

MILAN CHAMBER OF ARBITRATION

Case No. ...

FINAL AWARD

issued by the Sole Arbitrator avv. Andrea Bandini, in the Arbitration Proceeding No. ..., having its seat in Milan (Italy), governed by the Rules of the Milan Chamber of Arbitration (hereinafter also referred to as the "Rules"), commenced by:

X, with registered office in ... (Romania), acting through its legal representative ..., assisted and represented by ..., power of attorney attached to the request for arbitration filed on ... November 2014 (hereinafter also referred to as the "Claimant" or "X");

Claimant

against

Y, with registered office in ... (Romania), acting through its legal representative and judicial administrator, appointed by the Tribunal of ... (Romania), assisted and represented by ... as per power of attorney dated ... April 2016 (hereinafter also referred to as the "Respondent" or "Y")

Respondent

(hereinafter, individually, a "Party" and, together, the "Parties")

on the basis of

the arbitration clause contained in the EPC Turn-Key Contract, dated ... 2013 (hereinafter also referred to as the "Contract"), between Claimant and Respondent, providing as follows:

"Art. 26 Governing Law and Arbitration

26.1 This Contract and the rights and obligations of the Parties hereunder shall be governed by and construed and interpreted in accordance with Romanian law.

26.2 In the event a dispute arises between the Parties regarding the application or interpretation of, or in any way relating to this Contract, the Parties shall use reasonable efforts to reach a reasonable and equitable resolution of the matter on an expedited basis. In the event such efforts do not result in the resolution of the dispute, such dispute between the Principal and the Contractor arising out of or in connection with this Contract shall be finally settled:

a) as to purely technical matters – [...]; or

b) as to any matters other than those under letter (a) above (including whether letter (a) above applies or not) under the rules of Arbitration of the Chamber of Commerce of Milan (Italy) (the "Rules of Arbitration"). The arbitration shall be

conducted before a single arbitrator. The seat of arbitration under letter (b) shall be Milan, Italy. The language of the arbitration shall be English.

26.3 All awards rendered by the arbitrator shall be final and binding on the Parties and subject to no appeal.

[...]" (hereinafter also referred to as the "Arbitration Clause")

[...]

..*.*.*

I. - SUMMARY OF THE PROCEEDINGS

1 On ... November 2014, the Secretariat (hereinafter also referred to as the "Secretariat") of the Milan Chamber of Arbitration (hereinafter also referred to as the "Chamber") received from the Claimant a Request for Arbitration (hereinafter also referred to as the "RfA"), that was filed under reference No. The RfA was submitted on the basis and in execution of the Arbitration Clause.

2 [...].

3 On ... January 2015, the Respondent, represented by its counsel ..., filed its Statement of Defence (hereinafter also referred to as the "1st SoD"), by which, it raised some preliminary objections concerning the validity of the arbitration clause, objected Claimant's arguments and claims and submitted a counterclaim.

4 By Order No. ..., issued on ... February 2015, the Arbitral Council of the Chamber (hereinafter also referred to as the "Arbitral Council") appointed as sole arbitrator avv. Andrea Bandini (hereinafter also referred to as the "Sole Arbitrator" or the "Arbitrator"). On ... February 2015, the Arbitrator duly accepted and submitted, according to Article 18.1 of the Arbitration Rules of the Chamber (hereinafter also referred to as the "Rules") his statement of independence to the Secretariat. On ... March 2015 the Secretariat confirmed, according to Article 18.4 of the Rules, the Arbitrator.

5-9 [...].

10 On ... June 2015, the Sole Arbitrator issued the Procedural Order (hereinafter also referred to as the "PO") No. 1, by which, among other things: confirmed his acceptance and, therefore, constituted the Arbitral Tribunal; pointed out that, according to Article 32 of the Rules, the six month time limit for the filing of the final award, would expire on ... December 2015; established the procedural rules and time table of the proceedings.

11 On ... June 2015, the Secretariat informed the Parties and the Arbitrator that, taking into account that respondent did not pay the requested advance on costs, according

to Article 38.3 of the Rules, declared the closing of the proceedings related to the counterclaim filed by the Respondent and invited the Arbitrator to proceed the case on Claimant's claim only.

12-18 [...].

