4A_464/2009[1]

Judgement of February 15, 2010

First Civil Law Court

Federal Judge KLETT (Mrs), Presiding,
Federal Judge CORBOZ,
Federal Judge ROTTENBERG LIATOWITSCH (Mrs),
Federal Judge KOLLY,
Federal Judge KISS (Mrs),
Clerk of the Court: CARRUZZO.

X._____,
Appellant,
Represented by Mr François PERRET and Mr Philippe SCHWEIZER

v.

Y._____ Ministry,
Respondent,
Represented by Mr Martin KURER and Mr Hans-Ulrich KUPSCH

Facts:

A.

A.a On July 30, 1998, A._____ Company signed a contract with the Y._____ Ministry whereby it undertook to supply a certain number of missiles and firing units, as well as other equipment, for a price corresponding to more than Euros 400 million.

[1] Translator's note: Quote as X._____ *v.* Y. _____, 4A_464/2009. The original of the decision is in French. The text is available on the website of the Federal Tribunal www.bger.ch

The transfer of technology and mutual cooperation between the parties, with the participation of companies [omitted], were essential elements of the contract.

By amendments of November 30, 2001 and May 14, 2002, the Under secretariat of Y._____ (hereafter Y._____) and X._____ succeeded the original contractors.

Up to 55 % of the total price agreed had to be paid before any delivery took place, to take into account the costs incurred by X._____ for the performance of its contractual obligations. To ensure the return of payments on account received in case of breach of its obligations, X._____ signed four bank guarantees with Bank B._____, now named C._____, in favour of Y._____.

A.b On May 7, 2004, Y._____ sent X._____ a letter of termination. One month later, it invited them to repay the amount of Euros 161'003'867 plus interest, which had been unduly paid (excess payment) and pay the penalties for late execution.

B.

B.a X._____ disputed the legitimacy of the termination and on June 16, 2004, commenced arbitral proceedings pursuant to the Rules of Arbitration of the International Chamber of Commerce (ICC).

For its part, on June 29, 2004, Y._____ notified to C._____ an immediate call of the guarantees totalling Euros 199'229'983. The bank replied that given the filing of the request for arbitration, it was obliged to defer payment until notification of the arbitral award. An arbitral tribunal of three members was constituted under the aegis of the ICC, in conformity with the arbitration clause included in the aforesaid contract, setting the venue of the arbitration in Zurich. The submissions made by the Parties during the arbitration proceedings will be dealt with, to the extent appropriate, when examining the grievances relating thereto.

B.b On January 25, 2008, the Arbitral Tribunal issued a partial award. It found that the contract was terminated by mutual consent, which became effective on June 16, 2004. The arbitrators then rejected some of the claims and deferred other claims to a subsequent award.

B.c At the request of the Arbitral Tribunal, the Parties reviewed their claims taking into account the new legal situation created by the partial award. Y._____ maintained its submission concerning the reimbursement of the funds prepaid.

In a final award of July 21, 2009, the Arbitral Tribunal held the following concerning this submission:
"B. On Respondent's Prayers for Relief

297 Respondent's claims
1. for payment of
a. (...)
b. excess payment is denied in the amount of
EUR 87'710'345 and admitted in the amount of
EUR 73'293'522 plus interest based on the London Inter
Bank Offered Rate (LIBOR) (on the basis of 3 months
applicable to Euro) since the dates as specified under
claim n° 4) until payment date to the extent Respondent
did not receive payments from B._____
(C._____);
c. (...)
2. (...)
3. (...)
4. for declaration that Respondent is entitled under the bank
guarantees (...) issued by C._____ to draw down up to
EUR 146'367'244:
- EUR 73'293'522 plus

- interest at a rate of the 3 months LIBOR (applicable to Euro) on the following amounts since the following dates until 16 June 2004:

