4A_46/2011[1]

Judgment of May 16, 2011

First Civil Law Court

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

X. _____GmbH (previously V._____ Gmbh)
Appellant,

Represented by Mrs. Teresa Giovannini and Mr. Thomas Burckhardt

v.

Y. _____ Sàrl
Respondent,
Represented by Mrs. Anne Véronique Schlaepfer and Mr. Philippe Bärtsch

Facts:

A. This dispute arises from the delivery by V._____ GmbH (hereafter: V._____; presently: X._____ GmbH) to Y._____ Sàrl (hereafter: Y._____) of a production line for the production of non-woven materials. A non-woven is a textile the fibers of which are kept together chemically at random, thermically (thermobonding), mechanically (needling) or hydraulically (hydrobonding). According to Y._____ its goal was to produce a hydrophobic non-woven for medical use with a view to selling it to international companies for the production of surgical overalls, surgical kits and operating fields among other items.

The relations between these two companies were formalized in a contract concluded on October 12, 2001 (hereafter: the Contract) followed by an addendum signed on April 18, 2002 (Addendum

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Translator's note: Quote as X._____ GmbH *v.* Y. _____ Sàrl 4A_46/2011. The original of the decision is in French. The text is available on the website of the Federal Tribunal www.bger.ch.

nr. 1 in V._____'s parlance) and a technical extension accepted by mutual agreement on December, 18 2003 (Addendum nr. 2 in the terminology used by V._____ or the Technological Extension in the Respondent's parlance; both amendments to the Contract will be referred to collectively as "Addendums") hereunder.

B.

B.a On January 20, 2009 Y._____ initiated arbitral proceedings on the basis of the arbitration clause included in the Contract. In its last submissions it required the payment of Euro 5'127'646 by V._____ because the production line would never have been received and would not be able to produce the anticipated non-woven and also a finding as to the supply of spare parts during a period of ten years.

Ultimately V._____ submitted that the matter was not capable of arbitration because according to V._____ Y._____ had not complied with the two contractual clauses prescribing recourse to a neutral expert or an attempt at settling the matter before introducing the arbitral proceedings. Alternatively it submitted that the arbitral proceedings should be stayed until the aforesaid two preliminary steps would have been carried out and an order that Y._____ should pay compensation in the amount of one million Euros for omitting them. On the merits it submitted that the claim should be rejected in any event.

B.b An *ad hoc* arbitral tribunal of three members was constituted. Sitting in Geneva and applying Swiss law it issued a final award on December 3, 2010 in which it rejected the preliminary submissions of V._____, including those pertaining to financial compensation, partially granted Y._____'s submissions to the extent that V._____ was ordered to pay Euro 3'250'000 with interest and to deliver the spare parts against payment by December 31st, 2015, divided the costs of the arbitration between the parties by half, granted no further costs and finally rejected all other submissions.

The reasons on which the award rests will be stated in the review of the respective grievances to the extent necessary.

C. On January 21, 2011 V._____ (hereafter: the Appellant) filed a Civil law appeal with the Federal Tribunal. Invoking Art.190 (2) (b), (d) and (e) PILA[2], it submits that the Federal Tribunal should hold that the Arbitral tribunal had no jurisdiction *ratione temporis* to decide the case and consequently annul the award. On the merits it repeats the latter submission. The request for a stay of enforcement contained in the appeal brief was rejected by decision of the Presiding Judge of March 4, 2011.

On February 21, 2011 the Arbitral tribunal submitted certain exhibits taken from the file of the arbitration and made a brief remark as to one of the Appellant's arguments. In a letter of March 4, 2011 the Appellant asked that the Federal Tribunal reject one of the exhibits.

In its answer of February 28, 2011 Y._____ (hereafter: the Respondent) submitted that the appeal should be rejected.

On March 15, 2011 the Appellant filed some comments as to the determination of the Arbitral tribunal and the Respondent's answer.

The Respondent submitted its remarks on these observations and on the Appellant's letter on March 4, 2011 in a submission of March 29, 2011.

Reasons:

1.

In the field of international arbitration, a Civil law appeal is possible against the decisions of arbitral tribunals pursuant to the requirements of Art. 190 to 192 PILA (Art. 77 (1) LTF[3]). Whether as to the object of the appeal, the standing to appeal, the time limit to appeal, the submissions made by the Appellant or the grievances invoked, none of these formal requirements raises any problem in this case. There is accordingly no reason not to address the appeal. Whether the matter is capable of appeal as to the Appellant's various arguments remains reserved.

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[2] 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.

[3] Translator's note: LTF is the French abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173.110.

2.

On February 21st, 2011 the Arbitral tribunal, through its Chairman, produced a number of exhibits taken from the record of the arbitration, including a note dated April 3, 2009, which was attached to a brief of one of the Appellant's counsel of the same date entitled (by the Chairman of the Arbitral ribunal) "Respondent's summary answer to the notice of arbitration".

In a letter of March 4, 2011 counsel criticizes the submission of the aforesaid exhibit, underlines its informal nature and points out that the Respondent too sent a similar note to the Chairman of the Arbitral tribunal, which was not transmitted to the Federal Tribunal. Thus he asks that the exhibit in question should be struck from the record. However as the Respondent rightly points out in its submissions of March 29, 2011. It is not clear what the Appellant may be seeking to obtain in this respect as there is no indication as to why the aforesaid exhibit could have an impact on the outcome of the appeal proceedings. Indeed it does not appear that the April 3, 2009 note would have any interest in this respect. Under such conditions there is no need to grant the Appellant's request. This is even more so because the existence of the exhibit in dispute is formally stated in the award under appeal (nr. 171).

3.

The Appellant argues firstly that the Arbitral tribunal was wrong to accept jurisdiction "namely by disregarding the mandatory and preliminary contractual requirement to resort to a new expert and to mediation". The analysis of that argument, based on Art. 190 (2) (b) PILA requires first a summary of the grounds of the award on the two issues raised by the Appellant and that of the arguments put forward by the parties whether to criticize or to uphold them.

