respondents' breach of contract.

[214] "First, the Standard Conditions within the Partnership Agreement Pursuant state, at Clause 7.3, that 'Claimant may … suspend delivery of the products … (regardless of whether already ordered): (a) upon notice if Partner is delinquent on any amount then due to Claimant for longer than fifteen (15) days following demand for payment …'; and under Clause 6.4, Claimant may also withhold any technical support because of late payment by Respondents (both Clauses, 7.3 and 6.4 have actually specifically been approved in writing by Respondents on the last page of the Standard Terms and Conditions).

[215] "Apart herefrom, under Order no. 189/Year X Rev. 2, Claimant indeed delivered 416 units (out of a total of 504 units ordered) for a value of € … (out of a total contract value of € …). Respondent 2, on its side, has instead paid only € … for the units delivered (an advance payment of € … plus € … for the first delivery of 50 TYPE B Products).

[216] "In this context, it shall further be underscored that the total order value of the TYPE B Products – the only products of the order in dispute – amounts to only €.… Claimant has supplied TYPE B Products for a value of € … (of which just € … have been paid). The delivery of only 22 Products for a value of € … is still outstanding under Order no. 189/Year X Rev. 2. The value of the contested products is indeed insignificant with respect to the total contract value, the payment of which has nonetheless been suspended by Respondents to a very significant extent.

[217] "Although Respondents' objection to Claimant's supply only regards the TYPE B Products, it did not pay according to the terms agreed (30 days) for

23. "Cfr. *ex plurimis* Cass. Civ. no. 20846/2017; conform, Cass. Civ. no. 22626/2016."

most of the supply even of other uncontested products under the order, which actually had a much greater value than the TYPE B Products. These uncontested products (such as the TYPE C and TYPE D Products) were actually even of the same kind as those indicated in Claimant's first offer, dated 11 February Year X, relating to the pilot and subject of the 'General Order' (and Respondents have not asserted that these products were only compatible with TYPE B Products, and indeed they were de facto used together with various types of products).

[218] "In addition, at one point, Respondents expressed their clear intention not to pay for the supply – the value of which is not contested – prior to positive testing, approval and payment by Principal, a plausibly intolerable situation for Claimant, in particular in light of the fact that payment conditions were the main reason for the revision of Order no. 189/Year X for phase 2, resulting in Order '189/Year X-Rev. 2' (providing for '30 days', see above).

[219] "In light of the above, it is clear that the payment default – regarding an important amount – had a prevailing negative impact on the synallagmatic balance of the contract to the disadvantage of the interests and the position of Claimant.

[220] "Also, the fact that Respondents had made a further payment of € 10,000.00 during the settlement negotiations cannot compensate for this imbalance. The outstanding performance due by Respondents remains of enormous economic impact and value with respect to the outstanding performance of Claimant, which actually appears comparatively insignificant. Respondents' payment default is thus serious and amply justifies Claimant's suspension of further deliveries (for which Claimant has not requested any payment, e.g., in the form of damages) and Claimant's claim for full payment of the goods delivered."

v. Products generate faults

[221] "In the course of the proceedings, Respondents have lamented that Claimant's products generate faults, thus in a way suggesting that the products are, in addition to being non-conform to Project X, also defective.

[222] "This 'fault issue' was however only vaguely raised in the context of the counterclaim and kept generic. Indeed, Respondents reserved their right to file a claim in this respect in separate proceedings. The alleged faults were in any case never adduced under Art. 1460 CC as a reason to suspend payment after the disputed deliveries made in Year X and January Year X+1, or to annul deliveries, also because they allegedly arose only recently and in any case after payment for the deliveries in question was due (Mr Hunter even stated during the hearing that the faults generated were not linked to the Claimant Products as such). The

'fault' issue must therefore not be further examined by the Arbitral Tribunal here (but will be faced in the framework of the counterclaim below, to the extent relevant there, cfr. para. 243 et seq.)."

vi. Final consideration

[223] "Finally, it shall be stressed that Respondents' own counterclaim actually stands in clear contradiction to the reasons underlying the objection under Art. 1460 CC which illustrates and reinforces the rejection of such an objection. On one hand, the Respondents contest the supply of TYPE B Products as they were allegedly not conform to and not in compliance with the project. On the other hand, they lament that the supplier would have failed to complete the delivery of all of the products contracted, including the TYPE B Products (last lot), a circumstance that allegedly impeded the completion and testing of the works and caused the damages they claim."

