

4A_128/2008¹

Judgement of August 19, 2008

First Civil Law Division

Federal Judge CORBOZ, Presiding

Federal Judge KLETT (Mrs)

Federal Judge ROTTENBERG LIATOWITSCH (Mrs)

Federal Judge KOLLY

Federal Judge KISS (Mrs)

Clerk of the Court: CARRUZZO

X._____ Ltd,

Appellant,

Represented by Mr Jean-Marie VUILLEMIN and Mr Jean MARGUERAT, FRORIEP
RENGGLI

v.

Y._____ and Z._____ SpA,

Respondents,

Represented by Mrs Silvia TEVINI DU PASQUIER

Facts:

A.

A.a On November 9, 2002 X._____ Ltd (“X._____”), a company organised under the laws of Cyprus, and Y._____, a company organised under the laws of Qatar, entered into a Subcontract Agreement (“the Contract”) in the framework of the construction of an industrial complex in Qatar. X._____ undertook to perform certain dredging works with a

¹ Translator’s note: Quote as X._____ *v.* Y._____ and Z._____ SpA, 4A_128/2008. The original of the decision is in French. The text is available on the web-site of the Federal Tribunal www.bger.ch.

view to installing a refrigeration system using sea-water. For its part, Y._____ was to pay the price of the work, *i.e.* USD 13'750'000.-. It was also bound to provide its contractual counterpart with a guarantee for payment ("Payment Guarantee")² amounting to USD 7'500'000.-, which was to be issued by a bank or an insurance company and that X._____ was to approve (Art. 14 of the Contract).

By way of an arbitration clause inserted in the Contract, all disputes which it could produce would be submitted to one or several arbitrators under the aegis of the International Chamber of Commerce (ICC). The venue of the arbitration was set in Geneva and English was the language of the arbitral proceedings. The Parties submitted the Contract to the Swiss Code of obligations.

A.b On December 9, 2002 Y._____ sent X._____ a fax from an insurance broker with regard to the issuance of a guarantee in conformity with the Contract. On the 15th of the same month, X._____ informed Y._____ that the guarantee was not acceptable. The Parties then considered other forms of guarantees. They finally agreed on a parent company guarantee³ by Z._____ SpA ("Z._____"), a company organised under Italian law which the arbitrators treated as Y._____’s mother company although it held merely a minority share in the latter for reasons relating to the law of Qatar.

Thus, on December 20, 2002, Z._____ issued a parent company guarantee letter (hereafter: "the Guarantee"), worded as follows⁴:

"Re. Ras Laffan Common Cooling Water System Project Subcontract for Dredging/ Stockpiling Works

With reference to the above mentioned contract, We, Z._____ SpA (hereinafter referred to as the "Guarantor"), as ultimate Parent Company of Y._____ (hereinafter referred to as the "Contractor") do hereby enter into the following undertaking with M/s X._____ (hereinafter referred to as "X._____") stating that:

- 1. Contractor has been awarded the subcontract for the marine portion of the works for the project in subject by the Main Contractor ...*

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

³ Translator's note: In English in the original text.

⁴ Translator's note: The text was reproduced in English in the original decision.

2. Contractor ... has entered into a Subcontract with X._____ for the dredging/ stockpiling works of the intake channel and basis relating to the contract in reference.
3. Contractor shall pay X._____ a total subcontract price of USD 13'750'000.- ...
4. Contractor will make payments as indicated in the Subcontract Agreement date 09 November 2002 signed by and between X._____ and the Contractor.
5. Contractor will pay X._____ by bank transfer the amount of approved monthly invoices at 60 (sixty) days from the date of the said invoices.
6. Contractor will perform all of its obligations contained in the Subcontract Agreement.
7. In consideration of the above, the Guarantor, ..., undertakes to reimburse the sum of expired invoices as indicated in Item 5 thereof if the Contractor fails in any respect to perform the said financial obligations in above mentioned Subcontract Agreement or commits any breach thereof. The Guarantor will on simple demand from X._____ take whatever measures may be necessary to secure the payment of obligations of the Contractor under the Subcontract Agreement, and will indemnify and keep indemnified X._____ as if the Guarantor was the original obligor.

The present guarantee will become null when X._____ has received full payment in accordance with the terms of the Subcontracts Agreement.”

On December 26, 2002, Y._____ sent the original of the Guarantee to X._____. Then, on January 10, 2003, the Parties signed an addendum by which they modified Art. 14 of the Contract, among other things, in order to better take into account the changes made to the Guarantee anticipated initially.