19 At the hearing held in ..., on ... December 2015, on behalf of the Claimant, ... were present and, on behalf of the Respondent, ... were present. Both parties presented their respective claims and exceptions and each Party rebutted on the counterparty's one. At the end of the hearing, the Sole Arbitrator, following the discussion of the case, determined "*Taking into account the Parties' respective positions, and the Claimant's objection concerning the Respondent's last arguments raised in the rejoinder, and the necessity to clarify the thema decidendum of the present arbitral proceedings, the Tribunal provides both parties with the opportunity to file post-hearing briefs focused only on the admissibility of the last arguments and the Claimant's objections concerning the thema decidendum of the arbitral proceedings*". [...].

20 [...].

21 The Respondent, on ... March 2016, informed the Sole Arbitrator that, on ... November 2015, Y had been declared in insolvency by the Tribunal of ... [Romania] (decision No. ...) and asked the Sole Arbitrator to "*take all necessary measures in order to ensure the enforcement of the above mentioned legal provision.....*", according to Article 75 of Romanian Law No. 85/2014.

22-23 [...].

24 The Claimant, on ... April 2016, objected Respondent's allegation and modified its claims (prayers for relief).

25 By the PO No. 5, issued on ... April 2016, the Sole Arbitrator, in order to safeguard the due process principle, granted the Respondent the right to comment on Claimant's brief filed on ... April 2016 and the Claimant the right to comment on Respondent's rebuttal. By said PO, the Sole Arbitrator expressly invited the Parties "*to express their opinion taking into account that the seat of the arbitral proceedings is in Italy, the law applicable to the contract is the Romanian law and that the Respondent's insolvency has been declared by the Tribunal of ..., indicating which law should be applied and why*".

26 The Parties duly submitted, within the prescribed time-limits, their respective briefs.

27-42 [...]

II SHORT SUMMARY OF THE PARTIES' ARGUMENTS

1. – Claimant's arguments

- 43 The Claimant alleged that the Parties entered into a contractual relationship in 2013, firstly, on the basis of a pre-contract, submitted by Respondent (as doc. R-3) and by the Claimant (as doc. ...), signed on ... 2013 by X (established in Romania), W (established in Romania) and Y (hereinafter also referred to as the "Contract XWY") according to which X engaged Y – that accepted – to design, execute, construct, complete, commission and test, on a "Turn Key" basis all the works required to fully realise a ... System in ..., Romania (hereinafter also referred to as the "Works") and the Works were started in the same period. By means of the Contract XWY the Parties had already agreed on the essential elements of the Contract and, in particular, at point 7.4 they agreed on the fact that "*L'appaltatore (i.e. X) dovrà terminare i lavori entro e non oltre il ... ottobre 2013*" (i.e. "The Contractor shall have to complete the works within and not later than October, ..., 2013"). The signature of the Contract would have been a mere formality (not a condition for its validity under Art. 1240 of the Romanian Civil Code). The Claimant further alleged that "*Moreover, the circumstance that the EPC Contract provides for the deadline of October ..., 2013, is the further proof that the Parties entered into the EPC Contract before this date and that they wanted to agree on above deadline.*"
- 44 The Contract provided that Y should have achieved the Mechanical Completion (as defined in the Contract, hereinafter, the "Mechanical Completion") of the Works within sixty calendar days from the Reference Date (as defined in the Contract, hereinafter, the "Reference Date"), that is ... September 2013 (hereinafter the "Mechanical Completion Date").
- 45 The deadlines agreed were mandatory, because the extreme importance of such deadlines was repeatedly affirmed by the parties and was also confirmed by the provisions of the Contract regarding the "*delay penalties*" and "*the decrease of the Contract Price*" in relation to the change of Incentive law.
- 46 The Contract provided for a termination clause (Article 20.1 sub f) which entitled X to terminate the Contract if Y was in delay of more than 45 calendar days in the achievement of the Mechanical Completion, after the Mechanical Completion Date (i.e., October ..., 2013).
- 47 Claimant alleged that Respondent did not achieve the Mechanical Completion within

the Mechanical Completion Date and that X invited Y several times to remedy its delay, but Y did not achieve the Mechanical Completion within the Mechanical Completion Date and even within December ..., 2013.