100'561'228.00	Mar 00
24'871'225.00	Mar 00
3'715'208.00	Mar 00
17'758'048.32	Sep 02
931'464.89	Oct 02
2'665'916.76	Jan 03
3'186'443.43	Mar 03
2'443'276.55	Apr 03
1'413'257.08	Sep 03
1'300'838.90	Oct 03
1'124'181.76	Dec 03
717'552.38	Dec 03
315'221.29	Mar 04 and

- interest at a rate of the 3 months LIBOR (applicable to Euro) on the amount of EUR 73'293'522 since 16 June until payment date

is admitted;
5. (...)
6. (...)."[2]

C.
On September 14, 2009, X._____ filed a Civil law appeal against the award. Claiming that the Arbitral Tribunal had decided *ultra* or *extra petita*, had issued an award which was incompatible with public policy and had violated their right to be heard, the Appellant invited the Federal Tribunal to:

[2] Translator's note: In English in the original text.

"1. Annul the part of item B.1b (§ 297) of the award under appeal, to the extent that it grants the Respondent interest (referring to item B.4) calculated on an amount higher than Euros 73'293'522.-;
2. Annul item B.4 (§297) of the award under appeal;
3. Order the Respondent to pay all costs."

The Respondent submits that the matter is not capable of the appeal. Subsidiarily, it submits that the appeal should be rejected to the extent that the matter is capable of appeal.

The Arbitral Tribunal did not submit an answer.

Reasons:

1.
According to Art. 54 (1) LTF[3], the Federal Tribunal issues its decision in one of the official languages[4], as a rule in the language of the decision under appeal. When the decision was issued in another language (here English), the Federal Tribunal uses the official language chosen by the parties. In front of the Arbitral Tribunal, they opted for English. In the brief addressed to the Federal Tribunal, the Appellant used French. According to its practice, the Federal Tribunal will therefore issue its decision in this language.

2.
In international arbitration, a Civil law appeal is allowed against the decisions of arbitral tribunals under the conditions set forth at Art. 190 to 192 PILA[5] (Art. 77 (1) LTF).

[3] Translator's note: LTF is the French abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173.110.
[4] Translator's note: The official languages of Switzerland are German, French and Italian.
[5] Translator's note: PILA is the most commonly used English abbreviation for the Federal Statute on International Private Law of December 18, 1987, RS 291.

The seat of the arbitration was Zurich. At least one of the parties (in this case, both) did not have its domicile in Switzerland at the decisive time. The provisions of chapter 12 PILA are accordingly applicable (Art. 176 (1) PILA).

The Appellant is directly affected by the award under appeal, which ordered it to pay to the Respondent the interest which it claims it does not owe, and which it claims wrongly authorises calling the four bank guarantees provided in favour of its opponent. It accordingly has a personal and legally protected interest to ensure that the award was not issued in violation of the guarantees arising from Art. 190 (2) PILA, which gives it standing to appeal (Art. 76 (1) LTF).

Timely filed (Art. 100 (1) LTF, in connection with Art. 46 (1) (b) LTF) in the legally prescribed format (Art. 42 (1) LTF), the matter is, in principle, capable of appeal.

3.
The Respondent, however, disputes the admissibility for three separate reasons that should be examined in turn.

3.1 According to the Respondent, the parties agreed to rule out any appeal against a future award.

3.1.1 Art. 192 (1) PILA states that when both parties have neither domicile nor habitual residence, nor an establishment in Switzerland, they may rule out any appeal against the award of the arbitral tribunal in a specific statement in the arbitration clause or in a subsequent written agreement; they may also exclude the appeal only for one or more of the grounds stated at Art. 190 (2) PILA.

Federal case law has gradually set forth the principles arising from this provision. Substantially, it was stated that case law is restrictive in admitting agreements excluding appeals and that an indirect renunciation is considered insufficient. As to a direct

renunciation, the Federal Tribunal stated that a specific reference to Art. 190 PILA and/or to Art. 192 PILA is not mandatory. It is sufficient that an express statement by the parties should show clearly their common will to renounce any appeal. Knowing whether or not this is the case is a matter of interpretation (ATF 134 III 260 at 3.1 and cases quoted).

