ITALY

CHAMBER OF NATIONAL AND INTERNATIONAL ARBITRATION OF MILAN

Final award in case no. 10915, 14 November 2016[1]

Arbitrator:	Marco Perrini (Italy)
Parties:	Claimant: Contractor (US) Respondent: Supplier (Italy)
Place of arbitration:	Milan, Italy
Published in:	Unpublished
Subject matters:	– unilateral option clause – territorial competence not applicable in arbitration – litispendence not applicable in arbitration – good faith – breach of contract – loss of reputation

Summary

The parties concluded a contract for the supply of certain construction products. The contract provided that the parties could refer disputes to CAM arbitration or to the state courts – in which case the supplier could seize either a court at its seat or a court at the seat of the contractor, while the contractor could seize only the state court at the seat of the supplier. The supplier supplied no or defective products, and the main contractor deducted the costs of replacement products from contractor's compensation. The supplier commenced court proceedings in New York seeking payment for works done; the contractor commenced CAM arbitration seeking damages for breach, in the amount of the sum deducted by the main

1. Original award in Italian; translation approved by the sole arbitrator.

contractor. The sole arbitrator found preliminarily (1) that the arbitration clause in the Contract was valid, as it was a unilateral option clause providing for various options at the party's choice and such clauses are accepted in Italian law and jurisprudence. The clause at issue was neither ambiguous nor contradictory, and did not limit any party's access to justice – rather, it broadened it; (2) that the objection of lack of territorial competence could not be raised in arbitration, as this principle only applies in respect of courts. Here, the Milan seat was correctly determined in accordance with the applicable CAM Rules; (3) the proceedings should not be stayed because of the pending proceeding in the US court: litispendence is not applicable in principle in arbitration, arbitrators do not have under the Italian CCP a general power to stay proceedings, and the CAM Rules provide that a suspension of the time limit to render the award (and thus of the arbitration) can only be ordered by the CAM Secretariat. It was further doubtful whether the arbitration and the US court proceedings were identical, as the latter involved third parties and the petitum was different. The arbitrator concluded this preliminary part of his examination by noting that the award rendered in the present arbitration would be enforceable both in Italy – where as an award rendered in an international arbitration with seat in Italy it would be equated to a domestic award – and abroad as a foreign award meeting the requirements of the 1958 New York Convention. On the merits, the sole arbitrator held, on the basis of the evidence submitted, that the supplier did not violate its general duty to perform in good faith but breached the contract by supplying defective products (partly because of its failure to provide adequate packaging) or no products at all. As a consequence, the supplier should pay damages in the amount requested by the contractor. It was irrelevant that the contractor did not seek first the termination of the contract, since under the Italian Civil Code damages for breach of contract can be sought independent of the termination of the contract on which the claim is based: the party in breach is directly responsible for the damages caused by the breach. It was also irrelevant whether the supplier's breach was sufficiently serious to justify the termination of the contract, since the termination of the contract was not at issue here. The arbitrator then held that no damages should be awarded to the contractor for loss of reputation. First, such damages cannot be quantified ex aequo et bono, as requested by the contractor, but need to be proved like any damage; second, no harm to reputation followed automatically from the supplier's breach, and the contractor failed to prove that any such damage occurred. Finally, the sole arbitrator decided that each party was to bear half the costs of the arbitration and their respective counsel fees.

Contractor, a US company, entered into an agreement with a contractor in the United States (the US Main Contractor) for construction works at three hotels in the United States.

In 2012, Contractor entered into a Frame Contract with the Italian Supplier for the supply of certain products to be used in these projects. On the same day, Contractor and Supplier also concluded a Contract under which Supplier was to supply, package and deliver at the port of New York storefronts, windows and doors for the facade of one of the three hotels – the "Hotel" – in New York City,

against payment of.... Art. 12 of the Contract was titled "Competent Forum and Arbitration" and provided:

> "The forum of the seat of the Supplier shall have exclusive competence over any controversy arising under or in relation to the present contract. However, in derogation from the above, the Supplier may bring the controversy before the competent judge at the seat of the Contractor. All controversies arising under or in relation with the present contract shall be finally solved in accordance with the Arbitration Rules of the Chamber of National and International Arbitration of Milan by one or more arbitrators appointed in accordance with those Rules."

A dispute arose between the parties. Contractor claimed that Supplier delivered damaged and defective goods, failed to replace them as provided for in the Contract, and did not deliver certain goods at all; as a consequence, Contractor could not meet its obligation toward the US Main Contractor. The US Main Contractor then engaged other companies to complete the construction works and consequently incurred costs which it later deducted from its payment to Contractor, in the amount of US$ ZZZ. Supplier claimed that Contractor did not pay for goods delivered.

The Italian Supplier commenced proceedings in the Supreme Court of New York County, seeking payment for the works done.

The US Contractor in turn commenced arbitration at the Milan Chamber of Arbitration (CAM), seeking (i) a declaration that Supplier breached the Contract and violated the principles of correct behavior and good faith by maintaining that it could carry out works in the United States according to high and specific standards while it lacked the necessary organizational skills and means; (ii) damages in the amount of US$ ZZZ, being the amount deducted by the US Main Contractor from Contractor's compensation; and (iii) damages for loss of reputation, to be quantified ex aequo et bono. A sole arbitrator was appointed. Lacking an express choice by the parties, the CAM fixed the seat of arbitration in Milan as provided under its Rules.

Supplier argued that the arbitration clause in the Contract was invalid; that the Milan forum lacked territorial jurisdiction; and that the arbitration should be stayed on grounds of litispendence because of the pending court proceedings in the United States.

By the present award, the sole arbitrator preliminarily (i) held that the arbitration clause in the Contract was valid; (ii) denied the objection of lack of territorial competence; (iii) denied the request for a declaration that the

proceeding should be suspended on grounds of litispendence and therefore (iv) refused to stay the arbitration proceeding. On the merits, the sole arbitrator (a) held that Supplier did not act in violation of the principles of correct behavior and good faith and that as a consequence no damages could be awarded on this ground; (b) held that Supplier breached the Contract by its defective performance, and consequently awarded Contractor the requested damages of US$ ZZZ; and (c) denied Contractor's claim for damages for loss of reputation.

