Title:
ICC Award No. 10329, YCA 2004, at 108 et seq.

Table of Contents:
Facts
Excerpt
I. Preliminary Issues
   1. Arbitration Proceedings to Be Limited to the Preliminary Issues
   2. Existence and Validity of the Arbitration Agreement
      a. Existence of a contract between the parties
      b. Signatory Powers of claimant's representatives
      c. Enforceable arbitral award
III. Partial Arbitral Award On the Preliminary Issues
   1. Substantive Issues
      a. Applicable law
      b. Non-performance of the contract by respondent
      c. Claimant's claim for damages; amount of damages
      d. Interest
   4. Cost of the Arbitration and Legal Costs

Content:

Page: 108

Facts

S, as buyer, approached D, as seller for the purchase of a quantity of an industrial product. On 18 August, D confirmed by fax to S, the sale of a quantity of the product, according to the specifications and conditions mentioned in the fax. The stipulated condition of payment was "by irrevocable L/C at 90 days B/L date". Mr. M, on behalf of D, also stated in the fax that "our official order confirmation will follow shortly". Mr. A, president of S, wrote by hand on the fax, under the payment conditions "E. O. remissa diretta" [sic] (translation: "and/or directly payment 90 days"), countersigned the fax and sent it back to D on 18 August or shortly after that date. On 21 August, Mr. M of seller D faxed S a contract in the form of an "Order Confirmation" for the specified quantity of the product, asking S to send it back "duly countersigned for acceptance". The Order Confirmation provided for a letter of credit as a condition of payment as follows:

Page: 109

"by irrevocable letter of credit payable at 90 days from B/L date to be advised on [the bank] opened in favour of: D L/C to be opened by 14 September and to be payable against presentation of the following documents"

The Order Confirmation (also sometimes referred to by the parties as the contract) was dated 20 August and signed for D by Mr. K. The Order Confirmation was returned on or after 21 August, countersigned by the president of S, Mr. A, who had signed above the words "for acceptance". His signature was also on the other pages of the contract, together with the corporate stamp.

On 9 September, Mr. P, on behalf of D, sent by courier two originals of the contract that had been previously faxed, inviting S to "revert with one duly countersigned original for our reference". On 13 October, S's legal counsel wrote to D stating that the offer for the supply of the goods had been modified in respect of the condition of payment which, therefore, under Italian law, was to be considered as a new offer to which his client had not agreed. On 14 October, D informed S by fax that the goods were ready at the port of loading and were to be shipped the second half of October and on 16 October, D's legal counsel wrote to S, asking S to confirm that it was ready to perform its obligations under the contract. On 26 October, D's lawyers informed S that D was taking measures to mitigate its loss as a result of S having failed to take delivery of the goods and on 18 November, D sold the goods to a Filipino client at a reduced price.
Early the following year, D filed a request with the ICC for arbitration, relying on the arbitration clause in the contract which provided for ICC arbitration in Geneva. S contested the validity of the contract containing the arbitration clause and requested that the sole arbitrator render a preliminary award holding, inter alia, “that there was no binding arbitration agreement.

The sole arbitrator in his Procedural Order No. 2, decided that the further examination of the case would not be limited to the preliminary issues. The sole arbitrator dealt first with the question of the existence of a valid arbitration agreement. S had argued that it had never entered into a contract with D. The sole arbitrator applied the conflict rules of Art. 178(2) of the Swiss Private International Law Act (PILA) and found that in this case it would suffice for the substantive validity of the arbitration agreement that it conformed to Swiss law. However, S’s only argument relating to the substantive validity of the arbitration agreement was that the parties had not agreed on the method of payment. This question, in the view of the arbitrator, did not affect the validity of the arbitration agreement and only should be examined with the merits of the case. According to Art. 178(1) PILA which sets out the formal requirements for an arbitration agreement, a valid arbitration agreement resulted, on the one hand, from the fax sent on 21 August by D to S, to which the “Order Confirmation” containing an arbitration clause was attached as confirmation of a buying order made by S on 18 August and, on the other hand, from the fact that the 21 August fax was returned signed by S. S had also argued that Mr. K did not have the power to bind D. According to the applicable law, which was Swiss law since D had its seat in Switzerland, even if an unauthorized agent had signed the contract, D had at least implicitly ratified the contract, in particular, by seeking its performance. The sole arbitrator also rejected S’s argument that die award would be unenforceable under the 1958 New York Convention following the reasoning of “die majority of legal scholars and the Swiss Supreme Court” that Art. H(2) of die Convention must be interpreted in relation to Art. 7(2) of the UNCITRAL Model Law on International Commercial Arbitration and that “the formal requirements of die [1958 New York Convention] match up” with Art. 178(1) PILA which was inspired by the UNCITRAL Model Law.

The contract provided that it was governed by die laws of Switzerland which resulted in die application of die 1980 United Nations Convention on Contracts for die International Sale of Goods (CISG) and die application of die Swiss Code of Obligations for all matters not covered by die CISG. Applying die CISG, die sole arbitrator rejected S’s argument that there was no binding contract between the parties because S had not signed and returned die original contract. This was because die contract's validity was not contingent on the use of the written form. The sole arbitrator accepted S’s argument that initially no contract had been made between the parties because they had not agreed on a material term, the method of payment. However, by then signing above the words "for acceptance", and sending the contract back to D, S had accepted the terms of the contract. S also argued that A had signed without reading the contents in the belief that the contract had been altered to comply with his payment requirements. The sole arbitrator accepted that A had signed the contract in error and that S would not be bound by the contract which it had entered into under a "material mistake". However, since the error was due to A’s negligence, S was bound to compensate for the resulting damage. Damages were awarded to D for the price difference resulting from the sale of the goods to the Filipino buyer.