A.c The dredging work started in February 2003. In May/June 2003, a dispute arose between the Parties with regard to the ground underwater. X._____ deplored that it was much harder than indicated in the contractual documents. As to Y._____, it claimed that this was not so and that in any event, this was a circumstance which its contractual counterpart should reasonably have anticipated.

On October 8, 2003, X._____, stating that certain certified invoices had not been honoured, called the Guarantor. Disputing the accuracy of that statement, Z._____ refused to intervene.

Various subsequent meetings did not allow the Parties to find common ground.

B.

B.a On October 18, 2005 X._____ filed a request for arbitration against Y._____ and Z._____ with the ICC. In substance, it submitted that the Respondents were to pay USD 17'578'301.- as compensation for the costs incurred due to the geological conditions not anticipated in the Contract met during the performance of the works and due to the steps it had to take in order to meet the deadlines, USD 1'106'250.- for unforeseen additional costs related to the Second Gulf War and USD 1'274'885.- which had been withheld by the Respondents as compensation for alleged late delivery damages. The Appellant also requested an extension of the time limit necessary to finish the works and a finding that it no longer had any obligations based on the Contract towards the Respondents. In a letter dated November 18, 2005 Z._____ stated that it was bound by no arbitration clause and that accordingly, the proceedings initiated by X._____ could not be continued against Z._____.

On December 22, 2005 Y._____ filed its answer to the request for arbitration and a counterclaim.

Considering that a *prima facie* arbitration clause existed towards Z._____, the ICC proceeded to constitute a three members arbitral tribunal.

The Arbitral tribunal decided to deal with its own jurisdiction first as it was challenged by Z._____. It gave the Parties an opportunity to present their arguments in this respect. In an interlocutory award of January 31, 2008, issued by a majority of its members, the Arbitral tribunal held that it had no jurisdiction towards Z._____ in the context of the pending arbitral proceedings. However, it found that it had jurisdiction *ratione personae* towards Y._____.

B.b The reasons for which the Arbitral Tribunal held that it had jurisdiction *ratione personae* with regard to Z._____ may be summarized as follows:

B.b.a The Contract is governed by Swiss law. The subjective bearing of the arbitration clause must accordingly be examined based on Art. 178 (2) PILA⁵. To determine applicable law on the bases of that Article, one may not merely refer to that chosen by the Parties, *i.e.* Swiss law. The Guarantee must be considered as such since what is involved here is the nature and the

⁵ Translator's note: PILA is the most frequently used English abbreviation for the Federal Statute of December 18, 1987, on Private International Law, RS 291

consequences of a commitment underwritten by a third party, even if such analysis must take into account the context of the relationships resulting from the Contract. The Parties disagree as to whether the Guarantee is governed by Swiss or Italian law. It does not matter as applying either law leads to the same result. The Parties rightly hold the view that reference must be made to the decision issued by the Federal Tribunal in case 4P.126/2001 on December 18, 2001, in order to tell whether or not a guarantor is bound by the arbitration clause inserted into the main Contract. According to that decision a guarantee, even a several guarantee or a contract to the charge of a third person are not sufficient to carry that consequence⁶. However, this would be the case of the assumption of an obligation. The commitment undertaken by Z._____ must accordingly be characterized both under Swiss and Italian law.

Rightly, none of the Parties claim that the Guarantee would be a guarantee within the meaning of Art. 492 ff CO. Is it then a contract to the charge of a third person (Art. 111 CO), or a *sui generis* contract similar to that, or the assumption of an obligation? In the latter situation, the person assuming the obligation becomes the obligor at the side of the first obligor without the latter being freed from his obligation. In this case, the real intent of the Parties as to an assumption of obligation by Z._____ was not established. It remains to determine if the existence of an assumption of an obligation may be deducted from the interpretation, according to the principle of trust, of the intent expressed by the aforesaid corporation in the Guarantee. This is not the case. Admittedly, the Guarantee contains some language at the end of its § 7 from which, at first sight, one may infer the intent of Z._____ to undertake the same contractual obligations as Y._____ (“...as if the Guarantor was the original obligor”). However, besides the fact that the language is not free of ambiguity, the analysis of the other terms used in the document at hand – whether the designation of Z._____ as Guarantor and not as Co-debtor or that of the Debtor of the guaranteed

⁶ Translator’s note: As “Guarantees” the Swiss Code of Obligations (“CO”) basically recognises two institutions: the Guarantee, as generally understood in English parlance, is instituted by Art. 492 CO. It can be joint or several and the Guarantor answers for the performance of the principal Obligor. The word “Guarantee” is thus used here for the French “*cautionnement*”, the German “*Bürgschaft*” or the Italian “*fideiussione*”. On the other hand, Art. 111 CO contemplates a different type of “Guarantee”, namely that in which a person promises to another the performance of a third person. That “Guarantee” known in French as “*porte-fort*”, in German as “*Vertrag zu Lasten eines Dritten*” or in Italian as “*Promessa della prestazione di un terzo*” has been translated as “Contract to the charge of a third person”, as suggested in the Swiss-American Chamber of Commerce translation of the Swiss Code of Obligations, 3rd Edition, Zurich, 1995.