The sole arbitrator first noted that the arbitration clause in the Contract was a unilateral option clause. Unilateral option clauses give each party or both parties the choice between more than one means of dispute resolution, or several choices within one means of dispute resolution; the validity of such clauses, based on the parties' contractual autonomy, is accepted in Italian law and jurisprudence.

Art. 12 clearly provided for more than one option: the parties could refer disputes to the state court, in which case Supplier could elect to seize the state court at its seat or at the seat of Contractor, while Contractor could seize only the state court at the seat of Supplier; or they could refer disputes to CAM arbitration, independent of which party was the claimant. This clause was neither ambiguous nor contradictory, as proved by the fact that when a dispute arose both parties chose a correct way to file their claims. Nor could it be said that Art. 12 limited one party's access to justice – rather, it broadened it. Hence, the arbitration clause was valid.

The sole arbitrator then dealt with, and dismissed, Supplier's objection that the Milan (arbitration) forum lacked competence and that competence lay with the forum of Italian City X, Supplier's seat. The principle of territorial competence, reasoned the arbitrator, applies solely in respect of state courts; only the seat is relevant in respect of arbitration. Since the CAM Rules, to which the parties referred, provide that when the parties have not expressly chosen a seat in the arbitration agreement, the seat of the arbitration will be in Milan, Milan was the proper seat for the arbitration.

Supplier's objection of litipendence based on the US court proceedings was also unsuccessful. The arbitrator noted that litispendence finds in principle no application in arbitration – as a rule, arbitration can proceed at the same time as court proceedings. An interpretation has been advanced in doctrine in favor of extending litispendence, *de jure condendo*, to the case where identical court and arbitration proceedings are pending at the same time, in light of the fact that the jurisdictional nature of arbitration is now accepted. However, *de jure condito*, the Italian Code of Civil Procedure expressly provides that arbitrators may stay proceedings only in certain listed cases – and thus do not have a general power

to stay proceedings – and that their jurisdiction is not excluded by the pendency of the same dispute before the (Italian or foreign) court – so that they are under no obligation to stay proceedings on grounds of litispendence.

Also, the applicable CAM Rules provide that only the Secretariat may suspend the time limit to render the award, and thus, implicitly, the arbitration. As a consequence, the arbitrator would in any case lack the power to suspend the arbitration; a request to this aim should have been addressed to the CAM Secretariat.

Further, noted the sole arbitrator, it was doubtful whether the US proceeding and the CAM arbitration were identical, rather than simply having elements in common, as the former involved parties that were not parties to the arbitration and Supplier's *petitum* in the US proceedings was not the same as its *petitum* in the arbitration.

The sole arbitrator concluded his examination of the preliminary matters by stating that the award rendered in the present arbitration would be enforceable both in Italy and abroad. In Italy, the award would be equated to a domestic award, being rendered in an international arbitration (because at the time of signing the arbitration clause one of the parties, Contractor, had its seat abroad) with seat in Italy; as such, it would have the same effects as a decision rendered by an Italian court. Abroad, the award could be enforced as a foreign award under the 1958 New York Convention, as it met all the Convention's requirements.

The sole arbitrator then examined the merits of the case.

He first held that the Italian Supplier did not breach its duty to perform in good faith under the Contract. When signing the Contract, Supplier legitimately relied on its own capacities; during performance, it appeared from the evidence that Supplier attempted to solve problems as they arose.

This did not mean, however, that Supplier met all its contractual obligations. Rather, the sole arbitrator found that Supplier breached the Contract by supplying defective products (partly because of its failure to provide adequate packaging) or no products at all. Supplier itself acknowledged these difficulties in its performance – as shown by the evidence – but failed to remedy them. This breach led to the additional costs, incurred by the US Main Contractor and eventually paid by Contractor, in the amount of US$ ZZZ.

Supplier's objection that no damages could be awarded unless Contractor first sought a declaration that the Contract was terminated failed. The sole arbitrator relied on the provision in the Italian Civil Code that damages for breach of contract can be sought independent of the termination of the contract on which

the claim is based. The party in breach is directly responsible for the damages caused by the breach.

The arbitrator then held that it was irrelevant whether Supplier's breach was sufficiently serious to justify the termination of the Contract, since the termination of the Contract was not at issue here.

Contractor also sought non-contractual damages for loss of reputation, to be quantified on an equitable basis. The sole arbitrator denied this request. First, it was not possible to quantify this kind of damage ex aequo et bono, because Supreme Court jurisprudence holds that the damage to reputation must be dealt with as a damage proper, so that the party seeking compensation must prove that damage occurred. Second, Supplier's breach did not result automatically in damage to the reputation of Contractor, and Contractor failed to prove any such damage. Contractor only submitted a Letter of Default and a Delay Letter sent by the US Main Contractor, asking for prompt performance of the obligations in respect of the works on the Hotel. These letters, however, were in the arbitrator's opinion letters commonly sent in the performance of a (complex) contract and neither proved nor caused a loss of Contractor's reputation.

The sole arbitrator last decided that each party was to bear half the costs of the arbitration and their respective counsel fees.

Excerpt

[1] "The present arbitration, to be decided by the Sole Arbitrator and administered by the Milan Chamber of Arbitration [*Camera Arbitrale di Milano* – CAM], is an international *rituale* arbitration within the meaning of Art. 830(2) CCP,[2] with seat in Milan pursuant to Art. 4.2 of the CAM Rules."[3]
(….)

2. Art. 830(2) of the Italian Code of Civil Procedure (CCP) reads:

"…. However, if one of the parties has its residence or its actual seat abroad on the date of the signature of the arbitration agreement…."

3. Art. 4.2 of the Arbitration Rules of the Milan Chamber of Arbitration reads:

"In the absence of any agreement as to the seat, the seat of the arbitration shall be Milan."