Excerpt

I. Preliminary Issues

1. Arbitration Proceedings to Be Limited to the Preliminary Issues

1””Respondent had requested at the outset of this arbitration that the proceedings be limited to the examination of preliminary issues that should be disposed by way of a partial award. In Procedural Order No. 2 the arbitrator dealt with these procedural questions and answered negatively for the first part thereof, while reserving his decision as for the second part.”

2. Existence and Validity of the Arbitration Agreement

2””Respondent's submissions in this respect are threefold: first of all, respondent submits that a contract has never been
entered into between the parties; secondly, it argues that claimant's representatives who intervened in this matter and eventually sent documents to respondent had no valid powers to bind their principal, i.e., claimant; thirdly, respondent submits that in case the arbitrator would retain jurisdiction over the matter, an arbitral award would not be enforceable due to the lack of a valid arbitration clause by application of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards signed in New York (USA) on 10 June 1958 (hereinafter referred to as the New York Convention)." (…)

a. Existence of a contract between the parties

3" Respondent explains that, as a matter of fact, it returned by fax claimant's fax of 18 August whereby it had expressed the will to have the 'E/0 remissa diretta' payment clause inserted in the Contract and, also by fax, the 20 August 'order confirmation' without understanding it but with its signature.

4" Respondent also points out that no letter of credit has ever been opened by 14 September according to the terms of the Contract, which did not prompt any reaction from claimant thereon. Respondent concludes on the basis of these factual elements, together with the additional fact that it did not return duly signed the original Contract received from claimant by courier of 9 September, that no contract has ever been entered into between the parties and, as a result, no arbitration agreement was ever agreed upon.

5" As a matter of law, respondent submits that no agreement was reached on the essential elements of the Contract according to Art. 1 of the Swiss Code of Obligations (hereinafter referred to as CO), in particular as regards payment of the goods to be delivered. Claimant opposes to respondent the contents of Art. 178(3) of the Swiss Federal Private International Law Act (hereinafter referred to as the PILA) which provides, inter alia, that the validity of an arbitration agreement cannot be contested on the ground that the main contract may not be valid. Pointing out that such provision establishes the well-known principle of severability of the arbitration agreement, claimant submits that respondent has not any of the possible exceptions to such principle such as a party's incapacity or the fact that the agreement has been signed under duress.

6" On the merits, claimant acknowledges that respondent did not return the Contract received by courier duly countersigned, but stresses that this very same document was previously forwarded by fax from respondent to claimant. Claimant also adds that after the receipt of the Contract in original, respondent did not express any disagreement as to its contents until it was informed by claimant, on 14 October, that the goods were ready for shipment.

7" As a matter of law, claimant, relying on the United Nations Convention on Contracts for the International Sale of Goods signed in Vienna (Austria) on 11 April 1980 (hereinafter referred to as the Vienna Convention or CISG) which it considers being applicable in the instant case, argues that its own fax of 18 August was a 'proposal for concluding' within the meaning of Art. 14 CISG. Such an offer was not altered by the handwritten note (E/0 remissa diretta) of Mr. A because it contained the alternative 'and/or', thus falling under Art. 19(2) CISG. Claimant adds that in any event the 'order confirmation' may be considered as a new offer subsequent to previous telephone conversations and correspondence between the parties that confirmed their agreement on all essential points of the transaction.

8" It also states that the Contract was returned - at least by fax - by respondent, signed on all pages and concludes that such agreement was final and binding upon the parties when received by claimant, pursuant to Arts. 18 and 23 CISG.

9" On the issue of whether respondent had real intent to be bound by the Contract - as it did not return the originals - claimant, relying on Arts. 1 and 2 CO and related case law, submits that, to the contrary, the parties had indeed reached mutual assent on all essential terms of the transaction and, in particular, it was the parties' discernible intent to be legally bound by the exchange of faxes which took place on or around 18 August.
Prior to the examination of the issue of the existence of an arbitration agreement binding on the parties, the arbitrator shall determine the law applicable to said agreement. In August, at the time of the drafting of the arbitration clause contained in the 'order confirmation', respondent had its domicile outside Switzerland. Moreover, the place of the arbitration is Geneva. The prerequisites of Art. 176(1) of the PILA are therefore met. As a result, the provisions of Chapter 12 of said statute do apply in the instant case. It is also to be noted that the parties had agreed in the Terms of Reference to refer the matter to those of the provisions of the PILA that are mandatory.

Art. 178(2) of the PILA provides that an arbitration agreement is valid, as regards its substance, if it conforms either to the law chosen by the parties, or to the law governing the subject-matter of the dispute, in particular the law governing the main contract, or if it conforms to Swiss law. Such a provision sets out connecting factors between which [there] does not exist any hierarchy; it suffices that the arbitration agreement be valid, in respect of its substance, under one of these three laws. The conflict of law rule stated in Art. 178(2) of the PILA aims at ensuring the validity of the arbitration agreement (in Javorem validitatis) and avoiding to the extent possible disputes that may arise in this respect. [Here] it suffices therefore for the arbitration agreement to be valid on the substance that it conform to Swiss law.

The issue of the existence of the arbitration agreement, as raised by respondent, pertains to the substantive validity (validité matérielle) of the arbitration agreement pursuant to Art. 178(2) of the PILA.

However, Art. 178(2) does not list matters that are governed by the substantive law. The substantive law questions relating to an arbitration agreement include for example issues relating to the valid conclusion of the arbitration agreement, in particular the mechanism of conclusion of contract: offer and acceptation, time and moment for a contract to be perfected as well as all what may affect the parties' mutual assent (error, fraud, duress, etc.) and the consequences thereof.

In the present case, respondent does not argue that the arbitration agreement, in respect of its essential elements, was subject to any lack of mutual assent from the parties. It simply says that it was not discussed between them. Respondent only submits that the parties did not reach an agreement as to the payment of the goods to be supplied. The arbitrator considers therefore that this particular issue does not affect the validity of the arbitration agreement and only needs to be examined with the merits of the case.