*2. Respondents' Counterclaim*

[224] "Respondents counterclaim is based on the premise that Claimant has defaulted on its contractual obligations under Respondents' General and subsequent orders: in other words that Claimant is in breach of contract and thus caused significant losses to Respondents. Such breach of contract, to the extent it allegedly caused the costs Respondents claim for, consists, according to Respondents, in (i) the non-completion of the supply ordered by Claimant, i.e. the interruption of the supplies necessary for project completion, and (ii) the interruption and failure to provide any kind of (technical) assistance for the installation of the Products and the system installed therein, as well as for the resolution of system problems (also by providing Claimant's software). Respondents essentially blame Claimant to have abandoned them in the second project phase and claim the reimbursement of all related losses.

[225] "As stated above (para. 125 et seq.), Respondent 1 does not even have standing to sue with respect to the counterclaim at issue and, in any case, was not the holder of any contractual title or right to payment asserted here against Claimant, the orders for the disputed supply having been issued only by Respondent 2.

[226] "Contrary to Respondents' assumption, the above premises are not substantiated. The counterclaim is unfounded both in the '*an debeatur*' and the '*quantum*', as illustrated hereafter, and must be rejected."

*a. An debeatur*

i. Claimant's interruption of supply

[227] "Claimant cannot be blamed for the disruption of any further supply of products and services for the completion of Project X since, as illustrated above, the disruption of supply and services is justified in light of the serious payment default by Respondents."

ii. Lack of technical assistance

[228] "Apart from these considerations, Respondents actually did not prove that Claimant was contractually obliged to provide in the second project phase technical assistance and services in addition to the mere supply of the products. No written evidence has been filed in this regard and, indeed, under the Standard Conditions of the Partnership Agreement (cfr. Clause 3.1.2) 'Partner shall place orders for the Claimant Services directly with Claimant … specifying the Customer's name and address, the type of Service ordered, the Product that is subject of the service contract and the date of installation of the Product'; (according to Art. 1, 'services' mean: 'those Claimant services offerings which may include installation etc. …'. Further, in Clause 4.2 it is specified that: '[Technical] Support on-site will be quoted by Claimant on a case-by-case basis.'

[229] "Claimant's witness Mr Jones actually stated that Respondents did not buy an assistance package under the Agreement.

[230] "The statements of Respondents' witnesses are on the other side insufficient and inappropriate to disprove Claimant's statement, i.e. to provide positive proof of an obligation for technical assistance: it is true that Mr Hunter stated that there existed an agreement with Mr Jones to support Respondent 2 during the entire project – support which was *de facto* granted during the Pilot. However, he also admits to not know the contracts and any economic conditions. He actually admitted that Respondent 2 itself was in general required to take care of the installation availing itself of the support of the external suppliers Green Company and White Company (see … Ms Martin's statement regarding Respondent 2's usual suppliers).

[231] "Ms Brown stated that Claimant was asked and had to provide, during the entire project, the same support and assistance as during the pilot phase, and thus to install, etc. (see also Ms Martin's statement). The same witness however corrected herself immediately and stated that installation was actually due by Respondent 2 itself, and not by Claimant, and that the latter only had to *support* Respondent 2 with regard to an aspect of the installation, without referring to any related order under the Partnership Agreement (Transcript: Counsel for

Respondent 2: '*La partecipazione di Claimant per l'installazione era prevista…?*' Witness Brown: '*L'installazione no*.' Translation: Counsel for Respondent 2: 'The participation of Claimant for the installation was provided for…?' Witness Brown: 'The installation, no.' See also the statement of Ms Martin). Her statement is thus vague and in part contradictory. She also admitted that she was not present *on the site*, being among the administrative staff and stated to not even have been present in the company in the relevant period (see para. 162).

[232] "Last but not least, the same Partnership Agreement clearly provides, in Clause 6.4 of its General Conditions (specifically approved by Respondents), that any technical support can be interrupted by Claimant in light of late payment (which was the case here, as seen above): 'In case Partner has any payment past due with Claimant, Claimant will withhold technical support and any other Claimant Services until such payments are brought current.'

[233] "Accordingly, in the absence of any breach of contract by Claimant (both with respect to the product delivery and with regard to services, which were apparently not agreed upon for the second project phase) it cannot be held liable for the losses claimed by Respondents and allegedly arising from the lack of assistance."