I. ANALYSIS

1. Preliminary Issues

a. Validity of the arbitration clause

[2] "The Contract, in respect of whose performance the dispute arose, contains the following dispute resolution clause:

> '*Art. 12. Competent Forum and Arbitration*
> The forum of the seat of the Supplier shall have exclusive competence over any controversy arising under or in relation with the present contract. However, in derogation from the above, the Supplier may bring the controversy before the competent judge at the seat of the Contractor. All controversies arising under or in relation with the present contract shall be finally settled in accordance with the Arbitration Rules of the Chamber of National and International Arbitration of Milan by one or more arbitrators appointed in accordance with those Rules.'

[3] "First, it must be said that this is not a pathological arbitration agreement; rather, it is a clause that arbitration specialists, practitioners and jurisprudence nowadays deem to be equivalent to a unilateral option clause.[4] We can therefore state straight away that it is valid and effective.

[4] "The unilateral option clause – or, better, the clause for the unilateral exercise of the options herein foreseen; or, even better, the clause providing for a combination of options – consists in a complex agreement indicating and containing more than one mechanism of dispute resolution, or several choices within one means of dispute resolution. By such agreement, the contracting parties agree to grant one of them, or both, the power to choose unilaterally one of several contractually agreed options. They can do this in respect of either arbitration, court proceedings or a combination of both resolution mechanisms. In this last case, the parties agree to leave to their own choice whether to exercise unilaterally the option to have recourse to a state court or to arbitration. Thus, the parties grant themselves a power, in the form of the option to follow either the judicial or the arbitral path.[5] (On the acceptance of these clauses see,

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4. "[This clause] can be called in English not only 'unilateral option clause' but also, among others, 'split clause', 'combined options clause', 'hybrid clause'."
5. "'Therefore, the commercial rationale … is to have a dispute resolution clause that entitles [the party] to options for bringing its claim, both in arbitration and in state courts (then, in a variety of state courts)' [English original], in D. Draguiev, *op. cit.*, p. 21."

recently, D. Draguiev, 'Unilateral Jurisdiction Clauses: The Case for Invalidity, Severability or Enforceability', in Journal of International Arbitration, 2014, p. 19 et seq.)

[5] "If we analyze Art. 12 of the Contract, we can note that the Parties' intention to have a double option – court proceedings and arbitration – already appeared in the clause's title, 'Competent Forum and Arbitration', and that the contractual provision corresponds with the title.

[6] "In the case at issue – keeping distinct the various parts of the clause, whose purpose must not be confused or overlap – by the agreement in Art. 12 of the Contract the Parties gave themselves the power to:

(a) opt for referring disputes to the state court, in which case:

(i) if Supplier were the claimant, Supplier could seize the state court at its seat or at the seat of Contractor;
(ii) if Contractor were the claimant, Contractor could seize only the state court at the seat of Supplier;

(b) opt for referring disputes to arbitration under the auspices of the Milan Chamber of Arbitration, independent of which party is the claimant.

[7] "Though complex, this clause is neither ambiguous nor contradictory as to its functioning. In Art. 12, the Parties determined what were the instruments at their disposal and specified the modalities for exercising their option. From the system described above, it appears clearly what mechanisms can be activated, the available means of dispute settlement and the procedural paths to follow.

[8] "Thus, when a dispute concretely arose out of the Contract, the Parties would have to follow the agreed mechanism and exercise the respective powers of choice according to the options they granted to themselves in the dispute settlement clause.

[9] "According to this system and to its specific construction, on the one hand, Supplier could have seized the state courts in Milan or Italian City X, according to where was its seat, or the state courts of New York (which it did seize), where Contractor had its seat; or could have commenced arbitration at the Milan Arbitration Chamber. On the other hand, Contractor could have chosen for the state courts in Milan or Italian City X, depending on Supplier's seat, or choose in the alternative for arbitration, commencing proceedings administered by the Milan Arbitration Chamber (as in fact it happened).

[10] "All this was perfectly legitimate, although the peculiar construction of the clause left room, in practice, for the unilateral initiative of either party. The validity of unilateral option clauses – evidently also where, as here, the exercise of the option is potentially bilateral as it is granted to both Supplier and Contractor – is founded in the principle of the contracting parties' autonomy (see in respect of the Italian legal system, R. Martuscelli, '*Mutualità ed unilateralità della clausola compromissoria: la cosiddetta opzione di arbitrato*', in <www.comparazionedirittocivile.it>; A. Fabbi, '*Formazione progressiva dell'accordo compromissorio e offerta unilaterale a compromettere; arbitrato e controllo delle concentrazioni; impiego di procedimenti di discovery in arbitrati commerciali con sede in Italia*, in Int'l Lis [Rivista di diritto processuale internazionale e arbitrato internazionale], 2012, p. 192 et seq.).

[11] "The legitimacy of the unilateral derogation in respect of the means of dispute resolution in this type of clause, within the context of the options provided for by the parties, has been expressly accepted in the Italian legal system by some decisions of the Supreme Court and of courts deciding on the merits (Supreme Court, 22 May 2015, no. 10679; Plenary Session, 11 April 2012, no. 5705; Plenary Session, 8 March 2012, no. 3624; Court of Appeal, Milan, 22 September 2011, *Sportal Italia v. Microsoft Corporation*).[6]

[12] "Thus, the agreement in Art. 12, in the context of the Parties' Contract, must be deemed valid at all effect; it is based on the Parties' wish to set up a dispute resolution system going beyond the standard of ordinary forum selection and arbitration clauses, which provide for the jurisdiction of the state courts or for arbitration alone, in order to draft a clause meeting their specific needs.

[13] "In this concrete case, where the companies have their seat, business activities and assets in different countries, these needs must have been determined by the parties with the purpose of improving the chances of the future enforceability of the decision resulting from the (court or arbitration) proceedings. This led to the need of Contractor and Supplier to allow themselves a broader choice of options in respect of how and where to commence proceedings against the other contracting party.