3.1

3.1.1 Article 18 of the Contract provides as follows:

"In case of dispute as to the conformity or none-conformity of the supplies and services the Buyer and the Supplier must have recourse to a neutral expert before submitting the dispute to an arbitral tribunal."

As to Article 20 of the Contract it is worded as follows:

"In case of a dispute as to the interpretation or the performance of this contract an amicable settlement shall first be sought by the parties.

The possible disputes which may arise as to the interpretation or the performance of the provisions of this Procurement shall be submitted, after an attempt at conciliation fails, to an arbitral tribunal with no recourse to judiciary courts. The arbitral tribunal shall be composed of three arbitrators. Each party appoints an arbitrator.

…"

Already at its hearing of January 27, 2010 the Arbitral tribunal issued a formal decision as to the Appellant's arguments based on these two clauses. It rejected them and stated that the reasons would be developed in the future award. They are summarized hereafter.

As to the first point the Arbitrators state that the Expert's mission pursuant to Art. 18 (3) of the Contract would have been to pronounce on the technical aspects of the supplies and services in connection with a specific defect of the production line. Yet in the case at hand most of the dispute was really legal in nature as it involved the interpretation of the Contract and possible nonperformance but no technical issues. Moreover the Expert's role would have been principally to help the Parties to seek an acceptable solution and it was doubtful that his opinion could have led them to agree on issues that were totally alien to his mission. Furthermore, in view of the extreme positions taken by the Parties as soon as the dispute arose it was unlikely, even excluded, that an expert determining only the technical issues would have been able to persuade the litigants to find an agreement. Thus the Appellant had not established that recourse to an expert would have made it possible to resolve the dispute before filing of a request for arbitration and its argument that the request should be rejected for violation of Art. 18 (3) of the Contract or to obtain a stay of the proceedings until the expert's report would be delivered, had to be rejected.

As to the second issue the Arbitral tribunal held that the terms of Art. 20 (2) of the Contract were not sufficiently clear to claim that the absence of an attempt at conciliation would necessarily make the claim inadmissible. Moreover a meeting between the Parties had indeed taken place on January 13, 2009. That it may not have been a formal meeting was of little importance: its failure to succeed confirmed that the relationship between the Parties had deteriorated to the point that there was no longer any other possibility than to go to arbitration. Finally, in view of the incompatible positions adopted by the Parties it would have been excessively formalistic to hold that the request was inadmissible or to grant a stay of the proceedings due to a violation of Art. 20 (2) of the Contract.

3.1.2 As to the “applicable principles”, the Appellant raises the issue as to how the breach of a contract should be sanctioned when it imposes a duty on the parties not to proceed in front of an arbitral tribunal without resorting at first to the specific alternative ways of resolving disputes. It recalls in this respect that federal case law left open this very disputed issue and more specifically the issue as to whether such a violation makes the request inadmissible or should cause it to be rejected for the time being or if it must be cured by paying damages to the other party (Judgment 4A_18/2007 of June 6, 2007 at 4.3.1). In its opinion a comparative analysis of legal writing and case law in Switzerland and abroad shows a marked tendency to sanction such a violation by a decision of inadmissibility *ratione temporis*.

Applying these principles to the case at hand the Appellant argues firstly that the interpretation of the Arbitral tribunal as to the prior expert report is untenable. According to the Appellant the Arbitrators were seized of the very issue of the conformity of the plant delivered (the object delivered) with the plant promised (the object of the contract). That issue could not be resolved without an expert, such as the engineer in the construction contracts governed by the Rules of the International Federation of Consulting Engineer (FIDIC). Thus the Arbitral tribunal had arrogated to itself a competence which it did not have by issuing a decision without prior recourse to a specialist when its members had no technical knowledge in the field. As to the other two reasons they were purely speculative and were therefore of no help to resolve the issue at hand.

Secondly the Appellant argues that contrary to the opinion of the Arbitrators, the wording “an amicable settlement shall be first sought by the parties” at Art. 20 (1) of the Contract clearly indicates that the Parties had the duty to seek an agreement in good faith before introducing arbitral proceedings, which the Respondent refused to do.

More generally and as to the two preliminary requirements in the Contract, the Appellant takes the view that a neutral expert would most likely have made it possible to clarify a number of issues of conformity with the contract provisions as shown by the expert report it produced in the arbitral proceedings; in its opinion an attempt at conciliation would have had a chance to be successful in such a context.

Finally, as to compliance with good faith and the prohibition of abusing one’s rights, the Appellant claim to have demonstrated that in its letters of January 14 and 19, 2009 it had vainly demanded compliance with the aforesaid contractual mechanism and that it raised a defense of inadmissibility

in this respect in its answer of August 31st, 2009 already, then in its submissions of January 13 and May 19, 2010.

3.1.3 The Respondent points out in its answer that pursuant to Art. 186 (2) PILA the defense of lack of jurisdiction must be raised before any defense on the merits. According to the Respondent, the Appellant would not have complied with that requirement, the words “lack of jurisdiction” being nowhere in its filings in the arbitration. Actually the Respondent had submitted that the arbitral proceedings were not admissible but not that there was no jurisdiction of the Arbitral tribunal to which it had made its submissions on the merits. Moreover it had not immediately appealed the alleged decision on lack of jurisdiction issued at the hearing of January 27, 2010, waiting for the final award before doing so. Consequently its argument should be declared inadmissible on grounds of forfeiture.

Alternatively the Respondent argues that even if they were established, the alleged violations would have no impact on the jurisdiction of the Arbitral tribunal. Indeed the violation of contractual provisions constituting a mandatory preliminary to the arbitration would not fall within the jurisdiction of the Arbitral tribunal but would at most lead to a finding that the claim was temporarily inadmissible or to its rejection should it be impossible to go through the mechanism anticipated. This would be the majority view of legal writers in Switzerland and abroad, which would be echoed by the practice of arbitral tribunals and other national jurisdictions. Moreover in the aforesaid case the Federal Tribunal would not have stated that one of the possible consequences of the violation involved would have been the lack of jurisdiction of the arbitral tribunal. Consequently, in short, the arbitrators would have decided an issue of admissibility in this regard so that their decision would not be capable of appeal to the Federal Tribunal from the point of view of Art. 190 (2) (b) PILA.