*b. Quantum*

[234] "Respondents failed not only to prove a breach of contract by Claimant and that the conduct of the latter (disruption of supply and lack of assistance) was the actual cause for the costs they claim (lack of evidence for the causal link between the losses and Claimant's alleged 'default'), but also provided insufficient evidence on the *quantum* of the losses claimed. For the mere sake of completeness (Respondents already having failed to prove the '*an debeatur*') the Arbitral Tribunal hereafter illustrates why.

[235] "The losses and expenses allegedly due by Claimant are composed of

(i) the costs for non-completion of supply by Claimant, i.e. for the Products from ACME supplier (which had already been used and paid for in Year X-3 in the pilot phase, but subsequently disassembled), amounting to € …, and their (new) installation, in particular related costs (€ …: Invoice Blue Company; € …: invoice Red Company; and € …: invoice Black Company), and related manpower at night, amounting to € … (according to the relevant DEI tariffs);
(ii) manpower costs for the installation of Claimant Products without the latter's support for 40 nights: € …;

(iii) costs for specialized companies in certain arrangements in accordance with Principal's requests (€ …: Green Company invoice; € …: White Company invoice) and related manpower costs of € …; and
(iv) manpower costs for the re-elaboration and modification of the project submitted to Principal and the Competent Office by Ms Martin and Mr Brown (Change report Project X) amounting to €….

[236] "All these costs are expressly contested by Claimant (including the actual installation of equipment, any relation of the invoices filed for the project, the use of manpower and its costs, etc.)."

i. As to the ACME invoice

[237] "Respondents argue that due to the non-completion of the supplies, Respondent 2 would have been forced to reinstall 'the products of the ACME company previously used in the pilot that had been disassembled at the date of the conclusion of the contract with Claimant' and thus to sustain the related costs (invoice for € …). Respondents produced said invoice but did not file any document showing that it had effectively made payment, and thus their actual burden ensuing from such cost; no witness actually testified on the payment issue either. The invoice (although certainly regarding Project X) further does not specify the goods (and any number of Products) supplied but only makes reference to an order that was not filed in these proceedings. Finally, the Products from ACME were, according to Respondents themselves, bought prior to any contractual relationship with Claimant (for the first test). A link with Claimant's subsequent conduct for such acquisition and cost, necessary to prove a '*danno emergente*', has not been illustrated and proven. Likewise, Respondents have not asserted or specified as much why the amount of the invoice corresponded to the amount necessary to replace the outstanding number of Claimant Products; nor have they asserted any need for the disassembled ACME products for other purposes and thus to have suffered any loss of profit, e.g., because they used them *in lieu* of the Claimant Products for Project X.
[238] "With regard to the *manpower costs* allegedly used for the installation of the ACME products in Context 1, Respondents' allegations and evidence are insufficient to provide positive proof. As illustrated above, no evidence is in the file nor emerged during the hearing that would confirm that Claimant was responsible for the installation (see above). It is not clear why Claimant should bear the costs for the manpower at issue, which was to be employed in any case in the context of installation by Respondent 2, the installation being part of Respondent's field of activities. Even assuming that the installation of ACME

products would have required additional work with respect to the installation of Claimant Products, as may emerge from Mr Hunter's statement ('*A seguito degli spostamenti e del quantitativo diverso di prodotti abbiamo dovuto svolgere certi lavori, e questo ha portato un costo a livello orario …, e durante la notte fanno anche delle manutenzioni …*'),[24] Respondents failed to clearly describe, precisely circumscribe, and prove the need for and extent of additional works and related manpower with respect to the installation works that were in any case due by Respondent 2.

[239] "Apart from this, Respondents allege to have 'sustained the costs' for the manpower basing their calculation on the relevant tariffs. Respondents actually admitted that they used their own employees (among whom Mr Hunter) for the works in question (see also the oral witness statement of Ms Brown). We can accordingly assume that the regular remuneration of these employees would have covered the actual works. In order to claim the reimbursement of fees under the relevant tariffs, apart from omitting any indication of the workforce by name with their respective qualification, and the production of their witness statement as confirmation, Respondents however did not even allege that they could have employed this manpower otherwise or elsewhere for the amounts claimed here.