A clause providing that the award will be final[6] does not constitute a valid renunciation to appeal. The same applies to the commitment of the parties to respect and comply with the award (Decision 4A_352/2009 of October 13, 2009 at 3; Decision 4A_224/2008 of October 10, 2008 at 2.6.3; KAUFMANN-KOHLER/RIGOZZI, Arbitrage international, 2006, n° 754).

3.1.2 The arbitration clause contained in Art. 13 of the Contract of July 30, 1998 contains the following two paragraphs in particular:

"(P) The arbitration award, even if passed by the majority of the arbitrators, shall be final and binding for both Parties hereto. Both Parties to this Contract shall accept the award and proceed accordingly.
(Q) All further rules and procedures of the arbitration shall be in accordance with the applicable Rules of Conciliation and Arbitration of the International Chamber of Commerce."[7]

Considered in the light of the principles of case law cited above, such a clause is clearly not a valid renunciation to appeal, despite what the Respondent alleges. It moreover gives a translation which is too extensive when replacing the word "final"[8] with "endgültig/letztinstanzlich"[9] and the phrase "shall accept the award and proceed accordingly"[10] with "sollen den Schiedsentscheid anerkennen und vollstrecken"[11]. Upon

[6] Translator's note: *définitive* in French, *endgültig* in German.
[7] Translator's note: In English in the original text.
[8] Translator's note: In English in the original text.
[9] Translator's note: In German in the original text.
[10] Translator's note: In English in the original text.
[11] Translator's note: In German in the original text.

reading paragraph (P), it seems, furthermore, that the author of the text has tried to emphasise above all the fact that the award would have a final and binding character for both parties even if it was the result of a mere majority decision. In any case, the clause does not in any way manifest, with the precision required, the intent of the Parties to renounce in advance any right to appeal. As to the reference to the ICC Arbitration Rules, of which Art. 28 (6) states that parties "shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made", case law has for a long time emphasised that it is not sufficient to justify the application of Art. 192 (1) PILA (ATF 116 II 639 at 2c p. 640 and authors quoted). Moreover, and contrary to the opinion of the Respondent, the combination of the two paragraphs above does not allow for any other conclusion.

3.2 The Respondent also challenges the admissibility of the Appellant's first submission due to lack of precision. According to the Respondent the submission does not show from which date the sum of Euros 73'293'522 should bear interest in the Appellant's view, although it may be, in theory, a date within the period from March 2000 to June 2004, or even a date within the month of July 2004.

The submission certainly lacks precision concerning the point raised by the Respondent, although it seems apparent from the explanations of the Appellant that it would agree to pay interest on the aforesaid amount from June 16, 2004. Indeed, in par. 109 of its brief, the Appellant specifies that if item B.4 of the award were not annulled in its entirety, "its second section should be annulled." Applied to submission No. 1, this precision certainly means that the Appellant would agree, as an alternative, to pay interest to the Respondent at a three-month LIBOR rate (applicable to the Euro), on the amount of Euros 73'293'522, from June 16, 2004, in conformity with item B.4, third section, of the award under appeal.

In the event that the imprecision raised by the Respondent could not be corrected by this Court in case the appeal were granted, it would be for the Arbitral Tribunal to provide for this after hearing the Parties on the issue. It is indeed appropriate to recall

that an appeal in the field of international arbitration may only seek to annull the decision, and does not allow the Federal Tribunal to decide the matter on the merits (Art. 77 (2) LTF). Furthermore the imprecise, or rather the incomplete wording, of submission No. 1 of the appeal, should not prejudice the Appellant.

3.3

3.3.1 In par. 84 ff. of its brief, the Appellant states that on July 31, 2009, the Respondent requested that C._____ pay the amount of Euros 108'604'381 .81, in execution of the four bank guarantees issued in its favour. The Appellant adds that, on August 12, 2009, it requested the President of the Commercial Court of [omitted] to prohibit C._____ from paying this amount, which request was rejected by an Interim Order[12] of September 10, 2009.