- 48 Since Y accrued an unjustifiably long delay and failed to remedy its breach, X was forced to notify the termination of the Contract as per Article 1553 of the Romanian Civil Code, and, on ... 2014, X sent to Y a registered letter containing: the notification of the termination of the Contract; the notification that it had decided to retain the Works, pursuant to Article 22.1.3 of the Contract, requesting the Respondent to release immediately the site and the Works; and the request to obtain compensation for the damages suffered due to Y's serious breach.

2. – Respondent's arguments

- 49 Respondent maintained that in ... 2013 X signed an agreement with another company, H, having the same object and that only in late ... 2013 entered the Contract with Y (that, previously, was involved as subcontractor).
- 50 The Respondent alleged that given that the Contract XWY had been signed on ... 2013 and in said contract the Parties undertook to enter into an EPC contract and, in particular, the Contract object of the present dispute, it was not possible that the Contract could be signed the same day of the Contract XWY. At the date of signature of the Contract, the deadlines (that were not mandatory) provided by the same document had already expired, but the parties were still willing to execute the Contract.
- 51 There was no breach of the execution deadline by X, since the deadline written in the Contract was irrelevant and, in any case, the contractual deadline was continuously extended by agreement of both Parties and, in particular: correspondence between the Parties implicitly or explicitly showed that the Claimant did not consider that the deadline was exceeded; written agreements concluded between the Parties, with the participation of third parties, which provided for different deadlines for some parts of the works; updated execution time-schedules; unilateral acts issued by the Principal (specifically the Order to start the electrical work) with deadlines different from those provided for in the Contract.
- 52 In the event in which a delay in the execution of works does exist, such delay would not be attributable to Y, but to X, because the latter: failed to obtain, before the signature of the Contract, the necessary permits; changed several times the executive design.

53 According to the Respondent, the Claimant acted in ill faith when it sent the notice of termination of the contract on ... 2014 because:

- the contractual dead-lines were not mandatory and had been extended;
- the Contract had been executed in proportion of 97%, while X had paid Y less than 20% of the price;
- the Claimant obtained, on ... 2014, the license to operate the capacity in ... and therefore, before that date, a document confirming the reception of the ... System was issued by the Claimant

III. - RELIEFS SOUGHT BY THE PARTIES

54 The Claimant, by its RfA submitted on ... November 2014, claimed:

- (i) *ascertain and declare the breach of the EPC Contract by Y and, as a consequence, ascertain and declare that the same has been duly terminated pursuant to Clause 20 of the EPC Contract and Article 1553 of the Romanian Civil Code;*
- (ii) *subordinately, ascertain and declare the breach of the EPC Contract by Y due to the considerable delay of Y in the achievement of the Mechanical Completion and, as a consequence, ascertain and declare that the EPC Contract has been duly terminated;*
- (iii) *as a consequence:*
 - a) *ascertain and declare the right of X to keep the Works already performed by Y;*
 - b) *ascertain and declare that the Contractor shall: interrupt the performance of the Works and release the Work's site; deliver to the Principal all existing documents concerning the Works already performed; supply the Principal all the equipment and goods (including the ...) necessary to complete the ... System;*
 - c) *order Y to pay compensation for damages in favour of X, damages to be quantified in an amount of Euro ... or the different amount, lower or higher, which would be ascertained at the outcome of the proceedings;*
- (iv) *order Y to pay the costs of the Chamber of Arbitration and the fees of the Arbitrator, as well as to reimburse the legal fees and costs in favour of X.*

55 The Respondent, by its 1st SoD submitted on ... January 2015, claimed:

- 1) *"To ascertain and determine that the arbitration clause is null and void, that the Arbitrator has no jurisdiction, the Arbitrator is not competent to decide the*

dispute between X and Y and this arbitration proceedings is inadmissible and may not be pursued;

- 2) *Alternatively, in case the Chamber of Commerce of Milan or the Arbitrator Council deems that the decision on the validity of the arbitration clause and on the jurisdiction over the dispute at hand has to be decided and taken by the Arbitrator, Y hereby requests the Chamber of Commerce of Milan or the Arbitrator Council to appoint the Arbitrator. However such request is not to be intended as either tacit or express acknowledgment or acceptance of the jurisdiction of the Arbitrator over the dispute between X and Y.*