Anyhow should the arbitrator declare, on the merits, that there is no contract binding on the parties this would not necessarily cause the invalidity of the arbitration agreement by virtue of Art. 178(3) of the PILA which affirms the well internationally established principle of 'severability' or 'separability' of die arbitration agreement; this would be particularly true in this matter should the arbitrator state, as example, a lack of the parties’ mutual assent limited to the payment clause of the Contract.

Respondent still submits that the Contract was signed by error. However like above, respondent does not claim that such error was affecting one of the essential elements constituting the arbitration clause. Finally, it is worth noting that respondent does not argue that the arbitration agreement would have been made under duress pursuant to Art. 29 CO which, the case may be, might have affected its validity if proven.

Furthermore, respondent submits that the 'order confirmation' contained a specific provision (Sect. 17) providing for the agreement to be made in 'two originals'. According to respondent, since die agreement sent by DHL was not returned duly countersigned there had been no agreement between die parties and, as a result, no arbitration agreement was validly existing between them. According to respondent not only no original document was returned by respondent to claimant but also no original signatures were ever affixed by respondent on dieose documents.

As a matter of law, respondent relies on Art. 16(1) CO which provides that where the parties have decided to use a special form there is a presumption that they shall not be bound until such special form is complied with. Respondent raises therefore the issue of formal validity (validitéformelle) of the arbitration agreement. The seat of this Arbital Tribunal being in Switzerland and
at least one of the parties having been domiciled [at the time of the transaction] outside Switzerland, the **PILA** is applicable pursuant to its Art. 176(1).

19**Such validity is governed by Art. 178(1) of the **PILA** which provides that an arbitration agreement is valid if made in writing, by telegram, telex, telescopier or any other means of communication which permits it to be evidenced by a text. Art. 178(1) sets forth one of the five prerequisites for an arbitration agreement to be valid.** 18 Art. 178(1) of the **PILA** does not appear very restricting as to the requirements of form: not only such provision of law does not require the written form as meaning a document signed by all parties concerned (Art. 13 **CO**),** 19 but it is also satisfied with a commitment, even not signed, set out on a medium that may be reproduced in writing and which states the mutual assent of the parties on its contents.** 20 This may be, for example, an exchange of facsimiles or by any other means which provide a record of such mutual assent.** 21

20**In the instant case one can easily state that an arbitration agreement results (i) from the fax sent out by claimant to respondent on 21 August to which the 'order confirmation' was attached and which reproduced the text of said arbitration agreement, as confirmation of a buying order made by respondent on 18 August 1998, and (ii) from the fact that said fax was then returned by respondent to claimant, bearing its signature above the terms 'for acceptance'. In so far as respondent did not allege that there was a lack of mutual assent on the arbitration clause, the requirements of Art. 178(1) of the **PILA** are met. The agreement of the parties results therefore from this exchange of facsimiles and related text and signature. It does not matter that respondent did not return duly countersigned the 'original' contract attached to claimant's letter of 9 September couriered to respondent which, in any case, was nothing but the 'order confirmation referred to above, to be forwarded again to claimant for its 'reference' only.

21**In view of the considerations made above, the arbitrator considers that there exists a valid arbitration agreement between the parties.”

b. Signatory Powers of claimant’s representatives

22**Respondent submits that Mr. K who had signed the 'order confirmation' dated 20 August had no power to bind claimant - at least alone - since, at the time, he was neither member of the Board of Directors nor was duly authorized to represent the company, whether collectively or not. Likewise, respondent submits that Mr. M, who had signed the fax sent on behalf of claimant on 18 August confirming the transaction between the parties, had no authority to represent this company. Respondent concludes therefore that the Contract was not validly signed by claimant. Respondent also dismisses the ratification of Mr. K's signature by claimant which had submitted in the present arbitration a decision of the Board of Directors stating that its representative was duly authorized to sign the 'order confirmation' and ratifying, if need be, this document. Claimant's ratification of the Contract more than one year after is not acceptable under these circumstances according to respondent who concludes that no contract and, in particular, no arbitration clause was validly signed.

23**Respondent raises here again the formal validity of the Contract which directly affects the validity of the arbitration agreement and, thus, needs to be examined now.** 22 The preliminary question is to determine the law applicable to that issue. Chapter XII of the **PILA** does not expressly provide the issue of the law applicable to the representation powers necessary to enter into an arbitration agreement. According to case law and the majority doctrine cited by one of the leading legal scholars,** 23 the powers to represent a moral person are governed by the law applicable to such person, namely the law of its seat according to the general rule set forth by Art. 1SS lit. i of the **PILA**.** 24 Consequently, such issue is governed by Swiss law as claimant has its seat in Switzerland. It is worth mentioning in passing that the parties, in their respective pleadings, have argued this issue in application to that law.

24**Claimant argues that Mr. K was 'internally' authorized to sign alone the 'order confirmation' and responds to respondent's argument that the latter fails to appreciate the law of agency which protects bona fide third parties against the refusal by the represented entity to be bound by the contract and not to allow said third parties to withdraw from the contract. Claimant also explains that Arts. 718 et seq. **CO** protect third parties because whenever a person registered in
the Trade Register signs on behalf of a company that company may not claim that such person was not empowered to do so; a company may empower any other persons not registered in the Trade Registry to sign on its behalf pursuant to Arts. 32 et seq. CO as this is a common practice, claimant explains.

25"According to respondent Messrs K and M have not been empowered by the Board of Directors to represent the company - at least alone - within the meaning of Art. 720 CO according to the records of the Trade Registry submitted by claimant. Moreover respondent is of the view that claimant may not be left with the choice to decide at its sole option whether or not, in the particular case, it was bound by the sole signature of Mr. K.