[14] "From the point of view of the possibility to exercise one's rights, it cannot be said with certainty that the system set up by the parties abusively limited one party's access to justice. As the facts show, Art. 12 and the dispute resolution

6. "We should rather say, confirmation of the legitimacy of unilateral option clauses, since they were already allowed in Italy since Supreme Court decision of 19 October 1960, no. 2837, Giust. Civ., 1960, I, p. 1897, and Schizzerotto, '*L'arbitrato rituale nella giurisprudenza*', in *Raccolta sistematica di giurisprudenza commentata*, Padova, 1969, p. 64; Supreme Court decision of 22 October 1970, no. 2096, Rep. Foro It., 1971, under '*Arbitrato*', no. 16."

means therein not only do not jeopardize effective access to justice in case of a dispute under the Contract, but rather broaden it, since both parties had the opportunity to commence both court proceedings and arbitration, by making use of their respective options.

[15] "Similarly, it cannot be said that it is unclear from Art. 12 what are the options – between the courts and arbitration – at the disposal of the Parties or before which bodies and on what conditions these options can be exercised to file a claim. This is proved by the fact that both Parties chose the correct way to file their claims.

[16] "Nor can the clause at issue be deemed to be excessively generic, since the parties took care to specify all the criteria for determining before which courts or arbitral institution they could commence court or arbitration proceedings, in accordance with their choice among their respective options.

[17] "A remark needs to be made in respect of the paragraph in bold type between Art. 12 and the privacy clause, which seems to be a miscellaneous provision. It reads:

> 'The present contract consists of 4 (four) pages + typewritten and handwritten attachments. The parties accept the full efficacy of the content at all effects under the Italian law regulating contracts between private parties, with forum in Milan.'

[18] "The part of interest here is the last one, on the Milan forum. Because of its content and placement it appears to be, in its minimal wording, rather a repetition of one of the individual elements constituting the more complex mechanism of the dispute resolution clause in Art. 12.

[19] "Based on the above grounds, it must be concluded that the clause in Art. 12 of the Contract is valid."

b. Lack of territorial competence of the Milan forum

[20] "Supplier also raised the objection of lack of territorial competence of the Milan forum, [arguing that] the Italian City X forum is competent. This argument and the related request cannot be granted and must be rejected.

[21] "Like any other form of competence based on subject matter or value, territorial competence – together with the criteria to determine it in accordance with the Italian Code of Civil Procedure – concerns exclusively the jurisdictional authority of the state, distributing the adjudicating function among the various state organs.

[22] "Competence as regulated in the Code of Civil Procedure does not exist in respect of arbitration. There is no criterion in arbitration for distributing the adjudicative activities among arbitrators on the basis on any form of jurisdictional competence, and no criterion by territorial partition is applied.
[23] "Competence plays a – completely – indirect role in respect of arbitration, solely within the state ordinary court system, in the cases in which the state courts act in aid of arbitration, or during the possible post-arbitration phases of challenge or recognition and enforcement of the award.
[24] "Having made this clear, [we note that] by law only the seat of the arbitration[7] localizes the arbitration from the territorial point of view – the seat, though existing physically as the geographical place where the arbitration is intended to take place, being a purely juridical concept because of its fundamental consequences on the arbitration itself.
[25] "We must therefore leave aside the criterion of competence, which is irrelevant in arbitration, and consider instead the seat of the arbitration, which in the present proceeding was correctly determined in Milan, in accordance with the clear provisions of the Arbitration Rules of the Milan Chamber of Arbitration, which provide at Art. 4.2 that when the parties have not expressly chosen [a seat] in the arbitration agreement, the seat is fixed in the city of Milan.
[26] "We must note in this respect that the Parties provided in Art. 12 of the Contract that if arbitration was chosen as the option to settle the disputes, arbitration would be commenced before the Milan Chamber of Arbitration under the Chamber's Arbitration Rules. Hence, through their express reference to the CAM Rules, the Parties intended to incorporate those rules to regulate the various aspects of the entire arbitration.
[27] "Among the rules governing arbitrations administered by the Chamber of Arbitration of Milan, Art. 4 CAM Rules provides for the determination of the seat of the arbitration; Art. 4.2 provides that lacking a direct choice by the parties the Rules fix the seat in Milan.
[28] "Because of the Parties' express reference to the CAM Rules, on which they relied for its fundamental function of establishing the rules for conducting the arbitration, the indication in Art. 4.2 equals a direct choice of the Parties: their reference to the CAM Rules incorporates this system of rules governing the arbitration into Art. 12 of the Contract.

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7. "And the place where some arbitral activities may take place – in an absolutely secondary manner with respect of arbitrations and their seat."

[29] "In conclusion, there can be no modification of the territorial competence, nor can such modification be even considered. Rather, the determination that the seat of the present arbitration is in Milan is correct."

c. Litispendence

[30] "Recognizing the validity of clause 12 of the Contract, the Parties fully acted under this dispute resolution agreement; both legitimately sought judicial assistance in respect of the Contract's performance: Supplier before the state courts in the United States and Contractor in arbitration proceedings administered by the Milan Chamber of Arbitration.

[31] "Since the parties made different choices, and two parallel – court and arbitration – proceedings followed, we must decide whether we should apply litispendence, so that only the US court proceedings can be pursued, or whether there are elements against this conclusion, parallel proceedings can co-exist and the present arbitration can proceed in a regular manner.

[32] "It must be noted that litispendence has always found a rigid obstacle in arbitration: as a rule, the latter continues at the same time as the court proceeding. In light of this premise, there can be no reference to Art. 7 of Law no. 218/1995 and to the international litispendence therein regulated – which provides that the Italian court shall stay the proceeding when the objection of litispendence is raised because of an action between the same parties having the same object and the same basis.