[240] "With respect to the *alleged acquisition of material necessary to integrate the systems and the realization of 'new work' as a consequence of the installation of the ACME products*, the description of facts is again too generic and vague (cfr. Transcript, Mr Hunter; see also Transcript, Mr Brown), although the issue is of a highly technical nature and thus would have required a particularly accurate illustration. Further, the invoices produced do not mention Project X (apart from the invoice from Red Company) and their effective payment has not been proven. Even assuming that the technical equipment indicated there had been used for the project (as generically stated by the witnesses Mr Brown, Mr Hunter and Ms Brown), no further evidence has been provided to show the concrete use made of the equipment for the vague activities of 'system integration'.

[241] "The witness Susan Brown, the sister of the general manager, Respondent 2's shareholder and head of Respondent 2's administration department, but not a technician (as admitted during the hearing), affirmed that the use of the material subject to the invoices regarded the '*nuovi lavori tecnici*' (Translation: 'new technical works') which were, according to her, necessary in the context of the installation of the ACME products. Even if it is plausible that the alignment of various different products from different suppliers and systems used may

24. "Translation: 'following the repositioning and different quantity of products we had to perform certain works, and this ended up in hourly costs, … and during the night they also effect maintenance'."

require additional work, the extent of such additional work has not been sufficiently explained and illustrated. In particular, the witness statements appear to be too vague to prove the technical need for the material at issue as an exclusive consequence of the lack of supply or assistance by Claimant, which is in general not even responsible for the installation (see also Ms Brown's witness statement)."

ii. Manpower costs for the installation and alignment of Claimant's Products

[242] "Respondents' allegations and evidence are also insufficient to prove their claim for the reimbursement of manpower costs deriving from the installation and alignment of *Claimant* Products. First, as illustrated above, Claimant was not responsible for the installation of their own Products, such that related costs would in any case have arisen on behalf of Respondent 2. Second, no evidence has been provided for Claimant's obligation to support Respondents on site during such installations (especially after Respondents' payment default, in light of which Claimant was allowed to suspend any technical assistance under Clause 6.4 of the Standard Conditions, see above). Third, the engineers employed are neither indicated by name with their respective qualifications, nor has their work relationship with Respondents been illustrated. As to the calculation of their fees (relevant tariffs), reference is made to what was stated with regard to the costs for manpower above for the installation of ACME products."

iii. (Extra) manpower costs

[243] "According to Respondents, especially the absence of Claimant's assistance upon the interruption of supply would have impeded the resolution of certain problems linked to the interface system between certain accessory products in Context 1supplied by Claimant and the general network in Locations 1 and 2. For this reason, Respondents would have to engage and pay external companies.

[244] "From the provided correspondence exchanged in January and February Year X+1 it indeed emerges that when testing those accessory products in Context 1, some problems and dysfunctions of the system have appeared. For the reasons thereof, various explanations and opinions have been furnished. According to Respondent 2, the problem is in any case attributable to Claimant or at least could have been resolved better and earlier with its support. According to Claimant, the reason could lie in the erroneous configuration of the Claimant devices (made by Respondent 2) or in the incorrect integration between the general network and the devices of another network (supplied by Respondent 2), and the Claimant devices. In the latter case, according to

Claimant, the modifications of the configuration should have regarded not the Claimant devices but the two networks.

[245] "The communications between Principal and Respondent 2 do not furnish final certainty as to the causes of the problem. Principal itself has affirmed, in January Year X+2, that '*la problematica a nostro avviso non è immediatamente riscontrabile come un'anomalia di funzionamento della rete*' (Translation: 'the problem is according to us not immediately detectable as an anomaly of the functioning of the net') but does not however exclude this with certainty '*pur rimanendo ovviamente disponibili alla collaborazione finora mai lesinata*' (Translation: 'although obviously remaining available to any collaboration so far never stinted'; see email, dated 10 January Year X+2, from Chartered Engineer Ross). Even Respondent 2 wrote in January Year X+2 that '*Sul fatto dell'instabilità dei prodotti … va chiarito il motivo per il quale non funzionano e comunque ancora è poco chiaro il motivo per il quale sulla rete generale non è possibile raggiungerle, visto che n. 2 sono rimaste raggiungibili*';[25] email from Mr Ross, dated 10 January Year X+2, and email, dated 10 January Year X+2, from Brown). In March Year X+2 Principal wrote '*con riferimento all'oramai annosa questione del mancato funzionamento tra la rete e i "prodotti", e visto che sembrerebbe oramai appurato che le parti prese separatamente funzionano correttamente, sembra necessario l'intervento specialistico di una terza parte di comprovata esperienza sul sistema complessivo*',[26] see email, dated 30 March Year X+2, from [another employee of Principal]).