26"As a matter of fact it flows, indeed, from the extract of the Trade Registry submitted by claimant that Mr. K, as company manager (direttore) - and not 'director' within the meaning of Swiss law - had the power to represent claimant under his signature, but only together with the signature of the Chairman (presidente) or a substitute (delegato), whilst regarding Mr. M the latter had no authority at all to represent the company if one considers the records of the Trade Registry in this respect. Mr. K explained during his testimony that this is claimant's internal policy for one representative to sign alone if the other is prevented to do so, for instance when traveling, as regards collective signatories.

27"On this second factual element internal arrangements between claimant and its employees have no effect vis-à-vis bona fide third parties unless such arrangements are brought to the attention of these third parties, pursuant to the analogical application of Art. 933(2) CO. It does not seem that such arrangement, if made in this case, was communicated to respondent.

28"It is to be considered from the evidence submitted, that Mr. K had no powers to sign alone, but instead, collectively. Limitation was therefore made as to his mode of representation of the company, although, from the reading of the Trade Registry, Mr. K's authority to do in the company's name all acts which the company's object may entail was not altered pursuant to Art. 718a CO - The mode of representation as determined by the contract, the By-laws or the Trade Registry does not exclude the agency within the meaning of Arts. 32 et seq. It is necessary to take into account the circumstances of the case and to put emphasis on the safety of the business transactions (principle of sécurité des transactions). Furthermore when signing a contract, a company may also give a power of attorney to a third party; it is not obliged to be represented by individuals registered at the Trade Registry to this effect.

29"Given the nature of the business transaction in this matter, namely a straightforward international sale of goods transaction, and the need to secure business transactions for the safe functioning of the trade against too stringent formalities, the arbitrator is of the opinion to apply the principle mentioned above. This issue shall therefore be examined in accordance with Arts. 32 et seq. CO. In order to bind the principal, the agent must have been authorized by the latter to act on its behalf pursuant to Art. 32(1). In this case it is beyond doubt that claimant had the intent to be bound by Mr. K; however formally speaking, the latter had no ... single formal power of attorney to that effect. Respondent may be entitled in law to consider that it was not bound by contract. However it is necessary to examine the possible ratification of the contract as alleged by claimant but disputed by respondent.

30"As a matter of law Art. 38(1) CO provides that where an unauthorized person has entered into a contract purporting to act as agent, the alleged principal acquires no rights nor incurs obligations until he ratifies the contract. Such ratification is not submitted to any specific form; it may be implicit or result from conclusive acts (actes concluants) or may even result from the passivity or the silence of the third person on behalf of which a contract was made; from this viewpoint, the behaviour of that person shall be examined, as if a bona fide man would have been entitled to do it. The contract is deemed ratified for instance when such third person has, later on, performed itself the contract.

31"In the instant matter, the arbitrator is of the view that claimant has - at least-implicitly, if not by conclusive acts, ratified the Contract. In effect, it may be considered that, by 16 October at the very latest, claimant had ratified the Contract when, through its lawyers whose authority is not questioned, it had sought performance of the contract in granting respondent a certain time-limit to perform its own obligations.

32"Anyhow under the circumstances claimant had no real reason to expressly ratify such contract as respondent had not, at that time, put into question the validity of the signature of claimant's representatives. It is worth noting that such
issue was raised only during this arbitration and that respondent did not request earlier from claimant whether it was ratifying the contract pursuant to Art. 38(2) CO. Finally, formal ratification of the Contract by claimant that occurred on IS October [of the following year] can also be considered as valid, notwithstanding respondent's opinion to contrary, since the right of ratification is not contingent upon any time-limit. Accordingly, respondent's argument that it had not been bound by contract with claimant for the ground discussed above is rejected."

c. Enforceable arbitral award

Respondent still submits that should ... the arbitrator retain jurisdiction over the matter, the ensuing award would not be capable of enforcement pursuant to the New York Convention. Whilst exchange of facsimiles containing an arbitration agreement constitutes a valid arbitration clause pursuant to the PILA, the New York Convention has other prerequisites that are more strict, in respondent's view. Respondent explains that the application of the New York Convention to this matter should lead to conclude that no arbitration agreement has been validly made considering the absence of original signature on any document.

As a matter of law, respondent opposes the requirements for the formal validity of the arbitration agreement of Art. II of the New York Convention to those provided for by Art. 187(1) of the PILA. This raises the issue of the relationship between these two provisions and whether one prevails over the other. For the majority of legal scholars and the Swiss Supreme Court, Art. II (2) of the New York Convention must be interpreted in relation to the Model Law of the United Nations Commission on International Trade Law (UNCITRAL) on International Commercial Arbitration (hereinafter referred to as the UNCITRAL Model Law) which provides in its Art. 7(2) in initio that the arbitration agreement shall be in writing and that an agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement. For the Swiss Supreme Court and the majority doctrine, Art. 178(1) of the PILA is clearly inspired from such formula that took into account the development of modern means of telecommunication and which should also assist in the interpretation of Art. 11(2) of the New York Convention; on this basis, these authors and the Swiss Supreme Court express the view that the formal requirements of this Convention match up with those of the PILA. Given the circumstance of the case, the arbitrator considers that there is not reason to depart from this legal view in this matter.

Those formal requirements having been already examined above within the framework of Art. 178(1) of the PILA, there is therefore no need to examine them again under the light of Art. H(2) of the New York Convention. In any case, should this issue be examined under Art. H(2) of the New York Convention the same conclusion would be reached. This legal provision distinguishes two hypotheses: the first where an agreement was made in writing and signed by the parties, the second, that results from an exchange of letters or telegrams to which similar means of communications may be associated which, by essence, do not necessarily imply the parties' signatures. In this matter, the facts of the case correspond to the second hypothesis: an 'exchange' of documents - in fact the same document - took place, respondent having returned 'accepted' claimant's fax that evidenced, at least, the agreement of the parties on the arbitration agreement and its contents. In view of the above, respondent's last objection is rejected and the arbitrator declares having jurisdiction to settle the present dispute."