⁷ Translator’s note: Reproduced in English in the French original.

obligations (Contractor and not Contractor jointly with Guarantor) or the description of the commitments undertaken by the Guarantor (they are different from those contained in the Contract) – rule out the existence of the assumption of an obligation. The subsequent behaviour of the Parties also substantiates such a conclusion, which is not disproved by the fact that Z._____ had an interest in the fulfilment of the project, to which its sister company participated, such an interest being only indirect.

The same conclusion may be drawn from Italian law. According to that law, the Guarantee must be qualified as *contratto autonomo di garanzia*⁸ or as *promessa del fatto del terzo*⁹ (Art. 1381 of the Italian Civil Code), or as a combination of both types of Guarantees. Since it carries no assumption of an obligation by the Guarantor, it may not be described as an *accollo* (Art. 1273 of the Italian Civil Code), neither is it an *espromissione* (Art. 1272 of the Italian Civil Code). A *fideiussione* (Art. 1936 of the Italian Civil Code) is not applicable here either.

Accordingly, Z._____ did not become a Party to the arbitration clause contained in the Contract simply because it issued the Guarantee.

B.b.b Applying the theory of the arbitration clause by reference does not allow for a finding that the Arbitral tribunal would have jurisdiction as to Z._____. Indeed, if the Guarantee refers to the Contract it is only with a view to identifying the obligations guaranteed. Nothing justifies a statement that the Parties to the contract of guarantee would have intended, by its mere reference, to submit to the arbitration clause inserted into the Contract.

B.b.c It is not established that Z._____ would have become involved in a significant manner in the negotiation or the performance of the Contract. Thus, it may not be deemed to have adhered by its acts to the arbitration clause there.

B.b.d Finally, there are no exceptional circumstances in this case which would require to extend the bearing of the aforesaid clause to that third Party by reference to the theory of abuse of rights.

⁸ Translator's note: In Italian in the French original.

⁹ Translator's note: In Italian in the French original.

C.

On March 7, 2008, X._____ filed a Civil law appeal. It petitions the Federal Tribunal to annul the award and to find that the Arbitral tribunal has jurisdiction to decide the claims made against Z._____. In the appeal X._____ claims irregular composition of the Arbitral tribunal and lack of jurisdiction thereof. The former ground for appeal was subsequently withdrawn.

The appeal proceedings were stayed by decision of the presiding Judge of March, 28, 2008, as a consequence of the Appellant having filed a challenge against one of three arbitrators with the ICC Court of International Arbitration. The appeal proceedings were continued after the challenge was withdrawn.

The Respondents principally submit that the matter is not capable of appeal or, alternatively, that it should be rejected: the Arbitral tribunal took no position as to the appeal.

On May 29, 2008, the Respondents filed a French translation of a legal opinion established by an Italian professor and produced in the arbitration. A copy of that translation was sent to the Appellant.

Reasons:

1.

According to Art. 54 (1) LTF¹⁰, the Federal Tribunal issues its decision in an official language, as a rule in the language of the decision under appeal. When that 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 chose English whilst in the briefs submitted to the Federal Tribunal, they used French. According to its practice, the Federal Tribunal will consequently issue its decision in that language.

2.

2.1 In the field of international arbitration, a civil law appeal is allowed against the decision of arbitral tribunals under the conditions set forth at Art. 190 to 192 PILA (Art. 77 (1) LTF).

¹⁰ Translator's note: French abbreviation for the Federal Statute of June 17, 2005 organising the Federal Tribunal, RS 173.110.

In this case, the seat of the arbitration was in Geneva. At least one of the parties (in this case the three parties) 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 Respondents wrongly argue the opposite, because Z._____ formulated some specific reservations in this respect at the outset of the arbitral proceedings, particularly in the Terms of reference. The references to legal writing which they quote to substantiate their opinion refer to a different hypothesis, not verified in this case, namely that in which no seat was set for the arbitration, whether in Switzerland or abroad (arbitration unbound; see amongst others: Bernard Dutoit, *Droit international privé suisse, Commentaire de la loi fédérale du 18 décembre 1987, 4th Edition.*, n. 6 ad Art. 176 PILA). Moreover, deciding whether Z._____ could be drawn in front of the Arbitral Tribunal or not is a question of jurisdiction *ratione personae*, which will be dealt with hereunder.