Y requests to the Arbitrator:

3. *To ascertain and determine that the arbitration clause is null and void, that the same Arbitrator has no jurisdiction, that the same Arbitrator is not competent to decide the dispute between X and Y and that this arbitration proceedings is inadmissible and may not be pursued.*
4. *In the case the Arbitrator finds that the arbitration clause is valid and binding and that the same Arbitrator has jurisdiction over the dispute at hand, Y hereby files this defence and counterclaim. However such defence and counterclaim is not to be intended as either tacit or express acknowledgment or acceptance of the jurisdiction of the Arbitrator over the dispute between X and Y.*

Thus, subject to requests 1 to 4 above, Y requests to the Arbitrator:

5. *To ascertain, determine and declare that X was obliged to procure all the relevant permits and authorizations including the "autorizatie de infiintare".*
6. *To ascertain, determine and declare that X has failed to procure to Y the "autorizatie de infiintare" in due time and, in particular, before mid-December, 2013.*
7. *To ascertain, determine and declare that because of X's delay and default in procuring the "autorizatie de infiintare" Y could not carry out the works and reach the Mechanical Completion by ... 2013.*
8. *To ascertain, determine and declare that because of X's delay and default in procuring the "autorizatie de infiintare" Y could not carry out the works and reach the Mechanical Completion by ... 2013.*
9. *To ascertain, determine and declare that X has failed to pay the extra works, it has failed to assist and support Y in the performance of the contracts, it has failed its obligation to cooperate with Y in the performance of the contracts, it*

has failed to mitigate the damages that it alleges to have incurred, it has severely breached its good faith obligation and it has willfully terminated the EPC Contract in the attempt to transfer to Y the adverse change of the Romanian legislation on ... plants.

10. *To ascertain, determine and declare that the works necessary to carry out the Mechanical Completion were almost completed by the end of ... 2014 and that X – contrary to its obligations and without any valid reason or good cause – refused to pay the extra works.*
11. *To ascertain, determine and declare that X – contrary to its obligations and without any valid reason or good cause – by refusing to pay to Y an advance on the works, despite that Y had de facto completed the works, did not provide to Y the minimum support that was necessary for reaching the Mechanical Completion.*
12. *To ascertain, determine and declare that if X had operated in compliance with the EPC Contract, with its obligation to pay the extra works and its obligation of good faith and cooperation, Y would have reached the Mechanical Completion.*
13. *To ascertain, determine and declare that X's behavior, conduct, execution of the contract and termination of the same contract were abusive, specious, unlawful and in breach of the principle of good faith and cooperation between the parties.*
14. *To ascertain, determine and declare that the damages claimed by X are undergrounded and unproved.*
15. *To dismiss and reject all demands and requests of X.*
16. *In the case the Arbitrator finds X is entitled to any damages or compensation, to ascertain, determine and declare that the amount of the damages requested by X is disproportionate in comparison to the alleged breach of contract by Y, to the damages actually suffered by Y and the actual circumstances of the case and, in any event, to reduce the penalties and the Termination Liquidated Damages in compliance with Article 1541 of the Romanian civil code, the applicable laws and principles.*
17. *To ascertain, determine and declare that Y has executed works and extra works for an amount equal to Euro ... (including VAT), that X has paid only Euro ... (including VAT) and that the outstanding credit of Y towards X is equal to Euro ... (including VAT).*