III. Partial Arbitral Award On the Preliminary Issues

Apart from having requested that the examination of this matter be limited to preliminary issues, respondent also requested the rendering of a decision under the form of a partial/interim award limited to said issues. The arbitrator does not see any need to render a partial award in so far as the disposal of the case on the merits does not justify further delay, given the substantive issues that appear to be straightforward and ready for decision. Furthermore, the arbitrator's reasons set out in Procedural Order No. 2 shall also apply here mutatis mutandis. Consequently, the arbitrator shall now examine the matter on the substance. Prior to deciding on whether there has been a contract between the parties, the arbitrator shall preliminarily examine which law shall govern this issue."

Page 122

Page 123

Page 124
1. Substantive Issues

a. Applicable law

37™ Respondent argues that no agreement was reached by the parties as the essential elements of the Contract were not agreed upon by application of Swiss law (Art. 1 CO). Claimant, referring to Sect. IS of the Contract, submits that the formation, validity, construction and performance of the contract are governed by Swiss law. But it also adds that the United Nations Convention on Contracts for International Sale of Goods signed in Vienna on 11 April 1980 (hereinafter referred to as the Vienna Convention or CISG) is applicable in this instant matter given the nature of the business transaction, the “origin of the parties and according to the well-established principle pursuant to which an international treaty such as the CISG is applicable to all disputes governed by Swiss law in so far as the parties have not explicitly opted it out.

38™ The Vienna Convention applies, inter alia, to contracts of sale of goods between parties whose place[s] of business are in different States that are Contracting States pursuant to Art. 1(a) CISG. With the entry into force of the Vienna Convention in Switzerland, international sale of goods regulations have been modified in that country: the Vienna Convention has become the main legal reference, the Swiss Code of Obligations having only kept a limited role in this context; hence, when a contract is entered into between a party established in Switzerland and the other in another Contracting State, the Vienna Convention applies as international convention.43 However, Art. 6 CISG provides, inter alia, that the parties may exclude the application of the Vienna Convention; such exclusion may be made either expressly or implicitly.44

39™ In this matter, the parties have their respective place of business in the Contracting States, i.e., Switzerland for claimant and Italy for respondent. It is also not disputed that the business transaction involved may be characterized as a sale of goods contract; in addition, this matter does not fall within the categories that are excluded from the scope of the Vienna Convention (Art. 2 CISG).45

40™ However, it must be stated that Sect. 15 of the Contract - for which respondent has not submitted that it may have been subject to any lack of parties' mutual assent - provides that 'the formation, validity, construction and performance of this contract are governed by the laws of Switzerland'.

41™ The issue is to determine therefore whether such contractual provision providing for the application of the law of one of the Contracting State[s] may be considered, within the meaning of Art. 6 CISG mentioned above, as referring the matter to the domestic law of that State, namely the Swiss Code of Obligations or the specific legal prescriptions governing international sales, i.e., the CISG that is part of Swiss law.46 In order to determine the meaning of this choice of law clause, it is necessary to ascertain the intent of the parties according to the provisions of Art. 8 CISG.47 48 In so far as such intent may be found.

b. Non-performance of the contract by respondent

44™ Respondent justifies the non performance of the Contract because:
- the contract was not binding in view of the absence of an original contract signed by respondent; - claimant's representatives did not have any authority to sign the Contract; - the parties' agreement on essential terms of the Contract was lacking; - respondent signed the Contract by error.

45"Respondent points out the contents of Sect. 17 of the Contract which provides, among others, that 'this contract has been drawn in English language in two originals'. Since it did not return to claimant the original contract duly signed, respondent considers that there is no contract binding between the parties. The arbitrator considers that respondent interprets Sect. 17 of the Contract as making its validity contingent upon the use of the written form.

46"Art. 11 CISG provides that a contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirement as to form.

Hence, the Vienna Convention does not submit sale of goods contracts to any particular form; such a provision only governs the offer and the acceptance, according to the aim of the Convention as defined in Art. 4 CISG, first sentence.

47"According to Art. 16(1) CO where the parties to a contract for which the law requires no special form have stipulated to use a special form, there is a presumption that they shall not be bound until the special form is complied with. Such a reservation is valid only if made prior to the entering into the contract. No such reservation may be found in the instant matter. From claimant's witnesses' deposition, it results - to the contrary - that claimant which drafted the Contract wanted to be bound by contract as soon as an agreement was to be reached by fax, without waiting for respondent's signature and the receipt of the original documents that, according to claimant are in practice often not returned by counterparts.

48"Such statements are consistent with the fact that claimant's courier of 9 September 1998 - to which the original contracts were attached for signature and return - was sent 'for [its] reference' only. Moreover, respondent has never alleged having made the reservation referred to above.

49"Accordingly, respondent has not demonstrated that the validity of the contract at stake was dependent upon the compliance of the written form. The related objection is therefore rejected.

50"The issue of the alleged lack of authority of claimant's representatives to bind their principal has been examined at length in respect of the validity of the arbitration agreement. The disposal of said issue applies mutatis mutandis for the contract as regards its substantive part. Further developments are therefore not necessary. To sum up, it suffices to say that all communications sent by claimant's representatives to respondent should be considered as having been ratified by claimant.

51"As already seen, respondent argues that no contract has been made between the parties because an agreement on essential terms of the Contract was lacking. As a matter of fact, such a disagreement is limited to payment. Respondent does not claim that other elements of the Contract were subject to disagreement between the parties. It is therefore necessary to analyse now in detail how, and if ever, a contract was entered into between them by application of the Vienna Convention.