[246] "No technical (expert) report has ever been produced in the proceedings that clearly analyzed the problem and indicate its causes.

[247] "Respondents' witnesses (e.g. Ms Martin, Mr Hunter) did not provide a clear and definite technical explanation for the problem that could supersede the doubts emerging from the correspondence analyzed above. They instead confirmed that the problems seem now largely to have been resolved simply after having updated Claimant's system – allegedly part of the supply and rendered available on 15 June Year X+2 – with the help of Green Company (not being able and allowed to download the system directly themselves from Claimant, after their conflict arose, a fact contested by the latter stating that such system is available for free from their website) (cfr. Transcript: Mr Hunter, Ms Brown, Ms Martin). It remains however unclear whether the technical problems emerged

25. "Translation: 'As to the fact of instability of the Products … the reason has to be clarified for which they do not work and anyhow it is not very clear for which reason they cannot be reached on the network given that 2 can still be reached.'"

26. "Translation: 'with reference to the now long-standing question of the lack of functioning between the network and the Products, and considering that it now appears clear that the parts taken separately do function correctly, the specialist intervention on the whole system by a third party having approved expertise appears necessary'."

due to a problem inherent in the delivered goods or whether they could have been easily resolved by applying adequate technical know-how or using a software update. Mr Hunter actually denied that the fault was caused by the Products, stating: '*E nello specifico l'unica parte che al momento non è collaudabile è una certa parte perché al momento non è in funzione*. Counsel for Respondent 2: *Ma c'è qualche connessione con i prodotti forniti da Claimant?* Witness Hunter – *No*. Counsel for Respondent 2: *Cioè questo problema posso farlo risalire ai prodotti?* Witness Hunter: *No*.'; see Transcript).[27] He just asserted that Claimant, knowing the products, might have optimized the work progress to resolve the problem. The installation and system configuration and, in general, supply of technical assistance were however no contractual duty of Claimant, as seen above. Such a duty did not arise exceptionally as a consequence of the delivery of allegedly 'wrong' products because, as stated above, the liability for the disputed delivery cannot be attributed to Claimant (on the contrary, Claimant was allowed to suspend any supply and technical support in view of Respondents' default).

[248] "Even assuming that Claimant had unreasonably interrupted its performance, in light of the uncertainty as to the origin of the still not definitively resolved problem, Respondents cannot attribute the costs in question to Claimant; for the effective payment of such costs, no evidence has even been provided.

[249] "With regard to the invoice from Green Company, dated 31 December Year X+1, it is actually surprising that it regards the final balance of Order no. XXX/*Year X* (which was not filed in the proceedings), apparently issued in Year X, for certain services. No mention is made in the invoice to Project X, the problematic interface of systems lamented and Green Company's concrete intervention, which actually emerged subsequently (end Year X+1, beginning Year X+2). The invoice from White Company does not indicate Project X nor any activity clearly relating to the services allegedly due as a consequence of Claimant's disruption of supply and services. As concerns the involvement of the allegedly employed experts, again no names and qualifications are indicated (not even whether they are external or internal workers – only some witnesses, such as Ms Brown, stated that initially, own staff was used), nor the activities for which they were used, in addition to the external companies providing assistance.

27. "Translation: 'And in particular the only part which at the moment cannot be tested is a certain part because it is currently not functioning. Counsel for Respondent 2: But is there any connection with the Products supplied by Claimant? Witness Hunter: No. Counsel for Respondent: I mean, can I trace this problem to the Products? Witness Hunter: No.'"

Last but not least, no evidence has been provided for their cost (and the actual payment made). In this respect, reference is made to the considerations made in para. 238."

iv. Costs for the project's re-elaboration and modification

[250] "The decision to order and replace the Products that were different from those originally approved for the pilot, and the consequent need for a re-elaboration, is ascribable to Respondents themselves. Accordingly, they cannot claim the related costs from Claimant, which is not in breach of contract as seen above.