18. *Condemn X to pay to Y Euro ... as price and consideration for the works and extra works done plus interests from maturity to actual payment.*
 19. *In case the Arbitrator finds that X is entitled to any damages or compensation, to set off X's credits with Y's credits according to applicable laws.*
 20. *To ascertain, determine and declare that X does not have the right to retain the works and that such works are property of Y.*
 21. *Condemn X to pay to Y as reimbursement of all damages, costs and expenses, including legal and arbitration costs."*
- 56 As above mentioned [...], on ... June 2015, the Secretariat, according to Article 38.3 of the Rules, declared the closing of the proceedings related to the counterclaim filed by the Respondent and invited the Arbitrator to proceed the case on Claimant's claim only.
- 57 The Claimant, by its SoC submitted on ... August 2015, requested the Arbitrator to:
- (i) *"ascertain and declare Y's breach of the EPC Contract for all the reasons as mentioned in this briefs and in the RoA and, as a consequence, ascertain and declare that the same has been duly terminated pursuant to Clause 20 of the EPC Contract and Article 1553 of the Romanian Civil Code;*
 - (ii) *subordinately, ascertain and declare the breach of the EPC Contract by Y due to the considerable delay of Y in the achievement of the Mechanical Completion and, as a consequence, ascertain and declare that the EPC Contract has been duly terminated, or terminate in any case the EPC Contract due to Y's breach of the same;*
 - (iii) *as a consequence and in any case:*
 - a) *ascertain and declare the right of X to retain the Works already performed by Y;*
 - b) *ascertain and declare that Y shall deliver to the Principal all existing documents concerning the Works already performed; supply the Principal all the equipment and goods (including the ...) necessary to complete the ... System;*
 - c) *order Y to pay compensation for the damages suffered by X as a consequence of Y's breach of the EPC Contract, damages to be quantified in an amount of Euro ..., or in the different amount, lower or higher, which would be ascertained in this proceedings;*

(iv) order Y to pay the costs of the Chamber of Arbitration and the fees of the Arbitrator, as well as to reimburse the legal fees and costs in favour of X;

(v) in any case, to reject any objection and arguments raised by Y."

58 The Respondent, by its 2nd SoD submitted on ... October 2015, requested:

1) "to dismiss and reject all the claims/requests of X as without merit;

2) to order X to bear the costs and fees of the arbitral proceedings and to reimburse the legal costs in favor of Y."

59 The Claimant, by its brief submitted on ... April 2016, as a consequence of Y's insolvency, modified its claims (prayers for relief) as follows:

(i) "ascertain and declare Y's breach of the EPC Contract for all the reasons as mentioned in this briefs and in the RoA and, as a consequence, ascertain and declare that the same has been duly terminated pursuant to Clause 20 of the EPC Contract and Article 1553 of the Romanian Civil Code;

(ii) subordinately, ascertain and declare the breach of the EPC Contract by Y due to the considerable delay of Y in the achievement of the Mechanical Completion and, as a consequence, ascertain and declare that the EPC Contract has been duly terminated, or terminate in any case the EPC Contract due to Y's breach of the same;

(iii) as a consequence and in any case:

d) ascertain and declare the right of X to retain the Works already performed by Y;

e) ascertain and declare that Y shall deliver to the Principal all existing documents concerning the Works already performed; supply the Principal all the equipment and goods (including the ...) necessary to complete the ... System;

(iv) in any case, to reject any objection and arguments raised by Y;

(v) order Y to pay the costs of the Chamber of Arbitration and the fees of the Arbitrator, as well as to reimburse the legal fees and costs in favour of X."

60 After having given the Parties the right to express their comments on the pertinent issues, by the PO No. 6, issued on ... May 2016, the Sole Arbitrator stated as follows:

1. "Respondent's request to stay the present arbitral proceeding is rejected in relation to the above (i), (ii) and (v) of Claimant's claims;

2. Respondent's request to stay the present arbitral proceeding is accepted in relation to the above (iii) a) and b) of Claimant's claims;

3. Respondent's request to stay the present arbitral proceeding in relation to the above (iv) Claimant's claim is postponed and shall be decided after the Parties' future submissions;
4. Respondent is granted with the opportunity to file its brief within ... May 2016, expressly stating its updated claims;
5. Claimant is granted with the opportunity to file its comments on Respondent's brief within ... May 2016."

61 Respondent, by its brief submitted on ... May 2016, expressly amended its previous claims on the merits and requested the Sole Arbitrator:

- "to dismiss and reject all the claims/requests of X as without merit taking into consideration the fact that Y was not in delay as it did not breach the contractual deadline and, as a consequence, the termination of the contract by X is without merit and made in ill-faith";
- to order X to bear the costs and fees of the arbitral proceedings and to reimburse the legal costs in favor of Y."

Therefore, all previous Respondent's claims on the merits must be considered waived.

