4A_539/2008[1]

Judgement of February 19, 2009

First Civil Law Court

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

X._____ SpA in liquidation,
Appellant,
Represented by Mr Mohamed MARDAM BEY

v.

Y._____ B.V.,
Respondent,
Represented by Mrs Anne Véronique SCHLAEPFER

Facts:

A.
In a contract of March 5, 1992, the Italian company X._____ SpA (hereafter X._____), now in liquidation and the Dutch company Y._____ B.V. (hereafter Y._____) created an internal Consortium, the purpose of which was to prepare and present an offer with a view to Y._____ being awarded by A._____ the construction works of the heat recovery steam generators for two electrical power plants in Egypt and with a view to jointly carrying out the obligations under the contract to be concluded by

[1] Translator's note: Quote as X._____ *v.* Y._____, 4A_539/2008. The original of the decision is in French. The text is available on the website of the Federal Tribunal www.bger.ch.

Y._____ as leader of the Consortium with A._____ if the offer was accepted. The contract was awarded to Y._____ and caused two agreements between the latter and A._____ to be signed on June 25, 1992.

At the end of 1994, a dispute arose between X._____ and Y._____ with regard to an order A._____ had modified. The Italian company refused to deliver the additional parts necessary for the modified order unless a financial guarantee was given. For its part, the Dutch company withheld payment in order to remedy its partner's alleged default.

On October 14, 1997 Y._____ notified to X._____ the partial termination of the Consortium Agreement due to a violation of the contractual obligations relating to the delivery of spare parts and because it was going into forced liquidation.

B.

On October 17, 2006 X._____ in liquidation submitted a request for arbitration to the ICC Court of Arbitration (ICC).

The parties jointly proposed Mr_____, attorney at the bar of Geneva as sole arbitrator. Their choice was ratified by the ICC Court of Arbitration. Specific Procedural Rules were adopted for the arbitration. They contain in particular the following provisions:

"1. … Notifications, communications and submissions between the Arbitral Tribunal and the parties can be made by registred mail, courier service, e-mail or telefax… The parties shall send their modifications [recte: notifications], communications and submissions directly to the Arbitral Tribunal and simultaneously send a full copy to the other party and to the ICC Secretariat.

7. Any individual, including parties and their officers, may be a witness. It shall not be improper for a party, its officers, employees, legal advisors or other representatives to interview witnesses or potential witnesses.

8. Each party shall name the witnesses upon whom it intended to rely and, to the extent possible, it shall file written witness statements of each such witness. The Arbitral Tribunal will decide issues such as possible filing of rebuttal witness statements or the refusal of witnesses to cooperate. If it proves impossible for a party to obtain a written witness statement from a witness (who is not under the control of such party), the party shall at least specify, when it provides the name of the witness, on what issues this witness will have to testify at the witness hearing.

10. Where a witness should ultimately not be able to attend even for a valid reason, the Arbitral Tribunal shall in principe not be entitled to consider his written statement, except if extraordinary circumstances so warrant. In such event the Arbitral Tribunal shall hear the parties and decided by taking, however, into account all relevant circumstances, including the parties' legitimate interests.

…

The parties shall be responsible for ensuring the presence of the witnesses at the hearing. Upon request, the Arbitral Tribunal will assist the parties with respect to witnesses not under their control.

…

15. The Arbitral Tribunal shall set the time limits and extend them as necessary.

The extension of deadlines shall only be granted exceptionally and provided that a request is submitted immediately after the event preventing the party from complying with the deadline."[2]

X._____ in liquidation claimed the payment of € 206'923.- and of EGP[3] 590'341.- from Y._____. The Defendant[4] submitted that the claim should be rejected entirely. In a final

[2] Translator's note: In English in the original text.
[3] Translator's note: "EGP" stands for Egyptian pounds
[4] Translator's note: The word "Defendant" is used for the French "*défenderesse*", to avoid confusion with the Respondent ("*l'intimée*") in the appeal proceedings.