The Respondent takes the view that in any event the Arbitral tribunal did not disregard the provisions at Art. 18 (3) and 20 (2) of the Contract. In its view the mandatory nature of such mechanisms would not derive from the text of the two provisions, neither would the lack of jurisdiction of the Arbitral tribunal as a sanction of their violation. Moreover, as to the preliminary conciliation, it would indeed have taken place on January 13, 2009. According to the Respondent the Arbitrators were anyway entitled to hold that an attempt at conciliation would have been doomed as the irreducible differences between the Parties as to the performance of their respective contractual obligations were such that the Appellant could not argue in good faith that an attempt at conciliation would have been likely to succeed. As to the expert report the Respondent takes the

view, after the Arbitrators, that it would have been of no use to solve the issues at hand, which were legal and not technical. In its view this would be proved by the fact that in July 2005 an engineer by the name of A._____ had issued a report confirming that the production line did not make it possible to manufacture the product which the Respondent intended to market and that this finding by an expert did not lead to an amicable settlement of the dispute. Consequently the Respondent takes the view that the Appellant had no interest in the implementation in the expertise process contained at Art. 18 (3) of the Contract.

3.2

Seized for lack of jurisdiction the Federal Tribunal freely reviews the legal issues determining the jurisdiction or lack of jurisdiction of the arbitral tribunal, including the preliminary issues (ATF 134 III 565 at 3.1). Yet it reviews the factual findings on which the award under appeal rests only if one of the grievances at Art. 190 (2) PILA is raised against them or when some new facts or evidence are exceptionally taken into consideration in the framework of the Civil law appeal (Judgment 4A_234/2010 of October 29, 2010 at 2.1).

3.3

3.3.1 According to case law the interlocutory decision within the meaning of Art. 186 (3) PILA by which the arbitral tribunal finds that it has jurisdiction may not only be appealed to the Federal Tribunal immediately pursuant to Art. 190 (3) PILA but must be appealed under penalty of forfeiture (ATF 130 III 66 at 4.3; 118 II 353 at 2). The Respondent argues that the matter is not capable of appeal because the Appellant did not appeal timely the decision issued by the Arbitral tribunal as to jurisdiction at the January 27, 2010 hearing. The Respondent is wrong. The appeal to the Federal Tribunal against a decision must indeed be filed within thirty days after the full decision is notified (Art. 100 (1) LTF). Yet that time limit starts running only when the full reasons of the decision are received (BERNARD CORBOZ, in Commentaire de la LTF, 2009, nr. 9 ad Art 100 LTF). In this case as is clear from the extract of the minutes of the aforesaid hearing submitted by the Respondent, the Chairman of the Arbitral tribunal advised the Parties in that occasion that the reasons for which the inadmissibility defenses raised by the Appellant were rejected would be spelled out in the final award. Therefore that party could not appeal the interlocutory decision as to these defenses before it knew the reasons.

3.3.2 The Respondent argues at length that the Appellant would never have challenged the jurisdiction of the Arbitral tribunal but merely the admissibility of the request. The absence of any

reference to “lack of jurisdiction” in that party’s pleadings and the filing of submissions on the merits would leave no doubt in this respect. The argument based on Art. 190 (2) (b) PILA would accordingly be inadmissible due to forfeiture.

The argument is very formalistic and does not appear convincing. Firstly it is based on a disputable dichotomous analysis of the concept of inadmissibility of the request and lack of jurisdiction. Indeed the Respondent believes that these two concepts would categorically rule each other out. Yet that remains to be proved. To quote only Swiss procedural law, it generally holds jurisdiction as a requirement of admissibility of the claim and its lack as ground for rejection (see the title of chapter 2 of title 3 of the Civil Code of procedure of December 19, 2008 [CPC; RS 272] and Art. 59 (2) (b) of the same Code; also see among others: FABIENNE HOHL, Procédure civile, tome II, 2e éd. 2010, nr. 388 and nr. 484) and this, would indeed suggest that the two concepts are closely related.

It must also be emphasized that in its preliminary submission the Appellant invited the Arbitral tribunal to “hold the arbitral proceedings inadmissible due to the violation of Art. 18 and 20 of the Contract”. By doing so it denied the Arbitrators’ right to issue a decision on the merits as long as the steps contemplated by these two contractual clauses would not have been taken. In other words the Appellant denied that the Arbitral tribunal would be competent for the time being to issue a decision on the Respondent‘s submissions. Conversely it did not concede that the Arbitrators would already be empowered to issue a decision on the merits, albeit to hold the requests inadmissible. That the Appellant made some submissions on the merits to the Arbitral tribunal could not disprove the aforesaid deductions, no matter what the Respondent says. Indeed they were formulated only as an alternative and as a precaution because the Arbitral tribunal had decided that it would indicate only at the outcome of the proceedings the reasons for which the defense of inadmissibility raised in the answer to the request was rejected.

Moreover the Appellant rightly points out that at 4.2 of the aforesaid judgment 4A_18/2007 the Federal Tribunal held that the argument that an Arbitral tribunal disregarded the mandatory attempt at conciliation contained in the contract at hand was tantamount to failing to decline jurisdiction *ratione temporis* and was therefore an argument within the framework of Art. 190 (2) (b) PILA.

The argument based on that provision must accordingly be examined.