In its response to the appeal (par. 47), the Respondent added that C._____ paid the said amount, plus interest, on September 14, 2009. From these facts it deduces that the Appellant's submission No. 2 is incapable of appeal on twofold grounds, being that it disregards the principle of *res judicata* and that the issue would be moot.

3.3.2 The facts given above are all subsequent to the award under appeal.

Barring exceptions, the Federal Tribunal issues its decision on the basis of the facts established by the arbitral tribunal (Art. 105 (1) LTF). As Art. 77 (2) LTF does not preclude the application of Art. 99 (1) LTF, new facts and evidence are normally not admissible. The prohibition of *nova* has effects for both the appellant and the respondent (YVES DONZALLAZ, Loi sur le Tribunal fédéral, 2008, n° 4046). However, it is possible to submit and prove new facts that render the appeal without object (BERNARD CORBOZ, in Commentaire de la LTF, 2009, n° 22 ad Art. 99). This is what the Respondent has done in this case. It is, therefore, appropriate to examine the relevance of its arguments.

[12] Translator's note: *Ordonnance de référé* in French.

3.3.3 The Interim Order has no authority of *res judicata* (see Art. 488 (1) of Nouveau Code de Procédure Civile français [Dalloz, 2007, p. 312]: "The interim order does not, in principle, have the authority of *res judicata*."[13]). It does not bind the court that is, or will subsequently be, seized of the merits. Consequently, the Respondent wrongly submits that the authority of *res judicata* attached to the interim order issued by the President of the Commercial Court of [omitted] would prohibit the Federal Tribunal from ruling on the Appellants' grievances in connection with the award under appeal, in which the Arbitral Tribunal found that the Respondent had the right to demand payment of the bank guarantees and the extent to which it was authorised to do so. In his order, the French judge emphasises moreover, that it does not behove a Court in summary proceedings to interfere in the enforcement of the arbitral award, especially where an action for annulment was filed against before the Swiss courts (p. 6, 1st consideration).

That the payment of the guarantees has rendered submission No. 2 of this appeal without object is also untenable. Indeed, the abstract nature of the bank guarantee did not come into play in the basic legal relationship concerning the principal and the beneficiary (value relationship[14]), so the former may act against the latter not only to claim back the guarantee unjustly paid but also to recover any overpayment (TUTO RAIMONDO ROSSI, La garantie bancaire à première demande, 1989, No.'s 415 to 417; FRANÇOIS LOGOZ, La protection de l'exportateur face à l'appel abusif à une garantie bancaire, 1991, p. 78). Consequently, with a view to the opening of such action, it is not without interest for the Appellant to obtain a finding by the Federal Tribunal that the Arbitral Tribunal violated Art. 190 (2) PILA by allowing the Respondent to call the bank guarantees amounting to the sum and interest as specified in item B.4 of its award.

This being said, there is no reason not to entertain the appeal.

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[13] Translator's note: In French in the original text.
[14] Translator's note: *rapport de valeur* in French.

4.

Firstly, the Appellant blames the Arbitral Tribunal for having decided *ultra petita*.