award of October 8, 2008 the Arbitrator ordered the Defendant to pay € 51'842.10 to the Claimant with interest at 5 % from September 1997 until the date of the Award. He apportioned the costs and rejected all other submissions. According to the Arbitrator the Defendant withheld 456'000.- Dutch guilders, *i.e.* the equivalent of € 206'924.- which were normally due to the Claimant. However, the latter did not succeed in establishing the existence of a second withholding, that of EGP 590'341.-, so that the claim could only be rejected in this respect. The agreements between the parties show that the Claimant had a contractual duty to deliver to the Defendant the spare parts the latter requested. The veto right invoked by the Claimant to disregard that obligation was not to be taken into account in this case because it had participated in the discussions which the Defendant had with A._____ with regard to the changes made by the latter to the order for spare parts. Hence the Defendant was entitled to withhold an amount corresponding to that which it had paid to acquire elsewhere the spare parts which had not been delivered by A._____ . The total expenses and the costs relating to that purchase amounted to 341'755.- guilders. Consequently, the Defendant was to pay to the Claimant an amount of € 51'842.10 namely the difference (114'245 guilders) between the amount withheld (456'000 guilders) and the aforesaid 341'755.- guilders.

C.

On November 19, 2008 the Claimant filed a Civil law appeal. It invites the Federal Tribunal to annul the Award, to uphold the challenge against the Arbitrator and to send the case back to the ICC for a new decision.

The Defendant and Respondent submits that the appeal should be rejected.

The Arbitrator produced the complete file of the case and did not submit an answer.

Reasons:

1.

According to Art. 54 (1) LTF[5] the Federal Tribunal issues its decision in an official language, as a rule in the language of the decision under appeal. When the decision is in another language (here English), the Federal Tribunal resorts to 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 decisions of arbitral tribunals under the conditions set forth at Art. 190 to 192 PILA[6] (Art. 77 (1) LTF).

In this case, the seat of the arbitration was in Geneva. At least one of the parties (in this case both) did not have its domicile in Switzerland at the decisive time. The provisions of chapter 12 PILA are accordingly applicable (Art. 176 (1) PILA).
The Appellant is directly affected by the Award under appeal, which granted its submissions only in part. It has accordingly 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) (a) and (b) PILA, which gives it standing to appeal (Art. 76 (1) LTF).

Timely filed (Art. 100 (1) LTF), in the legally prescribed format (Art. 42 (1) LTF), aimed at a final award, the matter is capable of appeal in principle, subject to a review of the grievances raised in the appeal.

2.2 The appeal may only seek the annulment of the decision (see Art. 77 (2) LTF ruling out the applicability of Art. 107 (2) LTF), unless the dispute relates to the jurisdiction of an arbitral tribunal (ATF 127 III 279 at 1b; 117 II 94 at 4). The Appellant submits that the Federal Tribunal should revoke the sole Arbitrator. Whether such a submission is admissible or not has not been decided so far (see Judgement 4A_210/2008 of October 29, 2008 at 2.2

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

[6] 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.

and the cases quoted). The issue may remain undecided in this case because the Appellant wrongly submits that the sole Arbitrator was appointed irregularly as will be shown hereunder (see at 3).

2.3 The Federal Tribunal decides the matter on the basis of the facts established by the sole arbitrator (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).

3.
In a first grievance, based on Art. 190 (2) (a) PILA, the Appellant claims that the Arbitrator who issued the decision under appeal was irregularly appointed.

3.1 The Appellant also challenged the Arbitrator in front of the ICC Court of Arbitration, which rejected the challenge in a decision without reasons of September 27, 2007. Issued by a private organisation, that decision could not be the object of a direct appeal to the Federal Tribunal (ATF 118 II 359 at 3b) and it is not binding for the Court, which accordingly may freely review whether or not if the circumstances invoked to justify the challenge substantiate the grievance that the sole Arbitrator was irregularly appointed (ATF 128 III 330 at 2.2 p. 332).

3.2 Akin to a State judge, an arbitrator must present sufficient guarantees of independence and impartiality (ATF 125 I 389 at 4a; 119 II 271 at 3b and cases quoted). The violation of that rule leads to an irregular appointment pursuant to the aforesaid provision (ATF 118 II 359 at 3b). To determine whether a sole arbitrator presents such guarantees or not the constitutional principles developed with regard to State courts must be referred to (ATF 125 I 389 at 4a; 118 II 359 at 3c p. 361). However the specificities of arbitration, in particular those of international arbitration, must be taken into account when reviewing the circumstances of the case (ATF 129 III 445 at 3.3.3 p. 454).

According to Art .30 (1) CST[7] anyone involved in a judicial proceeding is entitled to have the case decided by a tribunal established by law, having jurisdiction, independent and impartial.