62 By the PO No. 7, issued on ... June 2016, the Sole Arbitrator decided, among other things, as follows:

1. the decision to stay the present arbitral proceeding in relation to Claimant's claims (iii) a) and b), as amended and specified by its Brief submitted on ... April 2016, is confirmed;
2. Respondent's request to stay the present arbitral proceeding in relation to Claimant's claim (iv) is rejected."

63 Under these circumstances, the claims to be decided can be summarized as follows:

A. Claimant's claims:

- (i) ascertain and declare Y's breach of the EPC Contract for all the reasons as mentioned in this briefs and in the RoA and, as a consequence, ascertain and declare that the same has been duly terminated pursuant to Clause 20 of the EPC Contract and Article 1553 of the Romanian Civil Code;
- (ii) subordinately, ascertain and declare the breach of the EPC Contract by Y due to the considerable delay of Y in the achievement of the Mechanical Completion and, as a consequence, ascertain and declare that the EPC Contract has been duly terminated, or terminate in any case the EPC Contract due to Y's breach of the same;

- (iii) *in any case, to reject any objection and arguments raised by Y;*
- (iv) *order Y to pay the costs of the Chamber of Arbitration and the fees of the Arbitrator, as well as to reimburse the legal fees and costs in favour of X."*

B. Respondent's claims:

- i. *"to dismiss and reject all the claims/requests of X as without merit taking into consideration the fact that Y was not in delay as it did not breach the contractual deadline and, as a consequence, the termination of the contract by X is without merit and made in ill-faith.;*
- ii. *to order X to bear the costs and fees of the arbitral proceedings and to reimburse the legal costs in favor of Y."*

IV. - REASONS

IV.A. – Preliminary and procedural issues

64 It seems appropriate to deal with few preliminary questions arisen and waived and/or decided in the course of the proceedings.

IV.A.1. – Validity of the arbitration clause, jurisdiction/competence of the Arbitrator

65 The Claimant submitted its RfA on the basis of the arbitration clause contained in the Contract. The Respondent, by its 1st SoD, submitted on ... January 2015, raised some preliminary objections concerning the validity of the arbitration clause and the lack of competence/jurisdiction of the arbitral tribunal.

66 In spite of this, the Respondent, in its further briefs (2nd SoD etc.) did not allege and raise again the above objections. Besides, at the hearing held on ... December 2015, the Respondent expressly stated (as it results from the pertinent minutes signed by the participants) *"Respondent confirms to drop its request for the Tribunal to ascertain and determine that the arbitration clause is null and void"*. Under these circumstances, it is clear that the Respondent implicitly and expressly waived any objection related to the validity of the above arbitration clause and to the competence/jurisdiction of the present arbitral tribunal.

67 In any case, the Arbitrator maintains that there are no other reasons or arguments to doubt the validity of the above arbitration clause.

IV.A.2. – Claims of the Parties and *thema decidendum*

68 Taking into account that, in the course of the present proceedings, the Parties debated on the admissibility of their respective claims and modified their prayers for relief as a consequence of the Parties opposite positions and of the different

occurred events, the Arbitrator granted the Parties several further deadlines in order to express their positions and issued two different procedural orders aimed at defining the object and *thema decidendum* of the present arbitration.

69 As above mentioned at para 27, on ... May 2016, the Sole Arbitrator issued the PO No. 6, by which he stated as follows:

1. *"Respondent's request to stay the present arbitral proceeding is rejected in relation to the above (i), (ii) and (v) of Claimant's claims;*
2. *Respondent's request to stay the present arbitral proceeding is accepted in relation to the above (iii) a) and b) of Claimant's claims;*
3. *Respondent's request to stay the present arbitral proceeding in relation to the above (iv) Claimant's claim is postponed and shall be decided after the Parties' future submissions;*
4. *Respondent is granted with the opportunity to file its brief within ... May 2016, expressly stating its updated claims;*
5. *Claimant is granted with the opportunity to file its comments on Respondent's brief within ... May 2016."*

70 In short, once the Respondent, on ... March 2016, informed the Arbitrator that, on ... November 2015, Y had been declared in insolvency by the Tribunal of ... [Romania] (decision No. ...), the Parties took opposite positions as regards the prosecution of the present arbitral proceedings.