4.1 Art. 190 (2) (c) PILA, allows the appeal of an award, in particular, when the arbitral tribunal decided beyond the submissions for which it was seized. Falling under this provision are awards which grant more than or something other than what was requested (*ultra* or *extra petita*). However, according to case law, an arbitral tribunal does not decide beyond the submissions if it ultimately does not grant more than the total amount claimed, but assesses certain elements of the claim other than the claimant, or moreover when, being seized of an action negating a right which it considers unfounded, finds in the award that a disputed legal relationship exists, rather than rejecting the action. An arbitral tribunal does not furthermore violate the principle of *ne eat iudex ultra petita partium* if it attributes a different legal qualification to the request than that which was presented by the claimant. The principle of *jura novit curia*, which is applicable to arbitration, indeed requires arbitrators to apply the law *ex officio*, without being limited to the grounds advanced by the parties. They may therefore entertain grievances that have not been invoked, as this is not dealing with a new claim or a different claim, but only a new qualification of the facts of the case. The arbitral tribunal is nevertheless bound by the object and the amount of the submissions, particularly when the claimant qualifies or limits its claims in the submissions themselves (Decision 4A_220/2007 of September 21, 2007 at 7.2 and cases quoted). It was thus decided that an arbitral tribunal seized of a request seeking the invalidation of a contract, together with a submission for the repayment of amounts paid in performance of it, could not reject the request and the submission only to award the claimant damages related to maintaining the contract, in the absence of independent or *ad hoc* submissions for payment (Decision 4P.273/1991 of April 30, 1992 at 2b and c).

4.2 Applied in this case, these principles require the rejection of the Appellant's grievance based on Art. 190 (2) (c) PILA.

In its latest submissions in the arbitration the Respondent (Respondent[15]) requested that the Arbitral Tribunal order the Appellant (Claimant[16]) to pay:

"EUR 161'003'867 plus interest based on the London Inter Bank Offered Rate (LIBOR) (on the basis of 3 months) since the dates as specified under section B3/8 RFS until payment date in respect of the excess payment to the extent Respondent did not receive payments from B._____ (C._____) as sought under Prayer 4"[17] (Fourth Submission of Respondent of December 26, 2008, p. 101, Submission 1.b.; see Final Award, § 15).

The abbreviation "RFS" in this text refers to the Respondent's First Submission[18] of November 24, 2005. In Chapter B3, item 8, of this document (p. 21), the Respondent lists the 13 payments it made from March 2000 to March 2004, for a total amount of roughly 161 million Euros, indicating the month during which they were made.

In its final award, the Arbitral Tribunal awarded to the Respondent the amount of Euros 73'293'522, after setting off Euros 161'003'867 against a claim by the Appellant for Euros 87'710'345 (§ 297, 1.b.). It also awarded to the Respondent the interest it claimed on the aforesaid Euros 161'003'867, to be paid in instalments as it desired, namely in accordance with the 13 payments made between March 2000 and March 2004, but limiting the interest to June 16, 2004 (§ 297, 1.b. in connection with § 297, 4., 2nd section). From this date, interest was awarded only on the balance of Euros 73'293'522 as a result of the set off (§ 297, 1.b. in conjunction with § 297, 4., 3rd section). In doing so, the arbitrators, far from ruling *ultra petita*, granted to the Respondent less interest than it had claimed and that would have covered the total amount of Euros 161'003'867, even after June 16, 2004.

[15] Translator's note: In English in the original text.
[16] Translator's note: In English in the original text.
[17] Translator's note: In English in the original text.
[18] Translator's note: In English in the original text.

To support its grievance, the Appellant submits that the Respondent never requested that it pay "interest on amounts other than the excess payment" (brief, par. 103). Therefore, as the Arbitral Tribunal set the amount payable for the excess payment at Euros 73'293'522, it could not award interest for the period prior to June 16, 2004 on the total amount of Euros 161'003'867, without going beyond the submissions (brief par. 108 ff.). Besides the fact that the Respondent takes issue with this statement, it is undermined by the last submission made to the Arbitral Tribunal, as reproduced above. Specifically, the Respondent did not request the arbitrators to award interest on the amount they would consider as an excess payment. It invited them rather to award interest on the amount the Respondent believed represented an excess payment and which it quantified, with precision in its pertinent submission, at Euros 161'003'867. Moreover, the mere fact that the interpretations that each party gives the concept of "excess payment" is different does not mean that the Respondent, while using this expression in the said submission, would have quantitatively limited the scope thereof within the meaning intended by the Appellant. So it is in vain that the Appellant bases its argument on the exceptional case in Decision 4P.273/1991, cited above (see brief, par. 109).