[33] "It appears clearly from the above that [Art. 7] aims at coordinating proceedings pending before the Italian courts and before a foreign jurisdiction. Thus, litispendence applies to the extent that the proceedings are identical and pending at the same time before the state courts of different states (Supreme Court, 25 September 2009, no. 20688); this element is the essence of Art. 7 of Law no. 218/1995, which exclusively concerns litispendence between the Italian and the foreign state court.

[34] "Conversely, its application is excluded when one of the two proceedings is arbitration, as in the case at issue, where a US court proceeding and an arbitration with seat in Milan are pending at the same time. Art. 7 not only does not apply; neither can it be applied directly in the context of arbitration by analogy. Rather, both formal and substantive reasons linked to the specific characteristics of this case lead to the non-application of litispendence.

[35] "We do not disregard the interpretation advanced in our legal system in favor of extending litispendence, *de jure condendo*, to the co-existence of identical court and arbitration proceedings – this, after arbitration was granted jurisdictional nature and taking into account the alleged interchangeability of

court and arbitration proceedings.[8] However, there remain formal criteria, among those provided for arbitration in our legal system, that must be taken into account.

[36] "In particular, Art. 819-*ter* (1) CCP – among the norms established for arbitrations with seat in Italy, be they domestic or international – provides that the jurisdiction of the arbitrators is not excluded by the pendency of the same dispute before the judge, thus adopting the criterion of parallel proceedings where an arbitration with seat in Italy and a court proceeding are pending at the same time, and applying [this criterion] also where the court proceeding is pending in another state. This allows arbitrators and judges to continue their task and bring their respective proceedings to a conclusion in mutual operative autonomy.

[37] "Hence, in the relationship between arbitration and litispendence there is no particular obligation or formality for the arbitrators to guarantee the possible priority of the court proceeding. Arbitration may proceed independently to its conclusion without being subject to litispendence.

[38] "As concerns the effects of a possible litispendence on the arbitration proceeding – that is, Supplier's request to suspend it – we must consider that the present arbitration is administered by the Milan Chamber of Arbitration and has its seat in Italy, so that the provisions that must be taken into account are the CAM Rules and the arbitration provisions in the Code of Civil Procedure.

[39] "We must first take into account the provisions on this point in the CAM Rules of Arbitration, which the parties selected in their Contract to regulate the arbitration procedure; in particular, Art. 32.3, according to which only the Secretariat may suspend the time limit to render the award, which clearly implies a suspension of the arbitration.

[40] "We note that pursuant to the applicable rules, the power to suspend the time limit to render the award – and thus the proceeding – is not in the hands of the arbitrators, nor is it entrusted to their autonomous will; rather, an intervention to this aim of the competent body, the Secretariat of the Milan Chamber of Arbitration, is necessary. Thus, the Parties (or the interested Party) should have addressed the request for suspension to the Milan Chamber of Arbitration, as the institution administering the arbitration, with the aim of

8. "This development started with the two most recent reforms of arbitration – Law no. 25/1994 and Legislative Decree no. 40/2006 – and was finally concluded by the recent decisions of the Constitutional Court, 19 July 2013, no. 223, and of the Supreme Court, Plenary Session, 26 May 2015, no. 10800, and 25 October 2013, no. 24153 [reported in Yearbook XXXIX (2014) pp. 424-426 (Italy no. 187)]."

requesting the Secretariat, which has the task of carry out [the suspension] in practice.

[41] "As per the Parties' will, the CAM Rules prevail – and this would in itself settle the question raised. We add, however, for the sake of completeness, that Art. 819-*bis*, nos. 1 and 2 CCP, provides that the arbitrators may suspend the arbitration proceedings before them only in the cases provided therein, since they otherwise do not have the power to suspend the arbitration.

[42] "Thus, arbitrators are generally not allowed to suspend the arbitration, both by law and under the [CAM] Rules, for several fundamental reasons and because of the impact that this would have on the time limit to render the award, nor do they have an autonomous power to this purpose unless expressly supported and authorized by law and, in the case of administered arbitration, unless with the direct intervention of the bodies of the arbitral institution under whose aegis the proceeding takes place, which have the task of preserving the regularity of the procedure.

[43] "This is the case here, and the Sole Arbitrator may not directly decide to suspend the present arbitration proceeding or the corresponding time limit, since he is bound in this arbitration by the Rules and, lacking those, by the law.

[44] "The conclusion to be reached from the examination of these formal conditions is that the Arbitrator may not make a statement on litispendence and that he may not suspend the present arbitration proceeding. This also applies to the objection of *continenza*,[9] which is the same as partial litispendence.

[45] "Other, substantive considerations concerning the specific case must be added to the [above] considerations on formal elements.

[46] "In particular, in order to have litispendence the two proceedings pending at the same time must be identical. Although the formal considerations are determinative, we note that in any case it appears from various details that there are doubts as to whether the American proceeding – to the extent this can be ascertained from the file – is identical to the arbitration. Even if these doubts are minor or residual, they are still doubts.

[47] "We refer here to the involvement of other parties in the proceeding carrying the same 'Index No. AAA' indicated in Supplier's request: the US Main Contractor and YYY Company; to the fact that the question of 'discovery' of documents with which Contractor did not comply arose in the proceeding having the different 'Index No. BBB'; to the fact that the affidavit of Contractor's legal representative was filed with this latter 'Index' number and not with the former; to the statement of the US court that the contracts in respect of whose

9. *Note of the Sole Arbitrator*: partial identity between two actions, so that one action includes the other.

performance the action was commenced had not been filed; to the discrepancy between Supplier's *petitum* in the US proceedings and [its *petitum*] in the present arbitration.

[48] "It follows that, although the two proceedings at issue have elements in common, it is not objectively possible to find with absolute certainty that the two actions are identical.

[49] "The conclusion we reach is that, even in the presence of two completely identical proceedings, there would be no room, for the formal reasons set out above, for the Arbitrator to exercise his power to find litispendence or suspend the arbitration proceeding.