71 On the one hand, the Respondent:

- a. alleged that, according to the Romanian law and, in particular, to Article 75 of Law No. 85/2014, all judicial and extrajudicial procedures as well as all enforcement proceedings against the debtor had to be suspended;
- b. alleged that a judicial administrator had been appointed by the Tribunal of ... [Romani], having the power to manage and represent Y;
- c. asked the Arbitrator to *"take all necessary measures in order to ensure the enforcement of the above mentioned legal provision."*

72 On the other hand, the Claimant:

- a. alleged that, according to the Romanian legislation (Art. 5, paragraph 55 of the Law no. 85/2014), the debtor in insolvency (Y) does not lose its legal capacity, but only a change in its management occurs due to the appointment by the Bankruptcy Court of the judicial administrator;
- b. alleged that according to the Romanian legislation (Art. 36 Law no. 85/2006, respectively article 75 of Law no. 85/2014), only the proceedings, pending at

the date on which the insolvency is declared, concerning requests for the debtor to be ordered to pay any amount could be suspended;

- c. expressly waived, amending its claims and prayers for relief, its request for Y to be ordered to pay compensation of damages (claims sub iii, c) of the conclusions as specified by the Reply to the statement of defence of November ..., 2015) and insisted on its claims sub (i), (ii), (iii) – a) and b), (iv) and (v) of the conclusion as specified by the said Reply.

73 In order to arrive to the above (mentioned at para 69) conclusions, the Arbitrator, in short and as better explained in the pertinent PO No. 6, maintained and reasoned - and hereby confirms – as follows:

- the issue of Y's legal capacity and representation in the present arbitral proceeding after the insolvency declaration was superseded, taking into account that on ... April 2016, Respondent submitted its power of attorney by which Y's judicial liquidator, appointed ... (exactly the same - as the one initially appointed and indicated in the 2nd SoD submitted on ... October 2015 - law firm and counsel) to represent Respondent in the present arbitral proceedings;
- as regards the effects of Y's declaration of insolvency in the present arbitral proceeding, the Arbitrator took act and pointed out that it was - and is - undisputed and, in any case, it had been proved by Respondent submitting the pertinent decision, that, on ... November 2015, Y had been declared in insolvency by the Tribunal of ... [Romania] (decision No. ...) and that Respondent has been put into a simplified bankruptcy;
- that, in order to assess and solve the questions raised by the Parties, the Romanian law (as substantive law chosen by the Parties as per Article 26 of the Contract and as confirmed by the PO No. 1, dated ... June 2015, Para. 7) had to be taken into account as regards the merit, and that the Italian procedural law had to be applied to the procedure, in application of the widely accepted principle that the procedural law of the venue of the arbitration applies, in absence of any provision of the arbitration rules referred to by the Parties (the Parties freely chose Milan, Italy, as seat of the arbitration and, by the PO No. 1, dated ... June 2015, Para. 8, was established – and the Parties did not raise any objection - that "*the proceedings shall be governed by the Arbitration Rules of the Chamber as supplemented by the present Procedural Order No. 1 and, as required, by Italian procedural law on arbitration.*");

- that Article 83(2) of the Italian Bankruptcy Law was not applicable in the present case because it makes reference to those cases where the receiver decides to terminate a contract (still in force) containing an arbitral clause, while in the present case, the relevant contract had been terminated by the Claimant before the arbitration proceedings;
- that, therefore, the present arbitral proceeding could, in theory, proceed on those claims that did not fall under the bankruptcy courts competence and that this last aspect was – and is - clearly regulated – and the Parties agreed on that – by Art. 75 of the (Romanian) law 85/2014;
- that Art. 75, of Law no. 85/2014 “*regarding the procedures for the prevention of the insolvency and insolvency as well*”, regulating the suspension of all judicial and extrajudicial proceedings and the enforcement, can be interpreted as establishing that only cases involving a monetary claims have to be suspended;
- that, the above interpretation was – and is - supported by the Romanian case law (concerning, mainly, Article 36 of Romanian Law No. 85/2006, having a wording similar to that of Article 75 of Law no. 85/2014) as, for example: decision of the County Court of Timis (Romania), in the Case no. 1842/3072010; decision of the Romanian High Court, section II – civil – decision no. 524/17.02.2015;
- that, therefore, Claimant’s claims (as amended by its brief dated ... April 2016) (i) “*ascertain and declare Y’s breach of the EPC Contract for all the reasons as mentioned in this briefs and in the RoA and, as a consequence, ascertain and declare that the same has been duly terminated pursuant to Clause 20 of the EPC Contract and Article 1553 of the Romanian Civil Code*” and (ii) “*subordinately, ascertain and declare the breach of the EPC Contract by Y due to the considerable delay of Y in the achievement of the Mechanical Completion and, as a consequence, ascertain and declare that the EPC Contract has been duly terminated, or terminate in any case the EPC Contract due to Y’s breach of the same*”, aimed at obtaining a decision on the liability (or not) of Y in the termination of the EPC Contract, without any monetary claim, could not be suspended and could be decided in the course of the present arbitration;
- that, as regards the others Claimant’s claims, the Arbitrator reached different conclusions because claims (as amended by its brief dated ... April 2016) iii, a (*ascertain and declare the right of X to retain the Works already performed by*