52"Claimant's fax of 18 August to respondent can be considered as an offer within the meaning of Art. 14(1) CISG, namely a proposal indicating the goods and making provisions for determining the quantity and the price. Such fax was returned back by respondent duly countersigned with the mention 'E/O R.D. 90 DS' (and/or direct payment 90 days) next to the term 'Payment' without it being precisely clear when it was exactly returned to claimant.

53"Contrary to claimant's view, the arbitrator considers that the payment element was not an 'ancillary point', when considering the following. Art. 19(1) CISG provides that a reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer. Art. 19(2) CISG, however, sets forth that a reply to an offer which purports to be an acceptance but contains 'additional or different terms which do not materially alter the terms of the offer' constitutes an acceptance unless objection of the offeror to the
discrepancy. Additional or different terms relating among other things to 'payment' are considered 'to alter the terms of the offer materially' according to Art. 19(3) CISG.

54° "In the arbitrator's view, the terms 'E/O R.D. 90 DS' added by respondent under the payment condition on claimant's fax of 18 August did alter the offer because it is understood from respondent's President's oral statement, that he made it clear, at least initially, that he did not want to have the letter of credit as sole means of payment. Therefore, respondent's reply to claimant's fax of 18 August cannot be considered as an acceptance within the meaning of the above-mentioned provisions.

55° Later on claimant, 'following [its] previous fax dated 18 Aug. and [its] previous phone-conv', sent the Contract by fax of 21 August to respondent, asking the latter to 'sign it and send back to [respondent] duly countersigned for acceptance'. The contract attached to that fax - and dated 20 August - did not reproduce respondent's alteration. To the contrary, payment by letter of credit was maintained.

56° Asked by counsel for respondent why such a different term had not been taken into account in the Contract, the witness M explained during the Oral Hearing that he had advised respondent that it was not possible for claimant to accept payment without a letter of credit for guarantee's reasons, but that he would nevertheless see with claimant's insurance department whether other payment arrangements would be possible for future transactions.

Page: 129

57° Asked by counsel for claimant what were the contents of the telephone conversation referred to in claimant's fax of 21 August, Mr. M testified that he had explained to respondent that it was not possible to have payment without a letter of credit and respondent acknowledged that fact. Such a testimony is consistent with the contents of claimant's fax of 21 August and the fact that respondent did return the Contract duly countersigned, without any new material alteration.

58° As a matter of law the arbitrator considers, under those circumstances, that claimant renewed its offer pursuant to Art. 14(1) CISG. The sending back of the Contract by fax by respondent to claimant - whatever the date may be - bearing the respondent's signature above the terms 'for acceptance' must be considered as an acceptance within the meaning of Art. 18(1) CISG. Such acceptance became effective at the moment it reached claimant pursuant to Art. 18(2) CISG, that is on or shortly after 21 August. Immaterial is the fact that, later, claimant did not react to the non-opening of the letter of credit. The arbitrator reaches therefore the conclusion that the parties were bound by the Contract dated 20 August.

59° Credit must be granted to the oral statement of respondent's President, Mr. A, who explained during the Oral Hearing that he had signed the 21 August Contract without reading its contents, but on the firm belief that the alteration had made on the 18 August offer had been actually accepted by claimant. It may well be that Mr. A misinterpreted the contents of the telephone conversations held with claimant's representatives.

60° In view of the above, the arbitrator understands that respondent signed the Contract by error: its President actually thought that claimant had finally agreed not to have payment by letter of credit only, whilst this was the sole means of payment finally retained in the Contract. As a matter of law, the arbitrator is bound to conclude that the parties were indeed lacking mutual assent as regards payment of the goods to be sold.

61° Since the Vienna Convention does not regulate legal issues pertaining to the lack of mutual assent, Arts. 23 et seq. CO must be examined. Art. 23 CO provides that a party is not bound by contract if it entered into the contract under a 'material mistake'. The mistake is 'material' when, inter alia, the mistaken party undertook an essentially greater consideration or accepted an essentially smaller one than was its intention pursuant to Art. 24(1)(iv) CO, which sets out a non-exclusive list of instances where the mistake is to be considered 'material'.

Page: 130

62° This is the arbitrator's opinion that respondent's mistake is material within the meaning of those provisions of law: Respondent wanted a payment that would not require to set up any form of guarantee whilst payment by letter of credit required to the contrary such sort of guarantee at the costs of respondent. There was therefore a difference on one of the elements of the Contract pursuant to Art. 24(1) CO and such difference was significant.
According to Art. 23 CO cited above, a party under a material mistake is not bound by contract. However Art. 26 CO provides that where the mistake is due to the negligence of the rescinding party, the latter is bound to compensate for the damage resulting from the cancellation of the contract unless the other party knew or should have known the mistake. According to Swiss case law someone who signs a contract without having read it is negligent within the meaning of Art. 26 CO.

Respondent has actually admitted that he did not read the Contract or that he did it but only after he had signed it upon receipt of a hard copy thereof. The arbitrator considers under these circumstances that respondent was negligent and should have taken the necessary and appropriate measures in such a case, by asking his daughter to translate the document - as he usually did - before signing it. Consequently, respondent is not discharged of its obligations under the Contract and must compensate claimant for the damages suffered pursuant to Art. 26(1) CO.

c. Claimant's claim for damages; amount of damages

Claimant's damages may be calculated according to Art. 75 CISG which provides that if the seller has resold the goods within a reasonable time from contract avoidance, the party claiming damages may recover the difference between the contract price and the price in the substitution transaction. In this case claimant, after having requested respondent to perform its obligations under the Contract by letter of 16 October, advised then respondent on 26 October that it was taking measures to mitigate its loss. Claimant finally sold the goods on 18 November to a Filipino customer. Such behaviour is consistent with Art. 77 CISG which provides that a party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss.