3.4

As already seen (aforesaid judgment 4A_18/2007 *ibid.*) the Federal Tribunal reviews the argument based on the violation of contractual provisions containing a mandatory preliminary to arbitration (attempt at conciliation, involvement of an expert, mediation, etc.) from the point of view of Art. 190 (2) (b) PILA concerning the jurisdiction of the Arbitral tribunal. It does so by default so to speak as it is impossible to connect such a grievance with another ground for appeal within the meaning of that provision, thus implicitly admitting that such a violation is certainly not serious enough to fall within procedural public policy as contemplated by Art. 190 (2) (e) PILA (on that concept see ATF 132 III 389 at 2.2.1) but still must be sanctioned in one way or the other. In the Court's view that does not mean that such a connection would necessarily dictate the solution to be adopted in order to sanction the filing of a request for arbitration without taking the mandatory preliminary step agreed upon by the parties.

The issue is already delicate as to whether that particular grievance is capable of appeal or not but even more so when it comes to determining the sanction of such a violation. The issue is much disputed as the Federal Tribunal already emphasized in the last case quoted (see 4.3.1). One of the explanations for the lack of consensus in this respect may be found in the fact that the various solutions proposed to sanction such a violation come from courts or legal writers of different legal perspectives which do not all give the same meaning to the basic concept to be taken into account in this context (jurisdiction, admissibility of the claim, procedural defense, rejection of the claim, etc.). Moreover, the very formulation of the issue in dispute, as it was made in the aforesaid judgment, may in itself be discussed to the extent that it appears to oppose insurmountably the material sanction (damages to be paid to the other party) to the procedural sanction (inadmissibility of the claim or rejection for the time being). Indeed it is not certain that the two types of sanctions cannot be combined. This is evidenced by the Appellant's preliminary submissions seeking both a finding that the arbitral proceedings were inadmissible due to the violation of Art. 18 and 20 of the Contract and financial compensation on the same grounds. This being so it is hardly possible to claim, as the Appellant does, that there would be a marked tendency to sanction the violation of a mandatory preliminary requirement to the arbitration by a decision of inadmissibility of the claim on the merits *ratione temporis*. It would rather appear that a majority of legal writers, at least in Switzerland, are in favor of staying the arbitral proceedings and giving the parties a time limit to cure the omission (see among others: POUDRET/BESSON, Comparative law of international arbitration, 2e éd. 2007, n° 13 *in fine*; KAUFMANN-KOHLER/RIGOZZI, Arbitrage international, 2e éd. 2010, n° 32a; CHRISTOPHER BOOG, How to Deal with Multi-tiered Dispute Resolution Clauses, in Bulletin

ASA 2008 p. 103 ff, spéc. 109). Be that as it may, there is no need to decide the issue in dispute here, even if it could receive an answer appropriated to all possibilities which can reasonably be doubted. Indeed for the reasons explained hereunder the Arbitral tribunal did not violate the two contractual clauses invoked by the Appellant.

3.5

3.5.1 Art. 18 (3) of the Contract prescribed the preliminary recourse to a neutral expert "in case of disagreements as to the conformity or non-conformity of the supplies and services". It is established that the Parties did not resort to an expert before the Respondent introduced the arbitral proceedings.

The Arbitral tribunal states that the Expert would have been exclusively empowered to pronounce on the technical aspects of the supplies and services in connection with a particular defect of the production line whilst the issues in front of the Arbitrators did not relate to these aspects but to the object of the contract and its possible nonperformance, namely legal issues (award 222 first coma). The Federal Tribunal is bound by the factual findings of the arbitrators as to the issues in the front of them. It is therefore in vain that the Appellant seeks to challenge that finding. Neither does it formulate an intelligible criticism of the interpretation given by the Arbitrators as to the mission given to the Expert by the aforesaid contractual clause when it claims without any further explanations that the expert report it produced in the arbitral proceedings "shows the identity of object" or that the mission was "equivalent to that of the engineer in the FIDIC contracts of which everybody knows that the decision is the necessary and mandatory preliminary to any seizure of an arbitral tribunal" (appeal, nr. 50). Moreover the additional argument which it formulates "*ex abundanti cautela"* in its observations of March 15, 2011 (nr. 19), as to the utility of resorting to an expert cannot be admitted because it was not submitted timely. Furthermore the argument does not invalidate the interpretation given by the Arbitral tribunal to the aforesaid clause in order to deduct the nature of the role that the Expert would have played in this case. It appears from the foregoing that there was no adequacy between the role given to the Expert and the issues to be decided by the Arbitrators. Consequently the latter rightly doubt that under these conditions and in view of the extreme positions of the Parties in the arbitral procedure the Expert's opinion could have let the Parties to reach an agreement on items totally alien to his mission (award, nr. 222, 2nd and 3rd comas).This is not "mere speculation", no matter what the Appellant says (appeal, nr. 51) but a sensible appreciation of the efficacy that the provisions of Art. 18 (3) of the Contract could have had if implemented.

Consequently, the Appellant wrongly argues that an expert should have been called upon before initiating the arbitration.

3.5.2 The Appellant's argument as to the failure to comply with the requirement of a preliminary attempt at conciliation does not appear founded either.

It is to be determined firstly if Art. 20 of the Contract instituted mandatory preliminary conciliation as the Appellant argues or if it merely submitted to arbitration the disputes which could not have been settled amicably as the Arbitrators held. This supposes an interpretation of the contractual clause in accordance with the general principles governing the interpretation of expressions of will (judgment 4A_18/2007, quoted above, at 4.3.2 and the case quoted). In this respect it does not appear that the Arbitral tribunal would have disregarded such a principle by emphasizing the incidental nature of the reference to "an attempt at conciliation" at Art. 20 (2) of the Contract, on the absence of any specific elements in the text of that clause which could establish that such a preliminary was a necessary step for the arbitral proceedings to be admissible and on the fact that the text at hand does not describe the conciliation proceedings in any greater details (award, nr. 224, second coma).Thus by reading the clause at hand, one does not know exactly what that tentative conciliation would have consisted of, assuming that the Parties would have given the same meaning to such a step, neither is it known if it required the intervention of a mediator or not, or even if it had to be initiated within a certain time limit. Such lack of precision doubtlessly does not argue in favor of the mandatory nature of the conciliation to be attempted. Yet the Appellant sees a strong clue of that in the first paragraph of the clause under review, more precisely in the part of the sentence stating that "an amicable settlement shall first be sort by the parties". The wording of that part of that sentence, in particular the use of the future, would suggest that it may be right; but it raises another issue, namely the relationship between the first two paragraphs of Art. 20 of the Contract and in this respect the issue as to whether or not the concept of amicable settlement and conciliation used by each of them are synonymous. Yet it is not necessary to analyze this issue any further. If indeed the mandatory nature of the attempt at conciliation mentioned at Art. 20 (2) of the Contract were established, this would not change the disposition of the argument under review.