Y) and b (*ascertain and declare that Y shall deliver to the Principal all existing documents concerning the Works already performed; supply the Principal all the equipment and goods (including the) necessary to complete the ... System*) aims at obtaining a declaration that X has the right to retain the Works performed by Y and the related documents, in case of a positive decision, it would have a monetary impact on Respondent's assets and, therefore, according to Article 75 of no. 85/2014, the Arbitrator maintained that he could not proceed on deciding on them;

- that the claim (as amended by its brief dated ... April 2016) v "*order Y to pay the costs of the Chamber of Arbitration and the fees of the Arbitrator, as well as to reimburse the legal fees and costs in favour of X*" was – and is - a natural consequence and a specific right of any Party of a pending case before a tribunal (arbitral or not) and, therefore, the Arbitrator had – and has - the power to decide on this claim;
- that, as regards Claimant's claim (as amended by its brief dated ... April 2016) iv (*in any case, to reject any objection and arguments raised by Y*), it was appropriate to invite Respondent to expressly state its claims in the present arbitration and Claimant to submit its comments on it.

74 By the PO No. 7, issued on ... June 2016, the Sole Arbitrator confirmed his previous decisions and stated, among other things, as follows:

1. *the decision to stay the present arbitral proceeding in relation to Claimant's claims (iii) a) and b), as amended and specified by its Brief submitted on ... April 2016, is confirmed;*
2. *Respondent's request to stay the present arbitral proceeding in relation to Claimant's claim (iv) is rejected."*

75 Under these circumstances, as a consequence of the different events occurred, of amendments of the Parties' claims and of the Arbitrator's decisions on said issues, the Sole Arbitrator shall have to decide only on the following claims:

- Claimant's claims:
 - A. "*ascertain and declare Y's breach of the EPC Contract for all the reasons as mentioned in this briefs and in the RoA and, as a consequence, ascertain and declare that the same has been duly terminated pursuant to Clause 20 of the EPC Contract and Article 1553 of the Romanian Civil Code;*
 - B. *subordinately, ascertain and declare the breach of the EPC Contract by Y*

due to the considerable delay of Y in the achievement of the Mechanical Completion and, as a consequence, ascertain and declare that the EPC Contract has been duly terminated, or terminate in any case the EPC Contract due to Y's breach of the same;

C. in any case, to reject any objection and arguments raised by Y;
D. order Y to pay the costs of the Chamber of Arbitration and the fees of the Arbitrator, as well as to reimburse the legal fees and costs in favour of X."

- Respondent's claims:

A. "to dismiss and reject all the claims/requests of X as without merit taking into consideration the fact that Y was not in delay as it did not breach the contractual deadline and, as a consequence, the termination of the contract by X is without merit and made in ill-faith;

B. to order X to bear the costs and fees of the arbitral proceedings and to reimburse the legal costs in favor of Y."

76 Therefore, the other issues discussed during the hearing held on ... December 2015 and in the following Parties' Briefs can be mainly considered as superseded and/or waived with the exception of those which are listed in the above paras 63 and 75.

IV.A.3. – Parties' procedural requests

[...]

IV.B. – Decision on the merit

[...]

IV.C. - Costs

[...]

The Sole Arbitrator
Avv. Andrea Bandini
... September 2016