[50] "If we add to this the further consideration that it is not completely certain that the two proceedings are identical, then it is even harder for the Arbitrator to refrain from hearing the case in arbitration by suspending the adjudicating task entrusted to him and failing to comply with his duty to answer the Parties' questions. The Arbitrator is bound by his foremost obligation to strictly comply with the time limit for rendering the award. If he autonomously suspended the arbitration without taking into account the limitations imposed by the CAM Rules or without the necessary legal basis, the time limit for a decision would continue to run uselessly until the final moment, not having been effectively used to conduct the necessary arbitration activities and to deal with the dispute."

d. Enforceability of award

[51] "Finally, we must dispel all doubts as to the efficacy and enforceability, both in Italy and abroad, of the final award rendered in the present arbitration.

[52] "First, this arbitration must be qualified as – and deemed, on the basis of the subjective criterion of Art. 830(2) CCP – an international arbitration, because at the time Art. 12 of the Contract was signed, in 2012, one of the parties to the present arbitration, Contractor, had its seat abroad, in New York State (USA).

[53] "Hence, with respect to the Italian legal system, the award to be rendered between the Parties will have full efficacy in [Italy] because it will be rendered at the end of an arbitration with seat in Italy and thus will be for our legal system a domestic award, with the same effects as a decision rendered by a court, as provided for in Art. 824-*bis* CCP.[10]

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10. "As to the necessarily *rituale* nature of an award rendered in international arbitration in Italy, see Supreme Court decisions, 26 May 2015, no. 10800 (Plenary Session); 30 September 2013, no. 22338; 26 May 2010, no. 12866; and 16 January 2004, no. 544." *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

[54] "As to its extraterritorial validity, the award resulting from this arbitration can be recognized and enforced abroad, in other countries than Italy, since it meets all the requirements for its circulation within the system of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. According to the Convention's parameters, and for the country in which its recognition and enforcement may be sought, it will be a foreign award.[11]
[55] "In sum, on the basis of the above considerations, the present arbitration does not stop at the stage of the procedural issues and can decide the questions of the merits raised therein."

2. Merits

a. Contractual claims

i. Good faith
[56] "We will now examine the merits of the contractual dispute. First, we must ascertain whether Supplier, as alleged by Claimant, breached the Contract from the point of view of the duty of good faith performance, according to criteria of correctness and loyalty.
[57] "In light of the required parameters we do not find that Supplier acted against good faith in the contractual performance at issue, neither at the initial moment of signing the Contract – when Supplier legitimately counted on its own working and entrepreneurial capacities – nor in the performance of the Contract: it appears from the several emails in the file that Supplier constantly and coherently cooperated in the attempt to solve the various difficulties arising in the Contract's performance.

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.

11. "Supreme Court decision, 21 January 2000, no. 671 [reported in Yearbook XXVII (2002) pp. 492-499 (Italy no. 158)]: litispendence cannot be an obstacle to the recognition and enforcement of the award, because it is not one of the grounds in Art. V(1) and (2) of the 1958 New York Convention."

[58] "If good faith means the contracting parties' general obligation of correctness and mutual loyalty in the performance of their contractual relationship – essentially, the obligation of cooperating with and informing the other party – then Supplier cannot be accused of anything in this respect. Its approach and conduct toward Contractor in respect of the contractual performance are not at odds with an intention to perform under the contractual obligations.
[59] "Based on the above considerations, since the abundant evidence in the file shows that Supplier's conduct was not against good faith, the damages sought by Contractor on this ground cannot be awarded."

ii. Breach of contract
[60] "Compliance with good faith in the Contract's performance does not necessarily mean that all contractual obligations were completed or carried out fully, or correctly complied with, and that the whole Contract was successfully performed. Hence, as requested by Claimant, we must examine the (non-)performance of the Contract.
[61] "An examination of the Contract concerning the Hotel in New York City leads us to find that the disputed Annex C, mentioned in Art. 6 of the Contract, does not exist or, at least, was not signed by Contractor and Supplier. The Contract at issue, as submitted in the file, is signed on each page by the Parties in both the Italian and the English version; Annex A and Annex B also appear to be signed. However, the signature of the Parties do not appear on Annex C, which contained the disputed schedule for the delivery of the products. Hence, Annex C cannot be taken into account for our examination, even if Supplier, in its statements in defense, recognizes that this schedule for the delivery of the products by [Supplier] had been drafted by Contractor and by Supplier's project manager.
[62] "Other provisions in the Contract, however, define Supplier's obligations, being the supply and the delivery free at the port of New York of the facades of the Hotel (Art. 2.1), as well as the supply, transportation and packaging of all the products indicated in Annex A (Art. 4).
[63] "In the absence of Annex C on the schedule of delivery, it is relevant whether the products under the Contract were not delivered or, though delivered, were not carefully executed and showed imperfections, breakages and defects. It is also relevant how they were delivered, since the obligation to supply goods implies the duty to supply them intact, without defects and imperfections, without breakages, operative for the purpose for which they are made and functional for the task that they must carry out.