It must be recalled with the Arbitral tribunal that the Parties met in Geneva on January 13, 2009 before the Respondent filed its request for arbitration and that the meeting was not successful (see award, nr. 166 and 224, 2nd coma). This set of facts warrants two conclusions: firstly, irrespective of

the informal nature of the meeting, there was indeed an attempt at conciliation in this case within the meaning of Art. 20 (2) of the Contract; it is not possible in this respect to agree with the Appellant's peremptory allegation that "the facts show that [the Respondent] refused any good faith discussion" (appeal, nr. 52). Secondly, in view of the failure of that attempt by the Parties to find an amicable agreement and considering the sovereign finding of the Arbitrators that this failure merely confirmed the irreversible deterioration of the relationship between the Parties, the Appellant does not act in good faith when it claims today that the Respondent should not have acted in front of the Arbitral tribunal without first pursuing a transactional solution, as the chances of such a step succeeding could already be ruled out at the time.

3.5.3 The Appellant does not criticize the decision of the Arbitrators to deny the financial compensation it was seeking as a consequence of the failure to undertake the preliminary steps foreseen by the Contract. That issue is closely connected to the two which have just been discussed and needs therefore not be examined (Art. 77 (3) LTF).

The argument based on Art. 190 (2) (b) PILA is accordingly to be rejected entirely.

4.

Art. 12.2 of the Contract, concerning the Supplier's guarantee states the following: "The Duration of the guarantee extends to:

- A period of 12 (twelve) months from receipt of the equipment by the Client User and in any event – at the latest over a period of 22 (twenty two) months from the date of loading of the equipment; the date on the bill of lading or that of the forwarder's certificate of receipt prevailing".

As to Art. 10.2 (4) of the Contract it points out that "the guarantee period shall start from the date of receipt".

4.1

4.1.1 To substantiate its second group of arguments the Appellant states on the basis of the aforesaid clauses that in its post hearing memorandum of May 19, 2010 it raised a defense that the claim was time barred by invoking both the relative time limit of 12 months and the absolute time limit of 22 months instituted by Art. 12.2 of the Contract. As to the latter time limit, it argues that it demonstrated with an exhibit that the last equipment delivered to the Respondent had been loaded

on February 2, 2004, so that the 22 months time limit expired on December 2, 2005. Hence the Respondent's claim initiated on January 20, 2009 only was time barred and in its opinion should have been rejected on that ground only.

As to the analysis in the award of the issue of the time limit, the Appellant points out that the Arbitral tribunal did indeed find that a defense had been raised in this respect (award, nr.285 (a) with reference to the aforesaid post hearing memorandum) but that it eventually limited its review to the issue of the relative time limit (award, nr. 287 and 288), without ever dealing with the second hypothesis in Art. 12.2 of the Contract, *i.e.* that of the absolute time limit of 22 months from the date of loading of the equipment.

According to the Appellant, this omission would violate its right to be heard within the meaning of Art. 190 (2) (d) PILA as the Arbitral tribunal did not address a defense it had raised and this would moreover be inconsistent with the rule of *pacta sunt servanda,* which is part of material public policy pursuant to Art. 190 (2) (e) PILA, as the Arbitrators failed to apply a contractual clause the existence of which they had acknowledged.

4.1.2 In its answer to the appeal the Respondent, after pointing out that the right to be heard does not require an international arbitral award to be reasoned, refers to the aforesaid sections of the award to deduct that the Arbitral tribunal entirely rejected the defense that the claim was time barred, including as to the issue of the 22 months time limit set at Art. 12.2 of the Contract. Thus in its view, the Appellant cannot argue that its right to be heard was violated. As to the rule of *pacta sunt servanda* the Respondent denies that it may have been violated in this case as the Arbitrators, when they rejected the defense that the claim was time barred, issued an award consistent with their interpretation of the contractual clause governing that issue.

4.1.3 For its part the Arbitral tribunal, in a letter of the Chairman of February 21st, 2011 pointed out the following as to the time limit:
"The Arbitral tribunal also reviewed the defense that the claim was time barred by the absolute time limit of 22 months from the date of loading of the equipment. It rejected it implicitly by holding that the Claimant [*i.e.* the Respondent in the federal proceedings] answered that defense in substance and convincingly (see Memorandum in Reply § 202) and that the Respondent [*i.e.* the Appellant in the federal proceedings] in its Memorandum in Reply (see §§ 243-244) did not contradict the substance of the arguments developed by the Claimant".

4.2

In one of the two parts of its argument the Appellant claims that the Arbitral tribunal disregarded the principle that agreements must be kept, which is one of the elements of substantive public policy.

4.2.1 The rule of *pacta sunt servanda,* within the restrictive meaning given by case law as to Art. 190 (2) (e) PILA is violated only if the arbitral tribunal refuses to apply a contract clause whilst admitting that it binds the parties or conversely if it imposes on them compliance with a clause of which it considers that it does not bind them. In other words the arbitral tribunal must have applied or refused to apply a contract provision in contradiction with the results of its own interpretation as to the existence or the contents of the legal deed in dispute. However the process of interpretation itself and the legal consequences logically drawn from it are not governed by the principle that contracts must be kept, so that they cannot base an argument that public policy was violated. The Federal Tribunal repeatedly emphasized that almost the entirety of the disputes which can be derived from a breach of contract are outside the scope of protection of the rule of *pacta sunt servanda* (judgment 4A_480/2010 of March 15, 2011 at 3.1 and case quoted).