Claimant calculates its damages as corresponding to the price difference per metric ton for the goods to be sold to respondent and those actually sold to the Filipino customer, in adding the storage costs; those costs are not disputed by respondent. Respondent alleges that the [price at which the goods were sold to the Filipino customer] does not represent the market price at the time of the substitute transaction...

From the evidence submitted in this regard, the arbitrator is satisfied that [the price at which the goods were sold to the Filipino customer] was a fair market price. Such amount was justified by the fact that claimant had tried to sell the goods on two occasions to other customers but that it did not succeed due to the latter's failing to confirm the order; the price per metric ton discussed with those customers ... may also evidence the fact that the market price of the product was decreasing continuously as from August. Finally, claimant demonstrated that the transaction with the Filipino client materialized as early as 18 November and that the price for said goods was actually paid by the client.

As a matter of law, the arbitrator considers that claimant took the necessary and appropriate measures in time and place to mitigate its damages. Its claim for damages ... is therefore admitted.

d. Interest

The [amount awarded] shall bear an interest of 5% per annum from the date of the filing of the Request for Arbitration until full payment, in accordance with the provisions laid down in Arts. 78 CISG and 104 CO.

4. Cost of the Arbitration and Legal Costs

Art. 31 (3) of the ICC Arbitration Rules provides that the final Award shall fix the costs of arbitration and decide which of the parties shall bear them or in...
condemned to bear the costs of the arbitration, fixed by the ICC International Court of Arbitration in their entirety.

72"...In the instant matter each Party's counsel submitted a statement of the legal costs incurred by his client in this arbitration.... The arbitrator finds also legitimate under the present circumstances to condemn respondent to support claimant's legal costs for the amount indicated above, said amount being reasonable and equivalent to the fees charged by the Swiss and Italian counsel of respondent. Respondent shall bear its own legal costs."

1In Procedural Order No. 2, it was decided, inter alia, that: "- the further examination of the case would not be limited to the preliminary issues;... - the possibility of rendering a partial (interim) arbitral award on preliminary issues after the Oral Hearing was reserved". The sole arbitrator's reason were as follows: "In so deciding, the arbitrator had considered Art. 20(1) of the ICC Rules, the very nature of the arbitral process that must be speedy and cost efficient, as well as the safe and fair administration of justice that is required for any arbitration. In addition, the arbitrator took into account the relatively low amount in contention and lack of real complexity of the issues to be determined. In addition, he considered that limiting the examination of the case to preliminary issues would manifestly be contrary to the principles referred to above. He had also paid due consideration to his right to decide any relevant issue or issues by way of partial (interim) award as provided for by the Terms of Reference and to the parties' observations made during the 4 October Procedural Hearing, as well as the arbitrator's duty to render an award within six months from the signature of the Terms of Reference, as prescribed by Art. 24(1) of the ICC Rules."

2Art. 1 of the Swiss Code of Obligations (CO) reads: "1. For a contract to be concluded, a manifestation of the parties' mutual assent is required. 2. Such manifestation may be either express or implied."

3Art. 14 of the 1980 United Nations Convention on Contracts for the International Sale of Goods (CISG) reads in relevant part: "(1) A proposal for concluding a contract addressed to one or more specific persons constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance. A proposal is sufficiently definite if it indicates the goods and expressly or implicitly fixes the terms of the offer to be the terms of the offer eventually made. (2) A rejection of the offer of the offeror thereby expires."

4Art. 19 of the CISG reads: "(1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counteroffer. (2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance. 3. Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially."

5Art. 18 of the CISG reads in relevant part: "(1) A statement made by or other conduct of the offeree indicating assent to an offer is an acceptance. Silence or inactivity does not in itself amount to acceptance. (2) An acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. An acceptance is not effective if the indication of assent does not reach the offeror within the time he has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. An oral offer must be accepted immediately unless the circumstances indicate otherwise. Art. 23 of the CISG reads: "A contract is concluded at the moment when an acceptance of an offer becomes effective in accordance with the provisions of this Convention."

6Art. 2 CO reads: "1. When the parties have agreed with regard to all essential points, it is presumed that a reservation of ancillary points is not meant to affect the binding nature of the contract. 2. Where agreement with regard to such ancillary points so reserved is not reached, the judge shall determine them in accordance with the nature of the transaction. 3. The forgoing shall not affect the provisions regarding the form of contracts (Arts. 11-16)."

7Art. 176(1) of the PILA reads: "1. The provisions of this chapter shall apply to all arbitrations if the seat of the arbitral tribunal is situated in Switzerland and if, at the time when the arbitration agreement was concluded, at least one of the parties had neither its domicile nor its habitual residence in Switzerland."


9See decision of the Swiss Supreme Court of 16 May 1996 in the matter G. S.p.A. v. M.Z. published in the Bulletin of the Swiss Arbitration Association (hereinafter ASA Bulletin) 1996, No. 4, pp. 667 et seq., espec. section 4; see also the Swiss Supreme Court's decision published in ATF (official record of the decisions rendered by the Swiss Supreme Court) 119 II 380, espec. section 4a with references."


12"Blessing, op. cit., No. 489; Dutoit, op. cit., No. 8."
"Lalive/Poudret/Reymond, op. cit., idem, No. 15; Dutoit, op cit., idem."

"See infra [51] et seq."

"ATF 119 II 1380/384 with references."

"ATF 119 II 380 idem; ATF 88 I 100."

"Dutoit, op. cit., No. 1, p. 497"

"Art. 13 CO reads: "1. A contract which by law must be in written form (Art. 12) must bear the signatures of all persons who are to be bound by it. Where the law contains no provision to the contrary, a letter or a telegram is deemed to be in writing, provided that the letter or the telegram form bears the signatures of the persons binding themselves."