When an Arbitral Tribunal assumes jurisdiction in a separate award (being understood that the proceedings will continue) it issues an interlocutory decision (Art. 186 (3) PILA), which may be challenged in front of the Federal Tribunal only on the grounds set forth at Art. 190 (3) PILA. If the award denies jurisdiction and thus puts an end to the proceedings, the award is final and it may be appealed to the Federal Tribunal on all the grounds set forth at Art. 190 (2) PILA. In this case, the Arbitral Tribunal issued an interlocutory award admitting its jurisdiction as to Y._____; however it denied jurisdiction as to Z._____, which brought the proceedings to an end with regard to that party; as to the decision denying jurisdiction with regard to one of the parties, the decision is partial (Art. 91 (b) LTF); partial decisions being assimilated to final decisions, the appeal in this respect is allowed on all the grounds set forth at Art. 190 (2) PILA.

The Appellant is affected directly by the award under appeal, which denied the possibility to draw in front of the Arbitral Tribunal one of the two Respondents that it sued. The Respondent thus has a personal, present 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 the format required by law (Art. 42 (1) LTF), the appeal is to be allowed in principle. This is subject to a review of whether or not the criticism made by the Appellant against the award should be capable of appeal, which the Respondent denies.

2.2 The appeal may be made only on one of the grounds exhaustively set forth at Art. 190 (2) PILA (ATF 128 III 50 at 1a, p. 53; 127 III 279 at 1a, p. 282; 119 II 380 at 3c, p. 383). The Federal Tribunal only entertains the grounds for appeal specifically invoked and reasoned by the Appellant (Art. 77 (3) LTF). The strict requirements as to the reasons set forth by case law under Art. 90 (1)(b)(OJ)¹¹ (see ATF 128 III 50 at 1c) remain valid under the aegis of the new law of Federal procedure.

The Appellant withdrew the claim of irregular composition of the Arbitral tribunal (Art. 190 (2)(a) PILA), which it had initially raised. The only ground for appeal it maintains relates to the jurisdiction of the Arbitral tribunal with regard to Z._____. This is a ground for appeal specifically mentioned in the law (Art. 190 (2)(b) PILA) and it is therefore to be allowed.

2.3 The appeal may only seek annulment (Art. 77 (2) LTF, which rules out applying Art. 107 (2) LTF). However, when the dispute relates to the jurisdiction of an arbitral tribunal, it was admitted, as a matter of exception, that the federal Tribunal may itself issue a finding of jurisdiction or lack of jurisdiction (ATF 127 III at 1b; 117 II 94 at 4). Thus, the Appellant's submission seeking a finding by the Federal Tribunal that the Arbitral Tribunal has jurisdiction as to Z._____ is to be allowed.

2.4 The Federal Tribunal issues its decision on the basis of the facts established by the arbitral tribunal (Art. 105 (1) LTF). It may not rectify or supplement *ex officio* the factual findings of the arbitrators, even if the facts were established in a manifestly inaccurate way or in violation of the law (see Art. 77 (2) LTF, ruling out the application of Art. 105 (2) LTF). However, as was the case under the aegis of the Federal law organising the judiciary (see ATF 129 III 727 at 5.2.2; 128 III 50 at 2a and cases quoted), the Federal Tribunal retains the faculty to review the facts on which the award under appeal is based if one of the grounds for appeal set forth at Art. 190 (2) PILA is raised against the findings of fact or if some new facts or evidence are exceptionally taken into consideration in the framework of the Civil law appeal (decision 4A_450/2007 of January 7, 2008, at 2.2).

¹¹ Translator's note: OJ is the name of the old statute organising Federal Courts which was substituted by the LTF of June 17, 2005.

In this case, the Appellant states that it does not intend to challenge the findings of fact of the Arbitral Tribunal, even though they appear unconvincing. Therefore the Federal Tribunal is to limit itself to the facts as found in the award under appeal.

3.

In a sole ground for appeal, based on Art. 190 (2)(b) PILA, the Appellant claims that the Arbitral Tribunal was wrong to deny jurisdiction as to Z._____.

3.1 As to lack of jurisdiction, the Federal Tribunal exercises free review on legal issues, including preliminary questions, which determine the jurisdiction of the Arbitral Tribunal or the lack thereof (ATF 133 III 139 at 5, p.141 and cases quoted). This does not turn it into a court of appeal. It does not behove the Federal Tribunal to research in the award under appeal which legal arguments may justify the admission of the grievances based on Art. 190 (2)(b) PILA. It behoves the Appellant to draw the Federal Tribunal's attention to them in order to meet the requirements of Art. 42 (2) LTF (decision 4A_160/2007 of August 28, 2007 at 3.1; at 1.5, not published, of ATF 129 III 675).