4.2.2 The Appellant argues that the Arbitral tribunal would have acknowledged the existence of a contract provision – Art. 12.2 of the Contract – yet would have simply refused by omission to apply it. It is not so. The rule of *pacta sunt servanda* would be applicable in this case if the arbitrators had held that the Respondent's claim was time barred according to the aforesaid provision because it had been introduced more than 22 months after the date of loading of the equipment but had nonetheless granted the submissions in the request. There is none of that at hand; if the Arbitral tribunal granted the Respondent's submissions it was because it held that the claim was not time barred. There is accordingly no discrepancy between the premise of its reasoning and its conclusion.

Consequently the argument is unfounded in this respect. It remains to review the criticism made by the Appellant in the same context but from the point of view of the right to be heard.

4.3

4.3.1 The right to be heard in contradictory proceedings within the meaning of Art. 190 (2) (d) PILA certainly does not require an international arbitral award to be reasoned (ATF 134 III 186 at 6.1 with references). Yet it imposes on the arbitrators a minimum duty to examine and deal with the

pertinent issues (ATF 133 III 235 at 5.2 p. 248 and cases quoted). That duty is violated when, inadvertently or due to a misunderstanding, the arbitral tribunal does not take into account some factual allegations, arguments, evidence and offers of evidence presented by one of the parties and important for the decision to be issued. If the award completely overlooks some items apparently important for the disposition of the dispute it behooves the arbitrators or the respondent to justify that omission in their observations as to the appeal. They have to demonstrate that contrary to the appellant's arguments, the items omitted were not pertinent to decide the case at hand or, if they were, that they were implicitly rejected by the arbitral tribunal. However, the arbitrators do not have the obligation to discuss all the arguments invoked by the parties, so that it cannot be found that they violated the right to be heard in contradictory proceedings because they did not reject, even implicitly, an argument objectively devoid of any pertinence (ATF 133 III 235 at 5.2 and cases quoted).

4.3.2 The Appellant's argument based on the expiry of the absolute time limit of 22 months was not rejected expressly by the Arbitral tribunal. The latter acknowledges in its observations as to the appeal that it rejected the argument implicitly only. That implicit rejection is based on the fact that the Appellant did not contradict in its reply the Respondent's explanations in its answer in order to challenge the argument that the claim was absolutely time barred.

In the arguments involved the Respondent substantially explained that for certain types of defects, such as the manufacture of specific parts, it was possible that the 22 months' time limit which started from the date of loading of the equipment would expire before the relative time limit of 12 months which was tied to the receipt of the production line of the non-woven. However in the normal course of things there should not have been any inconsistency between the two time limits as the receipt of the line should have taken place in the weeks following the delivery of the equipment. If there was an inconsistency in this case it is because the receipt of the production line was made impossible because it had not been finished four years after its assembly. Still according to the Respondent moreover, its claim was not a claim based on guarantee for the defects but a claim for non-performance (Memorandum in reply of October 29, 2009, nr. 202)

It is true that at nr 243/244 of its Memorandum in reply of January 13, 2010 the Appellant did not specifically refute that argument as the Arbitral tribunal points out in the aforesaid observations but merely denied in substance its alleged non-performance of the Contract and demonstrated that the clause excluding the seller's liability was valid. However in its observations of March 15, 2011 the

Appellant points out to the Federal Tribunal that it had explained its position as to the disputed issue much more thoroughly in another brief, namely its Post hearing memorandum of May 19, 2010 (nr. 22 to 41 and 236). Indeed the Appellant spells out in that section the reasons for which according to the Appellant the Respondent's claim underwent the same rules as to time limits, whether it was a claim for non-performance of the Contract (Art. 97 ff CO[4]) or a claim for guarantee of the object of the sale (Art. 197 ff CO). It moreover indicates specifically the reasons for which the claim would be time barred under both time limits established by Art. 12.2 of the Contract (nr. 38) and specifically as to the absolute time limit of 22 months contained in that clause (nr. 38 (ii), 39 and 246). Yet one vainly seeks in the text of the award a rejection, albeit implicit, of the arguments developed by the Appellant as to the absolute time limit. The reference at nr. 285 (a) of the award (devoted to presenting the Appellant's position) to "Article 12.2 of the Contract (Déf.19.05.2010, nr. 33 ss)" relates to a section of that party's brief dealing with both time limits and accordingly has nothing specific. It is moreover striking to notice in this respect that in the short observations it made as to the appeal the Arbitral tribunal does not quote the brief of that date, which deals with the issue in dispute in details, but a previous brief which appears much more vague in this respect. Similarly, the Arbitrators' reasons at nr. 287 of the award relate to the concept of receipt of the production line and consequently to the relative time limit. Evidence of that is also the fact that according to the Arbitral tribunal "it is not the duration of the time limit which is in dispute but its starting point" (award, nr. 287, § 1). However the award does not contain any reference, even by allusion, to the absolute time limit of 22 months, whether as to the applicability of that time limit or its requirements, in particular its starting point. Contrary to what the Arbitral tribunal states in the aforesaid observations, it does not appear either that the arbitrators would have found that the Respondent had answered the argument that the claim was time barred "substantially and convincingly". Accordingly, one would have to rely on the mere allegations of the Arbitral tribunal in the federal proceedings as to whether it dealt with the issue in dispute or not. Yet if it is true that the obligation to reason is not one of the aspects of the guarantee of the right to be heard within the meaning of Art. 190 (2) (d) PILA, relying on the mere allegation of the Arbitral tribunal that it dealt with the issue in dispute when faced with the Appellant's denials would deprive of its contents the minimum duty of the arbitrators to deal with the pertinent issues, which the aforesaid case law deducted from that guarantee.

