IN INTERIM AWARD IN CASE NO. 9781, YCA 2005

INTERNATIONAL CHAMBER OF COMMERCE

PARTIES:
Claimant: Buyer (Italy)
Place of arbitration: Geneva, Switzerland

SUBJECT MATTERS:
- Jurisdiction

FACTS

In March of 1996, the German company D concluded a sales agreement with the Italian company C for the delivery of a waste recycling plant (the March sales agreement). The March sales agreement specified the type of plant and the guaranteed capacity. The agreement was executed in Italian and German. Both versions provided in Art. 6 that in case of a dispute arising out of the agreement, German law was applicable and, further provided for the jurisdiction of the competent courts in Germany. An offer for the recycling plant (the offer) was also drawn up by D.

The Italian financing company F intervened at C's request and with D's consent. As a consequence, in April 1996 F submitted to D its Order (the April order) for the recycling plant. In May 1996, D confirmed this order by letter (D's confirmation letter) directly to F. By a letter of the following day (referred to as the May sales agreement or May letter) F, referring expressly to the April order, provided that "in derogation to our April order and in partial modification of the same, we communicate to you the variations to bring thereto, as agreed upon with the lessee" and introduced several amendments. It also contained the following dispute settlement and applicable law clauses:

"This agreement shall be submitted in all its aspects to Italian law and it is deemed to have been concluded in Italy. All questions which might be raised relating to the construction and/or implementation of the present agreement shall be submitted to the International Chamber of Commerce of Paris."

The letter was signed "Per accettazione specifica delle presenti variazioni" by both C and D. F's signature was labeled as fornitore (supplier) and C's was labeled as conduttore (lessee).

Problems arose with respect to the recycling plant and in December of the following year, C initiated ICC arbitration against D, alleging breach of contract. D had started an arbitration against F (the D-F arbitration). D and F had agreed
upon a sole arbitrator and F had asked the ICC International Court of Arbitration (ICC Court) to extend the D-F arbitration to C, since both disputes concerned the same legal relationship. C suggested to join the two arbitrations.

D in its response, contested the existence of a valid arbitration agreement between itself and C. Subsequently D agreed to conclude an arbitration agreement with C provided, inter alia, that the arbitration be consolidated with the D-F arbitration and that the same arbitrator be appointed. The parties initially agreed to this, but subsequently withdrew their agreement. The ICC Court decided that the arbitration between C and D should proceed separately, designated Geneva as the seat of the arbitration and appointed a different sole arbitrator.

In their Terms of Reference, the parties agreed that the ICC Rules applied and where these rules were silent, the arbitration would be governed by Chapter 12 of the Swiss Private International Law Act (PILA). The Terms of Reference also provided that the arbitrator would first decide in an interim award on jurisdiction and the applicable law to the merits of the case.

The sole arbitrator held that the arbitration agreement was valid as to form and substance and superseded the jurisdiction clause contained in the March sales agreement. He concluded that he did have jurisdiction and that the United Nations Sales Convention 1980 applied to the parties' agreement. With respect to the validity of the arbitration agreement, the arbitrator first determined that Art. 178 of the Swiss Private International Law Act applied to this question. The arbitration agreement was concluded in a valid form as both D and C had signed F's May letter "for specific acceptance". The substantive validity was examined under Italian law, as the law governing the object of the dispute. The sole arbitrator rejected D's argument that C did not have capacity to enter into the arbitration agreement as it had only signed the May letter in its sole capacity as lessee. The sole arbitrator examined this question from the point of view of whether C had acted as an agent for F or had signed in its own capacity, finding that C had signed in its own name and on its own behalf. The sole arbitrator further held that the May sales agreement entirely replaced the March sales agreement and that the arbitration clause in the May sales agreement was the only existing jurisdiction clause binding the parties.

Claimant argued that Italian law, rather than the CISG, applied to the agreement, as the contract was a procurement contract (a contratto d'appalto) as characterized under Italian law, rather than a sales contract, as argued by the defendant. The sole arbitrator reasoned that Germany and Italy were both parties to the CISG and that the contract was to be characterised under the Convention which provided a uniform substantive rule for the characterisation of the contract. Moreover, the place of business of the parties were in different States which satisfied the basic criterion of Art. 1(1) of the Convention. Because only five to seven per cent of the contract price related to services, rather than the supply of goods, this was not sufficient to bring the contract outside the scope of the Convention. Nor had the parties opted out of the application of the Convention as the clause in the contract stating that the agreement was deemed to be made in Italy could not be construed as an exclusion clause.