3.2 Before entertaining the ground for appeal raised by the Appellant, it is appropriate to recall the principles set by the Federal Tribunal with regard to the problem in dispute and to supplement them if necessary. When examining if it has jurisdiction to decide the dispute in front of it, the arbitral tribunal, among other questions, must resolve that of the subjective bearing of the arbitration agreement. It behoves it to determine which parties are bound by that agreement and if necessary to find out if one or more third parties not designated there nonetheless fall within its purview. Such an issue of jurisdiction *ratione personae*, which relates to the merits, must be resolved on the basis of Art. 178 (2) PILA (ATF 129 III 727 at 5.3.1, p. 736). That provision recognizes three alternative means *in favorem validitatis*, without any hierarchy between them, namely the law chosen by the parties, the law governing the object of the dispute (*lex causae*) and Swiss law (ATF 129 III 727 at 5.3.2, p. 736).

According to the principle of relativity of contractual obligations, the arbitration agreement included in a contract binds only the parties to the contract. However, in a number of cases, such as the assignment of a claim, the assumption of an obligation (simple or joint) or the transfer of a contractual relationship, the Federal Tribunal has long recognized that an arbitration agreement may bind even those who did not sign it and are not mentioned there

(ATF 129 III 727 at 5.3.1, p.735 and cases quoted). Moreover, a third party getting involved in the performance of a contract containing the arbitration agreement is deemed to have adhered to it through its acts if from its involvement one may deduct the intent to become a party to the arbitration agreement (ATF 129 III 727 at 5.3.2, p. 736; decision 4P.48/2005 of September 20, 2005 at 3.4.1).

The assumption of an obligation carries the transfer of accessory rights within the meaning of Art 178 (1) CO from the obligor to the party assuming the obligation. The arbitration agreement is such an accessory (Eugen Spirig, Commentaire zurichois, 3rd Edition, n. 50 ad Art. 178 CO; Thomas Probst, Commentaire romand, n. 3 ad Art. 178 CO; Rudolf Tschäni, Commentaire bâlois, Obligationenrecht I, 4th Edition, n. 1 ad Art. 178 CO; Werner Wenger/Christoph Müller, Commentaire bâlois, Internationales Privatrecht, 2nd Edition, n. 77 ad Art. 178 LDIP; Pierre Engel, Traité des obligations en droit suisse, 2nd Edition, p. 900). Therefore, it binds the party assuming the obligation, barring exceptions. This goes without saying when the party assuming the obligation substitutes the obligor, because a new person acquiring the quality of passive subject of the obligation, a new obligor, takes the place of the former. Case law also recognized that a joint assumption of an obligation carries the same consequence (decision 4P.126/2001 of December 18, 2001, at 2e/bb) even though, in that case, there is no change of obligor but the intervention of a second obligor, who becomes a joint obligor next to the original obligor (Probst, *op.cit.*, n. 13 ad Intro Art. 175-183 CO). The solution chosen for this kind of external assumption of an obligation may seem less obvious, considering that there is no substitution of obligor here; however, as the one adopted for the other form of assumption of an obligation, it is justified by the fact that the arbitration agreement, as an accessory to the obligation assumed and as such inseparable from it, goes over to the party assuming the obligation, barring a stipulation to the contrary, when the latter acquires the quality of joint obligor, whilst the original obligor remains bound. Procedurally speaking, it would not be efficient to compel the obligee to invoke the same obligation in front of an arbitral tribunal against the original obligor and in the ordinary court against the party assuming the obligation, let alone the risk of contradictory decisions that involving two jurisdictions would create. Furthermore, the solution chosen does not burden the new joint obligor as he knows, when he assumes the obligation jointly, that he may be drawn by the obligee in front of an arbitral jurisdiction. Thus he may either refuse the assumption of the obligation or agree with the obligee that the arbitration agreement will not apply to the disputes which may arise between them.