5.

The Appellant then raises some alleged contradictions, which would render the award under appeal incompatible with public policy within the meaning of Art. 190 (2) (e) PILA.

5.1 The grievances within this framework are based on the following sentence, taken from two federal decisions and quoted in par. 111 of the brief: "an award [...] violates public policy when it leads to an internal contradiction"[19] (Decision 4P.198/1998 of February 17, 1999 at 4a, Decision 4P.99/2000 of November 10, 2000 at 3b/aa). Both decisions refer to a precedent issued in French where it says that "a decision on the merits with respect to a disputed claim only violates public policy if it is in itself

[19] Translator's note: In German in the original text: „*Dem Ordre public widerspricht (...) ein Urteil, das unter einem inneren Widerspruch leidet*".

contradictory (...) or if it violates fundamental principles of material law to such an extent that it is no longer consistent with the determining legal order and value system" (Decision 4P.115/1994 of December 30 1994 at 2b, in Praxis 84 [1995] n°. 204 p. 665 ff., 671, see also Decision 4P.267/1994 of June 21, 1995 at 3a). To justify the link they established between a contradictory award and public policy, the two decisions quoted by the Appellant emphasise that Art. 190 (2) (e) PILA also endeavours to guarantee that Swiss international awards do not drop below a minimum quality threshold. Moreover, all the awards mentioned here refer to the opinion of FRANK VISCHER, according to whom "the violation of public policy according to Art. 190 (2) (e) PILA refers on the one hand to the consistency of the award, to its being free from internal contradiction, and on the other hand it refers to the violation of fundamental legal principles..."[20] (IPRG Kommentar, 1993, n° 32 at Art. 17).

The recent decisions, in particular the latest seminal decision as to the concept of public policy (ATF 132 III 389 at 2.2.1 and references), apparently do not mention the internal contradiction that afflicts an award as an element of this concept. Furthermore, a decision issued subsequent to those mentioned by the Appellant, states that "the alleged intrinsic inconsistency of an award does not fall within the definition of material public policy"[21] (ATF 128 III 191 at 6b), which seems difficult to reconcile with the previous case law (in this sense, see BERNARD DUTOIT, Commentaire de la loi fédérale du 18 décembre 1987, 4th edition 2005, p. 678 *i.f.*).

That an award reaches a minimum level of quality is certainly desirable. From there, to construct a requirement into an essential principle, which should form the basis of any legal order according to prevailing concepts in Switzerland, so that any awards including an irreducible internal contradiction should be sanctioned, is a step which case law has taken a little too quickly in its initial attempts at defining the concept of public policy. From a qualitative point of view, it is indeed hardly justifiable to

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[20] Translator's note: In German in the original text: „*Ordre public-Widrigkeit i.S. von Art. 190 Abs. 2 lit. e IPRG bezieht sich einerseits auf die Konsistenz des Urteils, auf seine innerliche Widerspruchsfreiheit, anderseits auf die Verletzung fundamentaler Rechtsgrundsätze...*".

[21] Translator's note: In French in the original text.

consider such an award more severely than an award based on unsustainable findings of fact or on the arbitrary application of a rule of law, which award does not fall within the anticipations of Art. 190 (2) (e) PILA.

It follows that the alleged intrinsic inconsistency of the reasons of an award does not fall within the definition of material public policy.

However, the grievance in question, had it been capable of appeal, would anyway have been rejected for the reasons stated below.