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10” *In the opinion of the Tribunal, the issue at stake is actually foreign to the reasoning recalled above. In the present discussion on the validity of the arbitration clause, the only question to examine is clearly to know whether C signed the agreement and the arbitration clause contained therein in its own name and on its own behalf, or conversely, in F's name and on the latter's behalf. In this case indeed (and in this case only), C would clearly not be bound to the May sales agreement or to the arbitration clause. As set out in Art. 1388 of the Italian Civil Code (CCIt) indeed:

‘Il contratto concluso dal rappresentante in nome e nell'interesse del rappresentato, nei limiti delle facoltà conferitigli, produce direttamente effetto nei confronti del rappresentato.’

Translation: 'The agreement concluded by the agent in the name and on behalf of the principal, within the limits of the powers conferred to it, produces effects directly to the principal.'
Pursuant to Italian case law:

‘La contemplatio domini, necessaria perché il contratto concluso dal mandatario produca effetti nei confronti del mandante, non richiede formule solenni, né deve risultare espressamente dal contratto, essendo sufficiente, perché si realizi, che il rappresentante abbia reso noto all'altro contraente, in modo esplicito e non equivoco, che egli intende agire, oltre che nell'interesse, anche nel nome di altro soggetto.’

Translation: ‘The contemplatio domini, necessary for the contract concluded by the agent to produce effect towards the principal, [requires] neither ... formal declarations, nor must result expressly from the contract, it being sufficient, for it to be achieved, that the agent ha[s] brought to the other contracting party's knowledge in explicit and unambiguous terms that it intends to act in the interest as well as in the name of the other individual.’

In other words, Italian law admits that an agency relationship may be inferred from any circumstances showing that the agent has made known to the contracting party expressly and unequivocally that the contract it executed was not binding upon itself but upon other persons.

11” "Now, not only does D not raise such an argument, but moreover it clearly states that C signed the agreement in its capacity as lessee, and lessee only. Thus D does not allege that it ever considered that C signed the agreement in the name and on behalf of F. C does not allege it either.

12” "The conclusion to be drawn from the above is simple: C signed the May sales agreement in its own name and on its own behalf, and thus the arbitration clause contained therein is valid and binding upon the parties, D on the one side, and C on the other side.

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17” "In this respect, the Italian applicable law provides that the first rule to be complied with is the literal method. As set forth by legal writers:

‘Il giudice si dovrà limitare all'esame del senso letterale delle parole in quanto 1a comune volontà delle parti emerga in modo certo e immediato dalle espressioni adoperate, di modo che l'elemento letterale assorba ed esaurisca ogni altro criterio di interpretazione.’

Translation: ‘The judge must limit himself to the examination of the literal meaning of the words inasmuch as the common intent of the parties results from the wording used in a certain and immediate way so that the literal element integrates and exhausts any other criterion of interpretation.’

Only where there is some ambiguity or doubt left, Art. 1362 CCIt will apply, pursuant to which:

‘Nell'interpretare il contratto si deve indagare quale sia stata la comune intenzione delle parti e non limitarsi al senso letterale delle parole.

Per determinare la comune intenzione delle parti, si deve valutare il loro comportamento complessivo anche posteriore alla conclusione del contratto.’
Translation: 'In interpreting the contract, one ha[s] to enquire on the common intent of the parties and not limit oneself to the literal sense of the words.

For determining the common intent of the parties, one must estimate their behaviour as a whole also after the execution of the contract.'

When examining the wording of the May sales agreement, one notes:

i° that it expressly integrates F’s April order, in partial modification thereof and in express agreement with the lessee, C;

ii° that it expressly refers to the description of the goods (descrizione dei beni) as set out in the March offer.

18° "There is therefore, in the opinion of the Tribunal, little room left for interpretation: the parties to the May sales agreement, i.e., as set out above, F, D and C whatever the rights of which of them can be as a result therefrom, intended to:

i° integrate, hence hold as contractually binding upon all the three parties concerned the description of goods as per D's March offer;

ii° integrate, hence hold as contractually binding upon all three parties concerned the F’s April order;

iii° modify these orders, as the case might be, in the clear and unambiguous wording of the May sales agreement.

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9° Cass. 96/ 2372; 80/ 4864; 75/ 1314."

10° Cian Trabucchi, Commentario breve al Codice Civile (CEDAM, Milano 1997) Art. 1362, Note III with reference to stable case law."

Referring Principles:

IV.5.1 - Intentions of the parties