The Respondent appears to want to argue at least implicitly that the issue of the absolute time limit set by Art. 12.2 of the Contract was not pertinent to the case at hand. Yet it tries to establish in

[4] Translator's note: CO is the French abbreviation for the Swiss Code of obligations

support of its argument that the Arbitral tribunal could not but reject the defense based on the 22 months time limit contained in that Contract clause if it had handled it. Such an attempt is bound to fail because it seeks to demonstrate the absence of foundation of the argument based on the absolute time limit and not its lack of pertinence. Yet the pertinence of the argument is undeniable because its admission would mean the rejection of the claim on the merits. As to whether or not the defense should have been admitted had it been dealt with by the Arbitrators, it is not for the Federal Tribunal to decide. Indeed this would be tantamount to disregarding the formal nature of the right to be heard and in case of violation of that right the necessity to annul the decision under appeal irrespective of the Appellant's chances of obtaining a different result (ATF 135 I 187 at 2.2, 279 at 2.6.1; 133 III 235 at 5.3 *i.f.*).

Under such conditions the argument based on the violation of the right to be heard must be admitted and consequently the award under appeal must be annulled.

Yet, in order to take into account the formal nature of the right to be heard and to avoid unnecessary proceedings it appears appropriate to deal with the other grievances formulated in the appeal to avoid that its author should again seize the Federal Tribunal to have them reviewed if the Arbitrators were to reject the defense that the claim is time barred in their new award.

5.

In a third argument, also divided in two parts, the Appellant argues that the Arbitral tribunal found that it was contractually liable not on the basis of the Contract and the Addenda concluded but due to a "tacit modification *ex post* of the latter" (appeal, nr 73). It argues in this respect that it right to be heard was violated (Art. 190 (2) (d) PILA) and that it wrongly assumed jurisdiction *ratione materiae* "to decide as to the existence of a tacit agreement" (appeal, nr 74).

5.1

5.1.1 In Switzerland the right to be heard relates mainly to the finding of facts. The right of the parties to be asked for their views on legal issues is recognized only limitatively. As a rule, according to the adage *jura novit curia*, state courts or arbitral tribunals freely assess the legal relevance of the facts and may also decide on the basis of rules of law other than those invoked by the parties. Consequently the latter do not have to be heard specifically as to the scope to be given to the rules of law, to the extent that the arbitration agreement does not limit the mission of the arbitral tribunal only to the legal arguments raised by the parties. They have to be asked for their

views exceptionally when the court or the arbitral tribunal considers basing its decision on a rule or a legal consideration which was not raised during the proceedings and of which the parties could not anticipate that it would be pertinent (ATF 130 III 35 at 5 and cases quoted). Moreover knowing what is unforeseeable is a matter of appreciation. Thus the Federal Tribunal shows restraint in applying the aforesaid rule for that reason and because the specificities of that type of procedure must be heeded in order to avoid that the argument of surprise may be used with a view to obtaining a substantive review of the award by the appeal body (judgment 4A_392/2010 of January 12, 2011 at 5.1 and the cases quoted).

5.1.2 As the argument is presented it is doubtful that the matter is capable of appeal in this respect. The Appellant argues that the dispute was as to the issue of whether or not it had undertaken to provide its counterpart with a production line capable of manufacturing absorbent non-woven (Appellant's thesis) or hydrophobic non-woven (Respondent's thesis). It then quotes a long section of the Post hearing memorandum filed by the Respondent on May 19, 2010 (nr. 117 to 124 and 135/136 of that brief) to deduct without further demonstration that both parties debated exclusively the interpretation of the written agreements binding them (Contract and Addenda). Yet in its view the Arbitral tribunal would have concluded that there was a contractual commitment in the meaning the Respondent wanted by reference to an alleged tacit agreement of the Parties subsequent to the written agreements although none of them raised that legal argument. In this respect the Appellant refers the Federal Tribunal to the aforesaid section of the Respondent's post hearing memorandum whilst claiming that "it will be easy to verify [the matter] by the pleadings of the parties contained in the record" (appeal, nr. 78 with reference, in footnote 78, to exhibits A-F of the Appellant). It is doubtlessly admissible for the Appellant to refer this Court to the pleadings in the arbitral proceedings since the issue is to find that a legal argument was absent, *i.e.* a negative fact. Yet the Appellant's argument summarized above appears at the very least lacunar and hardly consistent with the requirements of Art. 77 (3) LTF in its presentation of the opinions of the Respondent and of the Arbitral tribunal as to the issue of the elements to be taken into account to determine the object of the Contract. Be this as it may, the argument, even if it is admissible, cannot but be rejected.

5.1.3 It appears from the detailed and convincing explanations given at paragraphs 92 to 98 of the Respondent's answer with reference to the chronology at nr. 237 to 243 of the award that the Arbitral tribunal did not hold that the tacit amendment of the initial purpose of the Contract would have taken place after the Addenda where concluded but rather that it held that the amendment resulted from the conclusion of Addendum 1 and of the Technological Extension as well as from the

behavior of the parties in the meantime. Moreover the Respondent satisfactorily demonstrates with reference to the sections of its briefs in the arbitration proceedings that the thesis of an amendment to the initial object of the Contract, particularly in view of the Parties' attitude after its execution, had indeed been presented by the Respondent in the arbitration (answer, nr. 99 and the references at footnotes 79/80).

Under such conditions the Appellant vainly argues that there was a surprise as to how the Contract concluded on October 12, 2001 had been amended subsequently. The Appellant is not entitled to that argument considering that federal case law has long held that the behavior of the parties after the conclusion of the contract is a clue to their true intent (ATF 107 II 417 at 6), *i.e.* a decisive item for the subjective interpretation of the Contract.

5.2

The Appellant argues further that the Arbitral tribunal would have gone beyond the limits of its material jurisdiction. It is not so.

The aforesaid Art. 20 (2) of the Contract submitted to arbitration "possible disputes which could arise as to the interpretation or the performance of the provisions of this PROCUREMENT". The dispute decided by the Arbitral tribunal was undeniably in that category as it concerned the interpretation of the true intent of the Parties as stated in formal deeds (Contract and Addenda) or conclusively (behavior of the parties). As to the Appellant's argument that the Arbitrators would not have limited themselves to interpreting the contractual agreements but would have "created between [the parties] an entirely new tacit agreement" (appeal, nr 85) it has already been rejected when reviewing the previous argument.