5.2

5.2.1 In par. 112 to 131 of its brief, the Appellant points out an alleged manifest contradiction between § 97, 100, 218-220 on the one hand, and § 225, on the other, of the final award. It essentially claims that the Arbitral Tribunal had awarded to the Respondent, with regard to the excess payment, the amount of Euros 73'293'522 and accrued interest from June 16, 2004, while furthermore awarding interest for the period of March 2000 to March 2004 on the Euros 161'003'867 claimed, while the Appellant was entitled to deduct from this amount and retain the amount of Euros 87'710'345 as compensation for services rendered since the beginning of the execution of the contract (transfer of technology and industrialisation). However, it adds, one cannot argue without an irreducible contradiction, that interest is due on the excess payment, acknowledged to be Euros 73'293'522, while burdening the debtor with interest on more than twice that on amounts of which one did not know until June 16, 2004, according to the arbitrators, if they constituted excess payments which could be reimbursed.

For the Appellant, the contradiction would not be less evident if one wanted to follow the reasoning of the loan referred to in § 223 of the award. Indeed, the solution adopted by the Arbitral Tribunal would be tantamount to requiring the borrower to pay interest on the part of the loan it has already repaid by means of services in kind. In this context, the Appellant claims another contradiction in the fact that the Arbitral

Tribunal, while seeming to exclude the application of Art. 17 of the Contract, which provides the 3-month LIBOR as the interest rate in favour of Art. 73 CO[22], which sets the rate at 5%, nevertheless did apply the LIBOR rate.

Finally, although it held that the bank guarantees should only cover the excess payments, the Arbitral Tribunal allowed the Respondent to call upon them for amounts greater than these (the excess payments[23]). According to the Appellant, this would amount to yet another contradiction.

5.2.2 Considered in the light of the explanations provided by the Respondent in its answer to the appeal, in particular in par. 109 to 129, the contradictions denounced are only apparent.

From such explanations and the reasons in the pertinent passages of the award under appeal it follows that the reasons given by the arbitrators may be understood in such a way that they can justify the points under challenge in the award. These reasons can be summarised as follows.

The Respondent is entitled to repayment of Euros 161'003'867 it paid and which constitute excess payments. Of this amount, it must deduct Euros 87'710'345, representing the value of services that the Appellant provided over and beyond the military equipment supplied (technology transfer and industrialisation). Its residual claim amounts, therefore, to Euros 73'293'522. The two claims mentioned above did not become due until the contractual relationship was terminated by presumed mutual consent on June 16, 2004. It is therefore only then that the Respondent's claim could be set off with that of the Appellant, to be reduced to the above amount. As to the interest claimed by the Respondent on its initial claim of Euros 161'003'867, these may be awarded. Without a doubt Art. 17 of the Contract (English version) does not provide for this. It does, however, provide for this if the payments on account by the buyer

[22] Translator's note: CO is the French abbreviation for the Swiss contract law, the Code of Obligations.
[23] Translator's note: Added for the sake of clarity.

amount to less than the cost of equipment and services already provided by the seller, while referring to LIBOR interest rates. As this results in unequal treatment to the detriment of the Respondent, the provision cannot be applied. Therefore, it is appropriate to apply by analogy the general rules relating to loans (Art. 312 ff. CO) and interest rates (Art. 73 (1) CO). In this case, the LIBOR rate can be considered as a usual rate in international trade and thus be used. Consequently, the Respondent is entitled to payment of such interest on each of the 13 payments made to the Appellant, according to the respective dates of payment, and until June 16, 2004, and then, from this time on, interest on the balance of its claim. This claim is covered by the four bank guarantees which the Respondent is therefore entitled to call.

Thus summarized, the arbitrators' reasons do not at all appear contradictory. As to their legal foundations, which in fact constitute the real object of the Appellant's criticisms, they fall outside the jurisdiction of this Court.

5.3 With regard to item 4 of the award under appeal, the Appellant claims yet another contradiction in the fact that the Arbitral Tribunal has allowed the Respondent to call the bank guarantees, despite the fact that according to its own findings, the Parties had terminated the contract by mutual consent, while these guarantees could only be called upon in the case of "breaches of contract"[24].