[7] Translator's note: CST is the French abbreviation for the Swiss Constitution.

That guarantee allows the challenge of a judge whose situation or behaviour is such as to give rise to a doubt as to his impartiality (ATF 126 I 68 at 3a p. 73); its purpose is in particular to avoid that some external circumstances could influence the judgment in favour of or against a party. A challenge may not be limited to an effective bias of the judge being shown because an internal disposition of his could hardly be proved. It is sufficient that the circumstances should create the appearance of a bias and the suspect of the magistrate being biased. Only objective circumstances must be taken into consideration; purely individual impressions of a party to the proceedings are not decisive (ATF 128 V 82 at 2a p. 84 and cases quoted).

Subjective impartiality, which is to be assumed until disproved, ensures that anyone's case will be judged without personal considerations (ATF 129 III 445 at 3.3.3 p. 454; ATF 128 V 82 at 2a p. 84 and cases quoted).

Objective impartiality prevents in particular the same magistrate participating in the same case with different functions (ATF 131 I 113 at 3.4 p. 117) and it guarantees the judge's independence towards all parties (Judgement 4P.187/2006 of November 1st, 2006 at 3.2.2).

3.3 In light of the aforesaid principles, the circumstances alleged by the Appellant must be examined to decide if they suggest that the Arbitrator who issued the decision under appeal was irregularly appointed.

3.3.1 According to the Appellant, the Arbitrator would have lacked independence and impartiality when he gave the Respondent an additional ten days to file its answer. The circumstances in which the disputed extension was granted must be recalled in order to set this grievance in its context and to decide whether it is well-founded or not.

3.3.1.1 After the parties executed the Terms of Reference, adopted some specific procedural rules and discussed the proceedings in a meeting held with the Arbitrator on April 26, 2007 he communicated to them the Provisional Time-table in a letter on the following day, in accordance with Art. 18 (4) of the ICC Rules (hereafter "the Rules"). According to that calendar, the Appellant had until June 15, 2007 to file its claim and a possible request for the production of documents whilst the Respondent was to file its answer on August 17, 2007 at the latest.

On July 4, 2007, the Arbitrator called counsel for both parties to ask them to agree to a postponement of the hearing until November 19 and 20, 2007, instead of the initial dates of October 11 and 12, 2007. The request was accepted. During their phone conversation, the Respondent's counsel applied to the Arbitrator for an extension of ten days to file her answer. For his part, counsel for the Appellant suggested that the Arbitrator should adjust the time limits for both parties in order to take into account the postponement of the hearing as pointed out in a letter to the Arbitrator of July 13, 2007 (Exhibit C-10).

On July 6, 2007, the Arbitrator submitted a new provisional calendar to the parties on which the first two numbers of the aforementioned date of August 17, 2007 had been crossed out and substituted with "27" and he asked for their opinion on the proposed changes. In a letter of July 13, 2007, the Appellant disputed the ten days extension for the Respondent's answer. For its part, the Respondent indicated to the Arbitrator in an e-mail of the same day that it accepted the Amended Provisional Time-table. In a letter of July 20, 2007, the Arbitrator confirmed the Amended Provisional Time-table and indicated the reasons for which he considered fair and reasonable to accept the Respondent's request for a slight extension of the time limit for the answer. He emphasised that the time limit given to the Appellant for its witness statements had also been extended.

On August 14, 2007, the Appellant challenged the Arbitrator in front of the ICC Court of Arbitration. After giving all interested parties an opportunity to state their position on the challenge, that authority rejected it in a decision of September 27, 2007, without reasons pursuant to Art. 11 (3) of the Rules.

3.3.1.2 Relying on the pertinent facts just summarized, the Appellant claims that the Arbitrator entertained the request for a stay in dispute unbeknownst to the other party, thus demonstrating his bias by communicating with a party directly without informing the other. In its view, the reasons indicated by the Arbitrator in his letter of July 20, 2007 were inaccurate: firstly, contrary to what he stated, the Arbitrator had not used his discretion since he merely answered a specific request submitted by the Respondent *ex parte***;** also, the claim that the initial time limit would expire during the summer recess was immaterial because the parties had already taken that into account during their preliminary meeting of April 26, 2007;

finally, the unequal treatment meted out to the Appellant could not reasonably be compensated by both parties being granted an extension with regard to the filing of their witness statements.