[251] "Moreover, the Variation not only regards the TYPE B Products, but also includes the replacement of the Products to be installed in Context 2, the so-called TYPE C Products, which are different from those approved in the final project years before Claimant had become involved (see above). These TYPE C Products are not the subject of any protest or laments in this arbitration. Therefore, one can reasonably assume that a variation would have to be presented in any event and that the re-elaboration of the project was not only caused by the use of TYPE B Products (requested by Respondent 2 themselves), but would also have been necessary with regard to the other Products that were changed during the project and were not subject to the dispute. Furthermore, in light of the evidence produced, it cannot actually be excluded that (at least part of) the TYPE B Products were even ordered in consideration of space problems and that this rendered the replacement of Products and thus the Variation necessary.

[252] "Finally, the effective burden of the expenses for the re-elaboration or with losses (of profit) has not been proven by Respondents. The witnesses David Brown and Jane Martin confirmed during the hearing to have worked for numerous hours, also at night, on the Variation, but no evidence was provided with regard to the actual costs of € … claimed (in the terms illustrated under para. 238)."

*3. Compensation of Claims*

[253] "In view of the rejection of Respondents' counterclaim for payment of € …, the question of whether such claim can be set off with the Claimant's claim, as requested by Respondents secondarily, no longer arises. The request is irrelevant and in any case dismissed."

*4. Late Payment Interest and Attribution of the Payment of € 10,000.00*

[254] "As far as *late payment interest* is concerned, Claimant's request regards the non-(fully)-paid invoices no. 7389, dated 18 November Year X, for an amount of € … due on 18 December Year X, and no. 7564 for the amount of € …, dated 23 December Year X, due by 22 January Year X+1.
[255] "On 12 November Year X, Respondents made an advance payment for the supply (at the time indicated in Order no. 189/Year X) equal to €.... Such advance payment was (correctly) imputed by Claimant to the amount due under invoice no. 7389, which represents, pursuant to Art. 1193 CC, the first debt matured and the more onerous one for the debtor. The amount hereunder is thus equal to €....
[256] "Having said this, Claimant seeks the application of late payment interest on the capital due under the Legislative Decree (d.lgs.), 9 October 2002, no. 231 (subsequently amended by d.lgs., dated 9 November 2012, no. 192, implementing the Directive 2011/7/UE on combating late payment in commercial transactions).
[257] "Such provisions concern payments made as consideration in a commercial transaction and certainly regard the contractual situation at issue.
(....)
[258] "Art. 5, para. 1 of the Decree states that 'in commercial transactions between business entities/companies the parties are allowed to agree upon a different interest rate....
(....)
[259] "Art. 6.4 of the Standard Terms and Condition of the Claimant (creditor here), attached to the Partnership Agreement, provides: 'On any payment past due, interest shall accrue on monies outstanding from the due date to the date of payments at the lesser of the rate of one and one-half percent (1.5 percent) per month or the maximum rate allowed by applicable law.'
(....)
[260] "In light of the above, the amount of the interest to be applied as of the due dates has to be calculated as follows:

(i) With respect to invoice no. 7389: on the outstanding amount of € … late-payment interest accrued from 18 December Year X (due date) to …, in the amount of....
(ii) With respect to invoice no. 7564: on the outstanding amount of € …, late payment interest accrued from 22 January Year X+1 (due date) to …, in the amount of....

[261] "In September Year X+1, Respondent 2 had actually paid the amount of € 10,000.00 to Claimant. While the latter purports that *such payment has to be attributed* to the late-payment interest matured on the principal sum due (and thus deducted from the interest claimed at the legal rate), the Respondents assert that such payment has to be allocated only to the principal sum itself, thus reducing the amount of the main claim. However, Respondents have not produced any evidence for the explicit and declared attribution of the payment made to the principal sum due.
[262] "It must be underlined in this regard that the debt to be extinguished by the Respondents concerns a debt regarding a pecuniary obligation. Accordingly, Art. 1194 CC applies, which provides that partial payments must first be ascribed to the interest and expenses due unless the creditor consents to attribute the payment to the principal sum due (and this is not the case here).
[263] "The payment of € 10,000.00 made by Respondents in September Year X+1 must therefore first be imputed to the late payment interest accrued – the amount of which, as seen, … for the older invoice no. 7389 is equal to [a sum lower than € 10,000.00]. Said late payment interest must be considered extinguished in view of Respondent's payment.
[264] "The difference paid by Respondents … has instead to be imputed as partial payment to the principal amount due under the same invoice no. 7389, the latter being older and more onerous (see Art. 1193 CC) with respect to the subsequent invoice no. 7564.
[265] "The principal amount still due for invoice no. 7389 is thus equal to.… On such amount late payment interest accrues.… The principal amount still due for invoice no. 7564 is instead equal to … and on such amount late payment interest accrues … until actual payment is made."