Under the guise of an alleged internal contradiction, the Appellant disputes the manner in which the Arbitral Tribunal has interpreted the terms of the bank guarantees and the meaning it gave to the expression "breaches of contract"[25], to reach the conclusion that the Respondent's claim, for the capital and interest, was covered by these guarantees. To do so, it moreover relies on a passage of the award (§ 115) which has nothing to do with the issue of the guarantees. Such claims can not be taken into consideration in the framework of an appeal based on the violation of Art. 190 (2) (e) PILA.

[24] Translator's note: In English in the original text.
[25] Translator's note: In English in the original text.

6.

In a final group of grievances, the Appellant claims that the Arbitral Tribunal violated its right to be heard by resorting to totally unexpected legal arguments.

6.1 In Switzerland, the right to be heard concerns particularly factual findings. The parties' right to express their positions on legal issues is recognized only to a limited extent. Generally, according to the principle *jura novit curia*, state or arbitral tribunals are free to assess the legal relevance of factual findings and they may adjudicate based on legal grounds different from those submitted by the parties. Consequently, providing the arbitration agreement does not restrict the mission of the arbitral tribunal solely to the legal submissions made by the parties, these need not be heard specifically on the recognisable scope of legal provisions. Exceptionally, the parties must be invited to express their position if the court or the arbitral tribunal considers basing its decision on a provision or legal consideration, which has not been discussed during the proceedings and which the parties could not have suspected relevant (ATF 130 III 35 at 5 and references). Moreover, unpredictability is a matter of interpretation. Thus the Federal Tribunal is restrictive in the application of this rule and because regard must be given to the specific features of this type of proceedings, whilst preventing the argument of unpredictability from being used to obtain a material review of the award in the appeal (Decision 4A_400/2009 of February 9, 2008[26] at 3.1).

6.2 For the most part (see brief, par. 139 to 148), the Appellant here further repeats the objections it has made elsewhere, which by its own admission, "complement and feed each other". These grievances deserve the same outcome as the previous ones.

Clearly, on the basis of the submissions made by the Respondent and the explanations relating thereto, the question of interest and the claims on which they rest have always been central to the dispute, even if they do not constitute the core of the matter, so that its importance could not escape the Appellant. In truth, it is the way in which the

[26] Translator's note: Read "Decision 4A_400/2008 of February 9, 2009".

Arbitral Tribunal treated this issue which does not satisfy the Appellant. Moreover, it is difficult to imagine that it could not have suspected as relevant the legal norms and principles adopted by the Arbitral Tribunal, the implementation of which has nothing unpredictable, despite what it alleges.

Finally, the argument put forward by the Appellant in par. 149 of its brief has nothing to do with the issue of the right to be heard, discussed here.

7.

Upon completion of this review, the appeal must be rejected with costs (Art. 66 (1) and 68 (1) and (2) LTF). To determine the amount of costs, this Court will take into account the amount in dispute relating to the issue of interest (approximately 22 million Euros, see answer par. 141). However, it does not take into consideration the amount for which the Respondent was entitled to call the four bank guarantees, as this amount is not the object of the dispute – i.e. the question whether the conditions to call upon the guarantees were fulfilled in this case or not - at this point in the proceedings, with the exception of the interest in dispute. The amount awarded as costs includes the costs of translation referred to in par. 138 of the answer. To assess the costs, the difficulties of the case are to be taken into account, while ensuring, in accordance with the practice in this respect, the preservation of a certain proportion between the costs awarded to the other party and the judicial costs.

Therefore, the Federal Tribunal pronounces:

1. The appeal is rejected.

2. Judicial costs of CHF 100'000.- shall be borne by the Appellant.

3. The Appellant shall pay to the Respondent an amount of CHF 200'000.- for the federal judicial proceedings.

4. This judgment shall be notified to the representatives of the Parties and to the Chairman of the Arbitration Tribunal.

Lausanne, February 15, 2010

In the name of the First Civil Law Court of the Swiss Federal Tribunal

The Presiding Judge (Mrs):	The Clerk:
KLETT	CARRUZZO