According to the Appellant, an independent and impartial arbitrator would at the very least have invoked a misunderstanding arising from the phone conferences of July 4, 2007. He would have placed the veto on the record, reconsidered his agreement and invited the Respondent to proceed in accordance with the requirements of Art. 15 of the Specific Procedural Rules, according to which an extension could be granted only exceptionally and provided an *ad hoc* request be made immediately after the event preventing the requesting party from complying with the time limit. Instead of doing so, the Arbitrator deliberately chose not to correct the procedural error, the legitimate complaints of the victim notwithstanding. By granting a personal advantage to one of the parties verbally and *ex parte*, he would have resorted to an inadmissible unfair device according to the Appellant and the long list of serious procedural errors subsequently deplored by that party would show connivance between the Arbitrator and the Respondent, which, in addition to a blatant violation of due process, was sufficient to justify legitimate doubts as to the Arbitrator's independence and impartiality.

3.3.2 Contrary to the Appellant's opinion the decision under appeal, once set in its procedural context, was not such as to give rise to any legitimate doubt as to the Arbitrator's subjective impartiality.

The description of the pertinent factual circumstances shows that the Arbitrator was not approached by the Respondent unilaterally but rather he contacted both parties in order to ask them if they accepted to postpone the date initially scheduled for the hearing. When it was contacted by the Arbitrator the Respondent took the opportunity to request an extension of ten days for its answer. As to the Appellant, it also took the opportunity to request unilaterally that the Arbitrator adjust the time limits common to the parties with a view to the postponement of the hearing. That such a request or suggestion would be in the interest of both parties does not change the fact that the Appellant made it without consulting the other party. Accordingly, as a matter of principle, it is ill-advised to blame the latter for doing the same thing.

Also, the lack of transparency that the Appellant blames the Arbitrator for is groundless. To the contrary, the circumstances described above show that the Arbitrator communicated the Amended Provisional Time-table to the parties on which the postponement from August 17 to August 27 of the time limit for the answer was clearly mentioned, that he invited them to express their views on the proposed amendments and that he subsequently stated in writing the reasons for which he took the decision in dispute. It is obvious that an arbitrator who would have been biased against one party and conniving with the other would not have acted in this manner.

Moreover, as rightly pointed out by the Respondent, it is not established that the Specific Procedural Rules gave the parties an actual unconditional veto right with regard to the extension of time limits. Thus it behooved the Arbitrator to decide the requests the parties may submit in this respect. This is what he did in this case, necessarily finding against one of them. The reasoned decision he took could not as such give rise to a suspicion of bias in the mind of the party that had vainly opposed the disputed extension. It must be recalled that some procedural mistakes or a materially erroneous decision are not sufficient to create the appearance of an arbitrator's bias, except for particularly serious or repeated errors, which would constitute manifest disregard of his duties (ATF 115 Ia 400 at 3b).

Moreover one hardly sees *a priori* what interest the Appellant could possibly have to oppose a ten days extension being granted to the Respondent, in particular during the summer recess, when (the Appellant) does not claim to have made a similar request which the Arbitrator would have rejected.

Finally, the mere allegation of a "long list of the serious procedural errors subsequently lamented" without any further explanations, could not substitute for a demonstration that some specific error, assuming it was established, would have justified objective doubt as to the Arbitrator's impartiality.

It appears from the foregoing that the grievance under Art. 190 (2) (a) PILA is groundless.

4.

In a second grievance, the Appellant claims that the Arbitrator disregarded the equality between the parties.

4.1 Equal treatment of the parties, guaranteed by Art. 182 (3) and 190 (2) (d) PILA implies that the proceedings must be organised and conducted in such a way that each party has the same possibilities to present its case. Under that principle, which also applies to the time limits within which the briefs must be filed (KAUFMANN-KOHLER/RIGOZZI, International Arbitration, 2006, p. 196 n°486), the arbitral tribunal must treat the parties in the same way at all stages of the proceedings (ATF 133 III 139 at 6.1 p. 143 *in medio*).

4.2

4.2.1 According to the Appellant, the extension given to the Respondent would violate the equal treatment of the parties for the reasons already stated with regard to the grievance that the Arbitrator was biased. This is not so. The reasons developed to reject that grievance may be repeated here *mutatis mutandis*. In this context, it must be emphasised that the Appellant does not claim that the Arbitrator would have denied it what it granted to the Respondent, namely that it would have asked him in vain to extend a time limit he had set. Also, as the Respondent rightly points out, granting different time limits to the parties does not necessarily create unequal treatment (Michael E. SCHNEIDER, in Commentaire bâlois, Internationales Privatrecht, 2nd edition 2007, n° 66 and 87 ad Art. 182 PILA).