[64] "In particular, the Contract provided that Supplier had the duty to supply to Contractor the facades, storefronts and all other products described in Annex A, in accordance with the projects and specifics in Annex B, and to bear all the costs of their transportation to the port of New York.
[65] "Thus, even taking into account that a schedule was formally lacking, Supplier had further contractual obligations, such as to carry out the [necessary] works and manufacture the products under the Contract correctly, and to deliver the goods intact at the Claimant's destination, taking care of their transportation and the necessary packaging and arranging for a manner of carriage adequate to the nature of the goods, their dimensions and the length of their voyage overseas.
[66] "It is necessary to take these obligations and their non-performance into account in respect of Supplier's alleged breach, particularly regarding the non-conformity and breakages of the products to be supplied.
[67] "The many emails submitted in the file, which Supplier never disputed, clearly evidence several defects in Supplier's [performance of its] obligations, such as the breakage of the glasswork, which was damaged because the packaging was inadequate; the carriers' claims as to this inadequacy; the problems in sending packages that were too large for the means of transportation – airplane in particular; the air carriage reservations that were not carried out because the packages were inadequate; the inappropriate packaging for air carriage, lacking in protection and sufficient shockproof material; the glasswork's lack of resistance to water during the tests; the incomplete mock-up, which lacked some elements; the infiltration of water from gaskets during the tests; poor quality glasswork, evidencing spread silicon, damages, bumps around the perimeter, a hollow that had not been cleaned, and incorrect support handles; the broken glasswork sent in containers without protective wooden boxes; the badly cut tubes that could not be assembled; the lack of the necessary holes in the posts; the too short gaskets in the crosspieces; the aluminum glassholder that was mounted partly askew and the other way around; the fact that the jumpers in the posts for hooking the crosspieces did not arrive; the fact that the pressing bars for the posts did not arrive; the failure to send the brackets which anchor the facades and support the blind perimeter posts; the non-conformity with the specifics of some of the products delivered; the problems concerning the balustrades, hinges and gaskets; the failure to supply products to replace broken or defective ones; the failure to send part of the products, which were not delivered at all.
[68] "In light of the above, Supplier's attempt in its statements in defense to argue that its employees lacked the power to send the emails they sent, while not disowning those emails, does not affect the fact that at the relevant time those individuals were at all effects employees of Supplier and variously involved in the

operations under the Contract that is the subject matter of the arbitration; hence, their communications provide an insight in Supplier's activities concerning the performance of its obligations.

[69] "It appears in fact from the communications in the file that Supplier itself acknowledged its difficulties in dealing with many of the contractual operations and that there were defects which Supplier should have set right, although it frequently emerged that applying the correct solution or correcting situations was complicated. Such as, for instance, the typical case of glasswork broken because of transport in inadequate packaging without protection in the container sent by sea, with the uncertainty of what would be the following transportation means, by air or by sea, and the choice for air carriage without taking into account that protective packaging would be needed and the final dimensions of the packages in respect of this [means of] carriage, and the lack of any reservation for [the glasswork's] sending – and this the glasswork for the facade of the Hotel, the main object of the Contract and [the main recipient] of the goods to be supplied.

[70] "It appears thus that independent of the schedule and its acknowledgment, and independent of whether the delivery times therein provided were complied with, Supplier had further obligations that it apparently did not meet properly. We constantly see here activities commenced but not carried out to completion as they should have been, that is, manufacturing and supplying the contractual goods according to the necessary specifications, sending them in the correct manner and delivering them perfectly intact at destination.

[71] "These defects, breakages and failed deliveries forced Claimant to contact other enterprises in order to obtain all the works that were necessary to the realization and finalization of the project for the Hotel in New York, which were originally to be supplied by Supplier, with the ensuing further costs and expenses first born by the US Main Contractor toward the suppliers for a total amount of [US]$ ZZZ and then deducted from the amount owed by the US Main Contractor to Contractor.

[72] "Thus, because of the products that arrived broken, damaged, defective or unsuited to the project and their planned function or were not delivered at all, Supplier failed to comply with its obligations to supply, package and deliver those products, as it undertook to do in the Contract. Supplier must be deemed liable to reimburse Claimant in the amount of US$ ZZZ – the sum that otherwise need not have been paid to other enterprises and that would not have been deducted from Claimant's contract with the US Main Contractor because of the higher costs paid. These costs would not have been paid if the products to be supplied

by Supplier had been correctly delivered or their broken, defective and missing parts had been promptly replaced.

[73] "Further, it appears from the many communications submitted that Supplier did not deny these events; on the contrary, it acknowledged them, taking cognizance of what was happening and evaluating what to do in order to solve the problems that had arisen. It appears that Supplier did not ignore the problems and did not deny them but always clearly faced them in order to find a solution. While this means that it did not violate good faith in the performance of contractual obligations, it does not exempt it from its responsibility for not having fully performed them.

[74] "Furthermore, Supplier never disputed that Claimant entrusted the completion of the works and the supply of goods to other enterprises in Supplier's place – rather referring to this as a fact that had certainly occurred. It dos not raise any doubts in this respect and does not contest the ensuing amount of US$ ZZZ, in respect of which proof of bank payments has been filed.

[75] "Supplier objected to Contractor's refusal to take delivery of the last shipment by container, which was rejected on arrival in New York. This conduct, however, is also due to Supplier's email of 9 March 2013, by which Supplier informed [Contractor] that it intended to suspend (to block, according to an internal email of Supplier of 11 March 2013) as of that day all projecting, manufacturing and sending activities for the various orders, including the order for the Hotel, which email gave rise to an exchange of warnings submitted in the file by both parties."

iii. Reimbursement without termination

[76] "In respect of the reimbursement of the damages suffered by Claimant, we should discuss separately the objection raised by Supplier that Contractor's request for compensation was not preceded or supported by a request to terminate the Contract.

[77] "The answer is to be found in Art. 1218 of the Civil Code, pursuant to which compensation for damages for breach [of contract] can be sought judicially, and thus also in arbitration, independent of a previous request for or the effective termination of the contract on which it is based, and thus also if termination has not been sought.

[78] "Where there is breach, the party in breach is directly responsible for the ensuing damages, in accordance with Art. 1223 CC; there is no need for a first step – the termination of the contract – because the party in breach has an immediate duty to compensate the damage it has caused.