From a functional point of view, the joint assumption of an obligation is a surety guarantying an obligation (Probst, *op.cit.*, n. 7 ad Intro Art. 175-183 CO). This does not mean that the other forms of sureties (guarantee, contract to the charge of the third person, bank-guarantee, etc.) should be dealt with in the same way as to the arbitration agreement. Indeed, the position of the other guarantors is fundamentally different from that of a party assuming the obligation because the former, as opposed to the latter, do not become the passive subjects of the obligation guaranteed, but contract an other obligation, either independent (contract to the charge of the third person) or accessory (guarantee), with a view to guaranteeing the payment of the debt. Thus it is not possible to consider the arbitration agreement contained in the main contract as an accessory of the debt arising from the contract of guarantee *lato sensu*. Consequently, an arbitral tribunal may not assume jurisdiction on the rights of the obligee towards the guarantor merely because the contract between the obligee and the obligor contains an arbitration clause (see implicitly the decision 4P.126/2001 quoted, at 2e/bb, 4e §; see also: Pierre Jolidon, Commentaire du Concordat suisse sur l'arbitrage, n. 822, p. 141; Gabrielle Kaufmann-Kohler/Antonio Rigozzi, Arbitrage international - Droit et pratique à la lumière de la LDIP, n. 272; Philippe Fouchard/Emmanuel Gaillard/Berthold Goldman, Traité de l'arbitrage commercial international, n. 498, p. 298; Jens-Peter Lachmann, Handbuch für die Schiedsgerichtspraxis, 3rd Edition, n. 527; Karl Heinz Schwab/Gerhard Walter, Schiedsgerichtsbarkeit, 7th Edition, n. 34 ad chap. 7, p. 64; Jürgen Dohm, Bankgarantie und Schiedsgerichtsbarkeit, in Bulletin de l'Association suisse de l'arbitrage [ASA] 1987 p. 92 ff, 102 let. b). For its jurisdiction to be acknowledged, the guarantee contract must contain an arbitration clause specifically so providing or a sufficient reference to the arbitration clause in the main contract (arbitration agreement by reference) or, in the absence of such a clause, the guarantor must have stated expressly or by clear behaviour an intent that the obligee could in good faith interpret, according to the principle of trust, as a submission to the arbitration clause inserted in the main agreement.

4.

On the basis of the principles recalled and considering the criticism raised by the Appellant, the circumstances of the case call for the following remarks.

4.1 The Appellant and Y._____ entered into a contract for works (the aforesaid Contract) governed by Swiss law as a consequence of a choice of law clause (Art. 116 (1) PILA). That

Contract contains an arbitration clause, the validity of which is beyond discussion as it meets the formal requirements of Art. 178 (1) PILA and the material requirements of Swiss law (Art. 178 (2) PILA).

4.1.1 The question as to the subjective bearing of an arbitration agreement – at issue is which parties are bound by the agreement and to determine to what extent one or several third parties not mentioned there nonetheless fall within its scope *ratione personae* – relates to the merits and accordingly falls within Art. 178 (2) PILA (ATf 129 III 727 at 5.3.1, p. 736). This question falls under Swiss law as it is not established that the parties to the Contract would have submitted the arbitration agreement to another law and the two other possibilities anticipated by that provision (*i.e.* the *lex causae* and the *lex fori*) also lead to the application of that law. In principle, an arbitration agreement contained in a contract binds the parties only. Here, the Arbitral Tribunal did not find a real intent of the parties to extend the scope of the arbitration agreement contained in the Contract to the disputes which may arise between the contractor and the third party, who would be called upon to guaranty the payment of the works subsequently. The interpretation of the aforesaid clause on the basis of the principle of trust does not allow giving such an objective meaning to the intent expressed by the Parties. Be this as it may, and even in the opposite assumption, Z._____ would not have to tolerate the result of such interpretation as the arbitration agreement is a *res inter alios acta* for Z._____.

4.1.2 According to the principles of relativity of the obligations arising from a contract and of the legal independence of corporations, Swiss law sets some strict requirements as to the extension of an arbitration agreement to a third party not mentioned there (as to those requirements, see Kaufmann-Kohler/Antonio Rigozzi, *op. cit.*, n. 260 and references).

According to the Appellant, such conditions would be met in this case, as Z._____ became involved in the performance of the Contract, thus becoming a party to the arbitration agreement due to its behaviour. According to the Appellant, Z._____ would have intervened actively in the negotiations between the parties to the Contract, with regard to the performance of Y._____’s obligations. Hence, the arbitration clause would bind Z._____ (appeal § 6.5.4.2). In that argument, the Appellant does not take into account the findings of facts of the Arbitral Tribunal, from which it appears that Z._____ did not become involved in any significant way in the performance of the Contract (see award, n. 257 to 263). Indeed,

the few interventions emphasized in the award under appeal, particularly that of Mr A._____ had nothing in common with the behaviour of the third Party to which the arbitration agreement was extended in the case which led to the decision published at ATF 129 III 727. Accordingly, there is nothing in this case to justify that Z._____ should be subjected to the arbitration clause contained in the Contract.