*5. Amounts in Dispute*

[266] "Respondents lament that Claimant has initially claimed payment of € … and in the following briefs of € …, without giving evidence for the increase in its claim. The objection is meritless.
[267] "Having regard to the documentation provided since the beginning of the proceedings by Claimant, we acknowledge that initially, Claimant simply made some erroneous calculations (including a typing mistake) when adding up the single amounts claimed: in any case, the sum of all outstanding amounts invoiced (invoices no. 7389 – € …, and no. 7564 – € …) deducting the payment of € … (not € … as indicated in Claimant's brief), results in a total amount of € …, exactly the amount indicated in Claimant's final prayers for relief. However,

from the amount claimed, … already paid by Respondent 2 in Year X+1 and that are not attributable to late payment interest due have to be deducted (see para. 254 et seq.)."

*6. Joint Liability of Respondents*

[268] "As illustrated above, it undisputedly emerges from the records that the Parties' contractual relationship is regulated by a framework agreement, the Partnership Agreement, which explicitly provides for a joint liability of the Respondents. Indeed, on the first page of the Agreement, it is stated: 'All obligations and liabilities of Respondent 1 (and any successor) and Respondent 2 (and any successor) to Claimant under this Agreement shall be joint and several.' The Respondents' joint liability thus emerges not only from Clause 10.11[28] of the Standard Terms and Conditions attached to the Agreement which provides for the joint liability of each Partner in case the Standard Terms are signed by more than one partner (multiple entities), but from a specific provision indicated at the top of the agreement itself. Any further analysis of the need for a specific approval of Clause 10.11 under Art. 1341 CC is thus unnecessary.

[269] "Last but not least, both Respondents also signed, on the same date of the Agreement (13 May Year X) as 'borrowers' – jointly and severally – a credit application and agreement and a credit line with Claimant in which they again declared to be jointly liable vis-à-vis Claimant.

[270] "In conclusion, their objections in this regard are groundless and dismissed. A contractual clause provides, in passive terms, for the joint liability of the Respondents in relation to the contractual obligation that each Partner takes under the Partnership Agreement vis-à-vis Claimant. Accordingly, both Respondents are liable for the payment obligations taken by one Partner for the supply under Order no. 189/Year X Rev. 2 and thus in respect to the outstanding amounts due to Claimant."

28. "Pursuant to Clause 10.11 of the Standard Conditions: 'Multiple Entities. When more than one partner signs the Agreement, all agree that whenever the word "Partner" appears in the agreement, it shall be read as "each partner"; that any breach of covenant or warranty by any partner may, at Claimant's option, be treated as a breach by all Partners; that the liability of each Partner is joint and several.'"

X. COSTS

[271] "The costs of the arbitration proceedings have been determined by the Arbitral Council of the Chamber, pursuant to Art. 36 of the Rules, taking into account the Order of the Secretariat, according to which the value of the dispute has been divided by claim and counterclaim as follows.
[272] "*With respect to Claimant's claim*, considering that the economic value of the claim is included in the Xth scale of reference (between € … and € …):

– Fees of the Chamber of Arbitration of Milan: € …;
– Fees of the Arbitral Tribunal: € … plus 4 percent CPA (compulsory lawyers' social security contribution);
– Expenses to the extent indicated and determined by the Secretariat: € … for stamp duties applied on the Arbitral Tribunal's award, orders, minutes of hearings and the Parties' briefs;
– Expenses for the recording, for the transcript of the evidentiary hearing, and for the light lunch organized, as indicated by the Secretariat: €….

[273] "*With respect to Respondent 2's counterclaim*, considering that the economic value of the claim is included in the Xth scale of reference (between € … and € …):

– Fees of the Chamber of Arbitration of Milan: € … and 22 percent IVA (VAT):
– Fees of the Arbitral Tribunal: € … plus 4 percent C.P.A (compulsory lawyers' social security contribution) and 22 percent IVA (VAT);
– Expenses to the extent indicated and determined by the Secretariat: € … for stamp duties applied on the Arbitral Tribunal's award, orders, minutes of hearings and the Parties' briefs;
– Expenses for the recording, for the transcript of the evidentiary hearing, and for the light lunch organized, as indicated by the Secretariat: € … and 22 percent IVA (VAT).