[79] "In fact, pursuant to Art. 1453 CC, one party's failure to perform allows the other party – in contracts with mutual performances, like the one at issue – to request either performance or the termination of the contract, at its choice; compensation for damages being owed in any case.
[80] "As a consequence, as consistently held by jurisprudence, the request for compensation for damages for breach of contract is independent from the request for termination [of] or performance [under the contract] and can be made autonomously, that is, together with or separately from the request for termination, because Art. 1453 CC – saving in any case the compensation for damages – excludes that the request for damages presupposes or is conditional on a request for the termination of the contract, since the breach exists independent of a possible decision on termination (Supreme Court, 24 March 2014, no. 6886; 24 November 2010, no. 23820; 19 July 2008, no. 20067; 27 October 2006, no. 23273; 9 March 2006, no. 5100; 11 June 2004, no. 11103; and 23 July 2002, no. 10741)."

iv. Seriousness of breach
[81] "The argument raised by Supplier in respect of the effective relevance of its alleged breach remains to be discussed, based on the consideration that such breach would not justify in any case the termination of the Contract, not being a serious one.
[82] "A decision on the size, and possible seriousness, of the breach is only relevant where the termination of the contract is to be decided, an extreme conclusion to be reached only where there is a serious breach in the context of the whole of the obligations agreed by the parties. In the case at issue, however, Claimant does not seek the termination of the Contract under Arts. 1453 and 1455 CC, only seeking compensation for the damages resulting from the breach, under Arts. 1218 and 1223 CC. Hence, we do not need to evaluate the size and seriousness of Supplier's breach; it suffices that there is a breach, even if not a serious one."

b. Loss of reputation
[83] "Claimant alleges that Supplier's breach also damaged Claimant's image, and asks for adequate compensation to be quantified by the Sole Arbitrator ex aequo et bono in accordance with Art. 1226 CC.
[84] "However, Supreme Court jurisprudence holds that the damage to reputation and image must be dealt with as a damage proper; hence, the party seeking compensation must prove that the damage occurred (Supreme Court decisions, 30 September 2014, no. 20558; 24 September 2013, no 21865; 14

May 2012, no. 7471; 16 February 2012, no. 2226; 21 June 2011, no. 13614; 13 May 2011, no. 10527).

[85] "In light of this premise and on the basis of the facts as appeared in this arbitration, we do not deem that Claimant has proved this further damage to its reputation, beyond the monetary damage ascertained and acknowledged in the context of the purely contractual dispute.

[86] "If, on the one hand, Supplier's behavior in respect of the Contract – some of its aspects in particular – has been found to be a breach, this on the other hand does not lead automatically to damages to the image and reputation of Claimant.

[87] "Only the direct consequences of the contractual relationship between Contractor and Supplier – on the contractual level – are to be considered, without successive consequences that could affect Claimant's image.

[88] "This is confirmed by the fact that Contractor has not proved that its image and professional and commercial reputation were damaged in its field of business; or that the possible harm to its image led to monetary loss; or that it lost some orders because of its altered image; or that other commercial operators in Claimant's business and economic sphere of activity maneuvered to exclude it from being given supply orders on image-related grounds; or that competitors obtained an advantage over Claimant because of the worsening of its image or relied on this worsening in respect of the granting of certain work orders.

[89] "Nor did Contractor prove that any business deals that it possibly lost were the direct consequence of the damage to its image caused by Supplier, that is, no proof has been given of a link between the possible effect of the loss of an order and the cause of the worsened image.

[90] "The sole element on which Contractor relies to argue that its commercial and business image was damaged are the letters received from the US Main Contractor, asking for a prompter performance of the obligations in respect of the realization of the Hotel in New York: that is, the 'Letter of default' and the 'Delay letter' [English original].

[91] "However, these letters must be seen for what they actually are: very ordinary [letters] in the performance of a (complex) contract. As such, not only do these letters cause no loss of image but also, in this specific case, it has not been proved by Claimant that its image was effectively and concretely damaged outside the contractual relationship as a consequence of these communications.

[92] "Hence, also in accordance with the established opinion of the Supreme Court mentioned above, since Claimant did not prove an effective damage to its image and reputation and since there is no proof that this feared damage effectively and concretely led to negative economic and business consequences for Contractor, no compensation can be awarded, not even if quantified on an

equitable basis under Art. 1226 CC. Also, pursuant to [Art. 1226 CC] the amount of the damage could be quantified only if proof were successfully given that the damage effectively occurred and was the direct consequence of a loss of image caused by Supplier's breach. This is not the case."

II. COSTS

[93] "When concluding the arbitration proceeding, the Sole Arbitrator, pursuant to Art. 30.2(g) of the CAM Rules, must also decide who is to be bear the legal fees and arbitration costs and in what proportion.

[94] "The Sole Arbitrator is aware, for the purpose of allocating these amounts, of the general principle that legal fees and arbitration costs are allocated in proportion to the successfulness of the parties' claims.

[95] "In the present case it is appropriate and reasonable, in light of the conclusions reached, to allocate costs between the parties taking into account the general outcome of the arbitration, that is, the fact that some of Claimant's claims have been denied.

[96] "Hence, in light of the decision in its entirety, it is ordered that each party bear half of the costs of the arbitration and the whole of their respective legal fees.

(….)

[97] "Since it appears that Claimant has paid the entire amount of the costs of the arbitration in advance …, Supplier shall reimburse Contractor for half of that amount.

[98] "As to counsel's fees and the costs incurred by the parties in the arbitration, Claimant has declared an amount of … and Supplier has declared an amount of…. Contractor and Supplier shall each bear the costs they have incurred in their entirety."

III. AWARD

[99] "The Sole Arbitrator, on the basis of the reasons given and the conclusions reached, finally decides as follows:

(1) Preliminarily:

(a) holds and declares that the clause in Art. 12 of [the Contract] is valid and effective and admits the Request for Arbitration filed by Contractor;
(b) denies the objection of lack of territorial competence;
(c) denies the request for a declaration of litispendence/*continenza*;
(d) denies the request to suspend the present arbitration proceeding.

(2) On the merits:

(a) denies the argument that Supplier violated the principles of correct behavior and good faith under Art. 1375 CC and thus does not grant Contractor's claim for damages;
(b) holds and declares that Supplier breached [the Contract] within the meaning of Art.1218 CC;
(c) as a consequence, orders that Supplier owes the requested amount of US$ ZZZ to Contractor as compensation for the damages incurred, pursuant to Art. 1223 CC;
(d) denies Contractor's claim for damages for loss of reputation;
(e) orders that Supplier reimburse to Contractor half of the arbitration costs, which the latter paid in their entirety …;
(f) orders that Contractor and Supplier each bear the costs incurred for legal assistance in the arbitration."
(….)