"Lalive/Poudret/Reaymond, op. cit., No. 9; see also Werner Wenger in International Arbitration in Switzerland - An Introduction to and a Commentary on Articles 176 - 194 of the Swiss Private International Law Statute (Helbing and Lichthahn/Kluwer Law International, Basle-Geneva-Munich, 2000) ad Art. 178, Nos. 10 et seq., pp. 333 et seq."

"Lalive/Poudret/Reymond, op. cit., ad Art. 178, No. 23, p. 326."

"Poudret, op. cit., p. 28 and references cited."

"Art. 155 lit. i of the Swiss Private International Law Act (PILA) reads: "Except for Articles 156-161 PILA, the law applicable to the company governs in particular: (i) the power of representation of persons acting on its behalf on the basis of its organization.""

"Art. 720 CO reads: "The board of directors shall notify the office of the commercial register for the purpose of the registration in the commercial register of the persons authorized to act for the corporation (Art. 718), together with a certified copy of the resolution by which such authority is granted. The persons to be registered shall sign at the office of the commercial register or file their certified signatures."

"Pascal Montavon, Droit suisse de la SA, Tome III (Editions Juridiques AMC, Lausanne 1997) No. 5.1, p. 126."

"Art. 933(2) CO reads: "2. When a matter which requires registration is not registered, it can only be invoked against third parties if it is shown that the third persons were aware of it."

"See ATF 121 III 368/375, Semaine Judiciaire (SJ) 1996 177/180 cited by respondent."

"Art. 718a CO reads: "1. The persons authorized to act for the corporation may perform all legal acts on behalf of the corporation which the purpose of the corporation (Art. 626(2)) may entail. 2. Restrictions of these powers may not be enforced vis-à-vis bona fide third parties; provisions restricting the authority to act for the principal office or for a branch office (Art. 642) or requiring joint representation of the corporation shall be exempted therefrom if such provisions are registered in the commercial register."

"ATF 104 II 197 section 3b."


"Montavon, op. cit., No. 4, p. 126 with references."

"Art. 32(1) CO reads: "If one who is authorized to represent another party enters into a contract in the other party's name, then the party represented, but not the agent, shall have the rights and shall be bound by the obligations resulting therefrom."

"Art. 38 CO reads: "1. If one, without having been authorized, has entered into a contract acting as an agent, the person represented shall become an obligor or an obligee only if he ratified the contract. 2. The other party is entitled to require the principal to elect within reasonable time whether to ratify the contract, and shall no longer be bound if the principal fails to ratify within such time period."


"ATF 43 II 293, Journal des Tribunaux (JdT) 1917 I 642"

"ATF 101 II 222, JdT 1976 I 141."

"Note General Editor: The sole arbitrator was apparently referring to Art. 178(1) PILA which reads: "1. As regards its form, the arbitration agreement shall be valid if made in writing by telegram, telex, telecopier or any other means of communication which permits it to be evidenced by a text."

"See ATF 121 III 38 section 2c, pp. 43-44, JdT 1995 I 377/379-380 cited by respondent; see also Dutoit, op. cit., No. 4, pp. 497-498."

"Art. 11(2) of the 1958 New York Convention reads: "2. The term *agreement in writing* shall include an arbitral clause in an contract or an arbitration agreement signed by the parties or contained in an exchange of letters or telegrams."

"ATF 121 III idem p. 44; see also Wenger, op. Cit., No. 18, p. 337."

"ATF 121 III idem p. 45; see also Poudret, 'A propos de la vilité d'une clause arbitrale - Un arrêt pouvant prêter à confusion', in JdT 1995 pp. 354 et seq/357 - 358"

"Jean-Paul Vulliéty, Le transfert des risques dans la vente internationale - Comparaison entre le Code suisse des

44"See Karl Neumayer, Catherine Ming, Convention de Vienne sur les contrats de vente internationale de marchandises - Commentaire (CEDIDAC, Lausanne 1993) pp. 84-85."

45Art. 2 of the **CISG** reads: "This Convention does not apply to sales: (a) of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use; (b) by auction; (c) on execution or otherwise by authority of law; (d) of stocks, shares, investment securities, negotiable instruments or money; (e) of ships, vessels, hovercraft or aircraft; (f) of electricity"

46"Neumayer/Ming, op. Cit., No. 5, p. 87."

47"Idem."

48Art. 8 of the **CISG** reads: (1) For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was. (2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances. (3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

49"Walter Stoffel, 'Le droit applicable aux contrats de vente internationale de marchandises', in Les contrats de vente internationale de marchandises (CEDIDAC, Lausanne 1991) p. 32."

50"Neumayer/Ming, op. cit., No. 5, p. 88."

51"Neumayer/Ming, op. cit., pp. 127 - 128."

52Art. 4 first sentence of the **CISG** reads: "This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract..."

53"ATF 54 II 300, JdT 1929 I 66; see also Tercier, op. Cit., No 530, p.96."

54"See Art. 4 **CISG**: see also Neumayer/Ming, op. Cit., No. 6, p. 71; Francois Dessemontet, ‘La Convention des Nations Unies du 11 avril 1980 sur les contrats de vente internationale de marchandises’ in Les contrats de vente internationale de marchandises (CEDIDAC, Lausanne 1991) p. 64."

55Art. 24(1) **CO** reads: "1. An error is, in particular, deemed to be material in the following cases: 1. if the party in error intended to enter into a contract different from that to which he gave his assent; 2. if the party in error had another thing in mind than the one which is the object expressed in the contract, or another person, provided that the contract was concluded with a particular person in mind; 3. if the party in error promised a consideration considerably greater in extent, or accepted a consideration considerably smaller in extent than he had intended; 4. if the error related to certain facts which the party in error, in accordance with the rules of good faith in the course of business, considered to be a necessary basis of the contract."

56"ATF 34 II 523."

57"ATF 69 II 234, JdT 1944 I 22."

**Referring Principles:**

- IV.4.1 - Freedom of form
- VII.3.2 - Calculation of damages