[274] "The costs of the arbitration proceedings as determined by the Chamber of Arbitration have been entirely paid in advance by Claimant and Respondents.
[275] "Claimant has paid in total € … and Respondents have paid in total €….
[276] "The liquidation of all these costs (regarding the claim and the counterclaim) is fixed in proportion to unsuccessfulness and therefore they remain for Respondents, jointly, to bear.
[277] "Respondents must accordingly reimburse Claimant €….

[278] "Moreover, the legal fees and expenses relating to the defense of one's case are also liquidated in proportion to unsuccessfulness. They are established in accordance with the standards set forth in Arts. 1 to 11 of Ministerial Decree no. 55 of 10 March 2014 which determines the parameters for lawyers' fees under Art. 13, para. 6 of Law no. 247, dated 31 December 2012. Both Parties have indeed filed their calculation of costs and legal fees under such standards with their final rebuttal briefs, requesting the application of the maximum fees. Claimant has indicated a total amount of € … (IVA/VAT excluded) while Respondents have indicated a total amount of € … (22 percent IVA/VAT included).

[279] "Having Claimant succeeded in its claim, Respondents shall reimburse Claimant for legal fees and costs while Respondents must bear their own fees and expenses.

[280] "The Arbitral Tribunal, considering the limited number of hearing days, the evidentiary phase and the nature and complexity of the dispute, as well as the further criteria set forth in Art. 4.1 of the Ministerial Decree no. 55/2014, determines the legal fees to be reimbursed, jointly, by Respondents on the basis of the medium standard fees (regarding the scale of reference between € … and € … indicated by Claimant) which amount to € … (including an increase *ex* Art. 4.2. of Ministerial Decree no. 55/2014 for the number of parties involved and a forfeit for general expenses – equal to 15 percent of the fees – as provided for by the said Ministerial Decree).

[281] "Respondents shall therefore reimburse Claimant's Counsel fees and related expenses in the amount of € … (excluding IVA/VAT)."

## XI. AWARD

[282] "In light of the above, the Sole Arbitrator renders the following award:

The Sole Arbitrator, Maria Theresia Roerig, by means of a final decision, rejecting all other claims and objections:

(1) holds that she has jurisdiction to decide upon the present dispute, both with regard to the Claimant's claim and Respondents' counterclaim, and rejects any objections of lack of jurisdiction and as to the validity, scope and bindingness of the arbitration clause contained in the Partnership Agreement, dated 13 May Year X;

(2) ascertains that Respondents breached the Partnership Agreement, dated 13 May Year X, entered into with Claimant, due to their non-compliance with their joint obligation to pay the invoices no. 7389, dated 18 December Year X, and no. 7564, dated 23 December Year X, issued by Claimant;
(3) declares that Respondent 1 has no standing to sue with respect to the counterclaim;
(4) rejects Respondents' counterclaim;
(5) directs Respondents, jointly, to pay in favor of Claimant the outstanding amounts under

(a) invoice no. 7389, dated 18 December Year X, equal to … plus late payment interest at …. [the lower between the rate equal to 1.5 percent/month and the applicable legal late payment interest rate] as of … until actual payment, and
(b) invoice no. 7564, dated 23 December Year X, equal to … plus late payment interest at …. [the lower between the rate equal to 1.5 percent/month and the applicable legal late payment interest rate] accrued from …until full payment has been made…;
….
(6) directs that Respondents, jointly, shall bear the costs of the arbitral proceedings as quantified and liquidated by the Arbitral Council of the Milan Chamber of Arbitration pursuant to Art. 36 of their Arbitration Rules, equal to € …;
(7) and orders Respondents, jointly, to reimburse Claimant its Counsel's legal fees, plus mandatory social security fund contributions (4 percent), expenses (forfeit for general expenses equal to 15 percent of the legal fees) for defending its case as well as the costs anticipated by Claimant for the arbitral proceedings, to the extent and in the amounts indicated hereafter:

(a) Costs of Counsel's fees, including general expenses and social security fund contribution: € …;
(b) Costs of the arbitral proceedings: €…."