That Z._____ may have been considered by the arbitrators as the mother company of Y._____ does not justify a different conclusion. Indeed, except for special circumstances not met here, the control of a legal entity by another does not constitute sufficient ground to reverse the presumption that only a person underwriting the arbitration clause may be bound (Kaufmann-Kohler/Antonio Rigozzi, *ibid.*).

4.2 Since the Appellant may not rely on the arbitration clause contained in the Contract to attract Z._____ in front of the Arbitral Tribunal, it must be examined if the Italian company was not assigned the arbitration agreement when it executed the Guarantee.

4.2.1 To do so, an autonomous qualification of that legal act is called for in order to decide subsequently, on the basis of that qualification, whether or not that act, according to the Swiss view of such institutions, constitutes a joint assumption of an obligation implying a transfer of the arbitration agreement or another form of guarantee with no such consequence.

Indeed, the Appellant argues that the intent of the parties would be the exclusive basis of an extension of the arbitration agreement. According to the Appellant, case 4P.126/2001, already quoted, would mean that the mere qualification of a security as a guarantee, a contract to the charge of a third person or a guarantee *sui generis*, as opposed to a joint assumption of an obligation, would not rule out the possibility to extend the arbitration clause to the third party assuming the obligation (appeal, § 6.4). The principles recalled above at 3.2 contain an answer to that argument, from which one hardly draws an actual ground for appeal against the award under review. It flows (from the aforesaid case) that determining the nature of the commitment made by the third party is dispositive of the issue of the transfer *ex lege* of the arbitration agreement to that third party.

4.2.2 The Guarantee given by Z._____ contains no choice of law. Failing that, it is governed by the law of the state with which it has the closest connections (Art. 117 (1) PILA). This

means Italian law here, because the guarantor, which performed the obligation characteristic of the Contract (Art. 177 (3)(e) PILA), has its habitual residence in Italy (Art. 117 (2) PILA). The joint assumption of an obligation is dealt with similarly (ATF 111 II 276 at 1c and cases quoted; Dutoit, *op. cit.*, n. 4 ad Art. 146 LDIP; Félix Dasser, Commentaire bâlois, Internationales Privatrecht, 2nd Edition, n. 9 ad Erg. zu Art. 146; Frank Vischer/Lucius Huber/David Oser, Internationales Vertragsrecht, 2nd Edition, n. 1081, p. 495).

Since the Guarantee is governed by Italian law, the Appellant vainly blames the Arbitral tribunal, albeit in an alternative argument, for qualifying that legal act erroneously as to Swiss law by refusing to treat it as a joint assumption of an obligation (appeal, § 6.5.5).

4.2.3 The Appellant analyzes the commitment in dispute under Italian law and proceeds to a long demonstration, substantiated by a legal opinion, to reach the conclusion that the Guarantee could not be qualified as *contratto autonomo di garanzia* or as *promessa del fatto del terzo*, possibly as a combination of these two forms of security, contrary to what was held by the Arbitral Tribunal, but that it should be found to constitute a *fideiussione*¹².

Such demonstration is in vain. Indeed, the Appellant does not explain why qualifying the act as a *fideiussione* – a term the French translation of which is guarantee¹³ - would necessarily lead to a finding that Z._____ would have been assigned the arbitration clause contained in the Contract. The Appellant does not demonstrate, in particular, that the *fideiussione* would be the equivalent under Italian law of a joint assumption of an obligation, as contemplated by Swiss law. It does not behove the Federal Tribunal to substitute this lack of reasoning, specially not with regard to the application of foreign law.

Consequently, Z._____, which was not bound initially by the arbitration agreement contained in the Contract, did not become a party to that clause by underwriting the Guarantee.

5.

The only hypothesis still to be considered is that pursuant to which the intent of Z._____ to submit to arbitration would be derived from the Guarantee itself given by that company. The Appellant argues that this is the case here, to the extent that the interpretation of the

¹² Translator's note: In Italian in the original French text.

¹³ Translator's note: *Cautionnement* in the original text.

Guarantee according to the principle of trust would clearly show the intent of Z._____ to submit to the arbitration clause contained in the Contract (appeal, § 6.5.2).

5.1 That argument raises a problem with regard to the form required for the validity of an arbitration agreement (see Art. 178 (1) PILA). From that point of view, the Appellant may not deduct anything in its favour from case 4P.126/2001, mentioned above, because in that precedent, the Federal Tribunal found a joint assumption of an obligation causing the transfer of the arbitration agreement to the new obligor.

However, in this case, the Appellant claims that even if the undertaking by Z._____ would not constitute a joint assumption of an obligation, it would still show the intent of that third party to submit to arbitration the disputes to which that commitment could give rise. Yet, one cannot but notice that the Guarantee contains no arbitration clause. From a formal point of view, the only possibility would thus be to apply the theory of the arbitration agreement by reference (on that notion, see, among others, Kaufmann-Kohler/Antonio Rigozzi, *op.cit.*, n. 231 ff).

