

Chamber of Arbitration of Milan, final award 30 November 2017

Parties: Claimant: X (USA)
Respondents: Y and W (Italy)

Subject matters:
- validity of the arbitration clause
- subjective scope of the arbitration agreement

Sole Arbitrator: Maria Theresia Roerig

Headnote

Arbitral Tribunal ruled on the validity of an arbitration agreement in international arbitration.

Summary

Facts of the case

Respondent Y is an Italian company that was awarded a contract related to a public tender for the supply and implementation of technologies for a given project in Italy. Y subcontracted the execution of such works to another Italian company, Respondent W.

In 2015 Y and W entered a contractual relationship with Claimant (hereinafter, the Contract) in connection with the above-mentioned public contract, according to which Claimant, a US company, had to provide W with the related goods and systems. Y joined the Contract because W's economic parameters did not match Claimant's requirements: in order to solve the problem, the parties agreed upon the joint liability of Y and W. The Contract contained an arbitration agreement for a Sole Arbitrator before the Milan Chamber of Arbitration, seated in Italy.

A dispute arose, Claimant began an arbitration before the Milan Chamber of Arbitration according to the arbitration agreement contained in the Contract, seeking *inter alia* for an award to ascertain that Y and W breached the Contract and order them to pay the outstanding invoices.

Arguments of the Parties

Respondents raised objections *inter alia* on the validity of the arbitration agreement, and in particular to its bindingness to Y, and requested for the Arbitral Tribunal to dismiss the case with regard to Y on the ground that it fell out the subjective scope of the arbitration agreement. In particular, Y and W argued that the arbitration clause was null, as the parties did not accept it expressly. Respondents reasoned that the arbitration agreement – contained in Claimant's standard terms and conditions which were part of the Contract - lacked the double signature required according to Article 1341 of the Italian Civil Code (ICC), therefore it was not expressly approved.

Judgment of the Court

The Arbitral Tribunal examined Respondents' objections on the validity and subjective scope of the arbitration agreement, even if in their final brief Y and W abandoned the said objections. The Arbitral Tribunal affirmed that, according to the *Kompetenz-Kompetenz* principle (set by Art. 819 of the Italian Code Civil Procedure, ICCP) it is up to the arbitrator to decide on his/her own jurisdiction.

The Tribunal found that in the case at hand the arbitration agreement is valid for the following reasons.

The arbitration clause is certainly in writing, and the legal representatives of Y and W signed the document containing it, as required by both the New York Convention (Article II, Para. 1 and 2) and the *lex arbitri* (Italian Code of Civil Procedure, Article 807 and 808). The Arbitrator considered that, according to Article 1341, any restrictive clause contained in general conditions of a contract provides not for the written form requirement only, but also for a specific approval. However, in the case at hand, Y and W did specifically approved the arbitration agreement: Respondents signed the cover sheet of the Agreement, as well as the standards terms that followed. Furthermore, the cover sheet stated that the Agreement consisted of the cover itself, the Standard Terms and Conditions, and other documents. Respondents placed their signatures on both the first cover page and the bottom of the last one of the Terms and Conditions, where any vexatious clause was listed. Therefore, the signatories were fully aware of the existence of the arbitration clause, thus giving their full and informed adhesion to the derogation from State court jurisdiction.

Furthermore, Article 1341 ICC does not even apply to the case at hand. The speciality principle set by the Italian Statute on Private International Law (Article 2 of Law No. 218 dated 1995) refers to the 1958 New York Convention (and in particular Article II), and provides for a uniform substantive regulation of the formal requirements for arbitration agreements in international contracts, preventing contracting States from imposing further or more restrictive ones. Italian case law, as well as the prevailing scholarship have regularly held that Article 1341 ICC does not apply to *foreign* arbitration. Further, a contrary opinion would be in unavoidable contrast with the spirit and the letter of Article II of the New York Convention. There are multiple and concordant considerations, supported by the authoritative and prevailing scholarship, supporting the conclusion that Article II of the New York Convention must be deemed applicable to agreements for international arbitration, such as that at issue in this case, with seat in Italy. In conformity with the case law mentioned above, this leads to the inapplicability of Article 1341 ICC.

As for the subjective scope of the arbitration agreement, having been the arbitration agreement validly approved in writing by the legal representatives of both Y and W, and being the dispute covered by the objective scope of the arbitration agreement (which is not contested by Respondents), the Sole Arbitrator considers herself competent to decide the dispute towards Y as well.