This being so the Appellant's third argument proves to be unfounded if not inadmissible in in part.

6.

Finally the Appellant argues that the Arbitral tribunal violated its right to be heard by disregarding essential evidence, regularly produced, as to the receipt of the production line, namely as to a decisive item to determine the beginning of the relative time limit of 12 months contained in the Contract. In its opinion that evidence would demonstrate that the receipt of the object of the sale had taken place long before January 20, 2008, contrary to what was held by the Arbitrators, that it

had preceded the initiation of the claim by more than one year and consequently that the latter was time barred.

6.1

The right to be heard contemplated by Art. 190 (2) (d) PILA is violated as was already pointed out above (at 4.3.1) when inadvertently or due to a misunderstanding the Arbitral tribunal does not take into consideration some factual allegations, arguments, evidence and offers of evidence presented by one of the parties and important for the decision to be issued. It behooves the allegedly harmed party to establish that the arbitral tribunal did not review certain facts, evidence or legal arguments that it had regularly put forward to support it submissions and that they were of such nature as to impact the outcome of the dispute (judgment 4A_482/2010 of February 7, 2011 at 3.2 and the case quoted).

6.2 The Arbitral tribunal spells out in details in the award the reasons for which in its opinion the production line was not received according to the conditions defined at Art. 10.2 of the Contract at the conclusion of the tests made in 2004 (nr. 260 to 266) and in January 2008 (nr. 267 to 274). It concludes that receipt finally took place at a date subsequent to January 20, 2008 (nr. 275), namely less than a year before the request for arbitration was filed (nr. 276 ch. 3).

According to the Appellant this deduction would rest on the following two grounds (appeal, nr 96): on the one hand the fact that the Respondent had abandoned *pendete lite* its initial submissions that the Contract should be terminated and the purchase price reimbursed, thus agreeing to retain the production line (award, nr 272/273); on the other hand the fact that the Respondent could use the plant in part even though not to the extent that it could have hoped (award, nr 274). From that finding the Appellant draws two conclusions: first it denies any pertinence to the argument based on the amendment of the claim during the proceedings as to the determination of the time of receipt of the production line (appeal, nr 97); moreover it argues that whilst mentioning them in the award (see their list at nr 102 of the appeal), the arbitrators failed to reviewed the facts and evidence that the Parties had presented to determine the time at which the partial use of the plant had started, although they held that partial use to be decisive to set the date of receipt of the object of the sale (appeal, nr. 98 and 103).

This summary of the argument shows that the Appellant does not seem to have grasped the real meaning of the reasons in the award as to that issue in dispute. It is indeed clear not only from their contents but also from the way in which they were presented that the Arbitral tribunal never intended to turn the partial use of the production line into the criterion which would determine the type of receipt of that plant. Firstly it enquired as to whether the test made in 2004 and 2008 fulfilled the requirements at Art. 10.2 of the Contract so that one could talk about receipt of the production line within the meaning of that clause; and the Arbitral tribunal found that it was not so (award, p. 72 to 77, nr. 3.3.1/3.3.2). It then held with a view to the rules of good faith and to answer the Respondent's argument that "the line would never have been in a condition to be received" (award, nr 231), that the defense could no longer be admitted after the Respondent gave up its submission that the Contract should be terminated and that it was using the plant in dispute at least partially, even though not to the extent anticipated (award, p.78/79, nr. 3.3.3). In other words the Arbitral tribunal held by way of a legal fiction of sort that the Party's behavior in the arbitral proceedings (amendment of its submissions) and factually (partial use of the plant) indicated that if the production line had not been received as agreed before January 20, 2008, it was deemed to have effectively been received by conclusive acts afterwards. Having found so it could reject the Respondent's defense without having to determine in this respect the precise date of the fictitious receipt, which had in any event taken place less than 12 months before the arbitral proceedings were initiated. This being so the Appellant's argument is unfounded to the extent that it seeks to establish that the Arbitrators would have failed to take into consideration a number of circumstances which they had found with a view to establishing that the partial use of the production line had started well before January 20, 2008. Such circumstances relate to an inadequate criterion to determine whether or not the plant had been received by that date in accordance with the requirements of Art. 10.2 of the Contract. Moreover it must be pointed out that the Appellant does not explain what the concept of receipt would encompass within the meaning of that clause when it appears from reading it and from the Respondent's explanations (answer, nr. 112) that the wording at issue has a specific meaning, to the extent that it refers to the end of a relatively complex technical verification process.

Finally and more generally, the Appellant's explanations show that in reality it criticizes the way in which the Arbitrators assessed the evidence in the record of the arbitration to conclude that the test carried out in 2004 and 2008 had not led to a receipt of the plant within the meaning given to that word by the aforesaid Contract clause. Yet the assessment of the evidence is beyond the review of the Federal Tribunal in a Civil law appeal against an international arbitral award.

Thus assuming that the matter is capable of appeal in this respect, the argument appears groundless.

7.
The appeal is mainly rejected. Yet the appeal has been admitted on an issue which could prove to be decisive as to the outcome of the claim brought against the Appellant. Under such conditions it is justified to divide the costs of the federal proceedings between the Parties equally (Art. 66 (1) LTF) and to have each party bear its own costs (Art. 68 (1) LTF).

Therefore the Federal Tribunal pronounces:

1. The Appellant's motion that the note written by one of its counsel on April 3, 2009 should be removed from the record is rejected.

2. The appeal is granted in part, to the extent that the matter is capable of appeal, and the award under appeal is annulled.

3. The judicial costs set at CHF 25'000.- shall be borne by each party in half.

4. Each party shall bear its own costs.

5. This judgment shall be notified to the Representatives of the Parties and to the Chairman of the *ad hoc* Arbitral tribunal.

Lausanne May 16, 2011.

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

The Presiding Judge: The Clerk:

KLETT (Mrs) CARRUZZO