When in presence of a global reference accepted in writing, as is the case with regard to the Guarantee, the problem moves from form to consent (decision 4C.44/1996 of October 31, 1996, at 3c with references). An examination of the scope of the reference to the Contract contained in the text of the Guarantee is therefore called for. The issue in dispute relates to the merits and accordingly falls within Art. 178 (2) PILA. It will be examined under Swiss law, as *lex fori*. Indeed, the two other possibilities anticipated by the provision quoted *in favorem validitatis* are not relevant: the first, namely the law chosen by the parties, because the Guarantee contained no arbitration clause including a choice of law; the second, *i.e.* the law applicable to the main Contract (in this case Italian law governing the Guarantee), because the Appellant does not explain which rules of Italian law governing the interpretation of manifestations of intent would apply, neither does it demonstrate why such rules would be more favourable than the ones deducted from Art. 18 (1) CO.

5.2 According to the principle of trust, whoever makes a statement of intent to a third party is bound by his statement according to the meaning that the addressee may and should give it in good faith under the circumstances. The principle of trust makes it possible to attribute to a party the objective meaning of its statement or of its behaviour, even though this may not

correspond to the intimate intent of the person involved (ATF 133 III 61 at 2.2.1 and cases quoted). Despite the long and convoluted explanations given at pages 19-23 of its brief, the Appellant could not reasonably deduct from the text of the Guarantee that Z._____ agreed to submit to the arbitration clause contained in the Contract, even taking into account the circumstances surrounding the establishment of that document.

The only stepping stone the document in question gives to the Appellant is the reference made to the Contract and to the obligations it imposed on Y._____. However, the Arbitral Tribunal held in this respect that the reference was only there to identify the obligations guaranteed (Award, § 252). In any event, one does not see, objectively, that the Appellant could have deducted in good faith from that mere reference that Z._____ agreed to forgo the guarantee of the ordinary jurisdiction in favour of the arbitral jurisdiction contained in the Contract. Effectively, the Appellant's point of view would impose on any guarantor to submit to the arbitration agreement contained in the Contract the obligations for which he is guaranteeing performance, simply because he gave his guarantee to one of the Parties of that Contract. Such an opinion cannot be shared in view of the importance of guaranteeing jurisdiction of the ordinary courts.

As to the expression "*as if the Guarantor was the original obligor*"¹⁴ used in the text of the Guarantee, to which the Appellant gives much importance, it may indeed be important with regard to the legal qualification of that commitment but it does not appear decisive to resolve the issue at hand. Indeed, to say that one will issue a guarantee equal to the original obligor's does not mean that one will accept to be sued by the obligee in front of the same jurisdiction to which the obligor voluntarily submitted.

From reading the remarks at § 6.5.2.2, it is not clear where the Appellant is heading by establishing a comparison, on the basis of an internal mail, between the guarantees as originally established by the mother companies of both parties to the Contract and those which substituted for them. The connection between the argument and the alleged intent of Z._____ to submit to the arbitration agreement contained in the Contract is not discernable.

¹⁴ Translator's note: In English in the original French text.

Finally, with regard to the Parties' subsequent behaviour (see appeal, § 6.5.2.3), which is not dispositive to reconstitute their normative intent anyway, the Appellant merely points out that Z._____ would have relied on the Contract to refuse to perform. It is not clear why such a circumstance would necessarily imply a manifestation of intent by the Italian company to submit to the arbitration clause contained in the Contract.

The Appellant therefore fails in its attempt to demonstrate that the Arbitral Tribunal had jurisdiction as to Z._____ as a consequence of the direct application of the theory of the arbitration agreement by reference (see appeal, §6.5.4.1).

6.

One cannot but conclude that the Arbitral Tribunal was right in declining jurisdiction as to Z._____. Consequently, the appeal can only be rejected and the Appellant must pay the judicial costs (Art. 66 (1) LTF) and the Respondent's costs (Art. 68 (2) LTF) with regard to the Federal proceedings.

Therefore, the Federal Tribunal pronounces:

1. The appeal is rejected.
2. The judicial costs set at CHF 25'000.- shall be borne by the Appellant.
3. The Appellant shall pay to the Respondents severally an amount of CHF 30'000.- as costs.
4. This decision shall be communicated to the representatives of the Parties and to the *ad hoc* Arbitral Tribunal.

Lausanne, August 19, 2008

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

The presiding Judge:

The Clerk:

CORBOZ

CARRUZZO