4.2.2 In the second branch of the same argument, the Appellant blames the Arbitrator for considering as established some facts which had been merely alleged by the Respondent, in violation of Art. 8 CC[8] and to have done exactly the opposite with regard to the Appellant. Thus, the Arbitrator would have relied on the mere deposition of U._____, a director of the Respondent, to find that the Appellant had been implicated in the discussions relating to the new order of spare parts. That individual's statement would also have been sufficient for the Arbitrator to consider as proved the price of 37'972.- Dutch guilders taken into account by the Respondent for transportation and delivery costs of the spare parts. Conversely, the Arbitrator would not have been satisfied that the amount of EGP 590'341.- was mentioned in a letter sent by the Appellant to the Respondent, without any reaction from the latter, in order to find that such an amount had effectively been withheld by that party.

[8] Translator's note: CC is the French abbreviation for the Swiss Civil Code.

Whilst claiming unequal treatment of the parties, the Appellant is really challenging the way in which the Arbitrator assessed the evidence and the results of that assessment. However, the Federal Tribunal may not review the assessment of the evidence in the framework of an international arbitration, except in the very narrow perspective of public policy. To the extent that the Appellant seeks to compel the Court to do so without relying on public policy, it does so in vain.

The quasi mathematical method used by the Appellant is in any way not the right one. Indeed, merely because an arbitrator holds that a fact advanced by a party was sufficiently proved on the basis of the evidence in the file does not mean that he should necessarily draw the same conclusion from another fact advanced by the other party even though there would be no evidence for that fact in his opinion. The grievance based on unequal treatment of the parties appears therefore just as groundless as the previous one.

5.
In a third group of grievances, the Appellant claims that the Arbitrator violated its right to be heard in contradictory proceedings in many ways.

5.1 The right to be heard, as guaranteed by Art. 182 (3) and 190 (2) (d) PILA does not differ in principle from that which is recognised in constitutional law (ATF 127 III 576 at 2c; 119 II 386 at 1b; 117 II 346 at 1a p. 347). Thus it was admitted that in the field of arbitration each party has the right to express its views on the essential facts for the decision, to present its legal arguments, to propose evidence with regard to pertinent facts and to participate in the hearings of the arbitral tribunal (ATF 127 III 576 at 2c; 116 II 639 at 4c p. 643). With regard to the right to produce evidence, it must be exercised timely and according to the applicable rules (ATF 119 II 386 at 1b p. 389).

Case law also deducted from the right to be heard a minimal duty to examine and to deal with pertinent issues (ATF 126 I 97 at 2b). Such a duty has been extended to international arbitration (121 III 331 at 3b p. 333) and is violated when, inadvertently or due to a misunderstanding, the arbitral tribunal does not consider some factual allegations, arguments, evidence or proposed evidence from one of the parties that are important for the decision to

be issued. It behooves the party allegedly harmed to demonstrate that the arbitral tribunal did not review certain facts, some evidence or legal arguments that had been regularly advanced to substantiate its submissions and that such elements could have influenced the decision. If it succeeds in doing so, it behooves the arbitrators or the Respondent to justify the omission by demonstrating that the elements disregarded were not pertinent to the dispute or, if they were, that the arbitral tribunal rejected them implicitly. However, the arbitrators have no duty to discuss all arguments raised by the parties and as to a violation of the right to be heard in contradictory proceedings they cannot be blamed for failing to refute, albeit implicitly, a grievance that was objectively without any pertinence (ATF 133 III 235 at 5.2 and cases quoted).

5.2 The first part of the grievance relates to the right to produce evidence. The Appellant claims that the Arbitrator violated its rights by rejecting its request to obtain the deposition in Milan of two of its former employees as witnesses through letters rogatories. V._____ and W._____ were the principal people in charge of the project undertaken by the Y._____ - X._____ Consortium. The circumstances in which that request was rejected must be recalled prior to reviewing the merits of the argument.

5.2.1 In accordance with the Amended Provisional Time-table of July 6, 2007 the Appellant sent various documents, including some written witness statements from the aforesaid two witnesses to the ICC, with copies for the Arbitrator and the Respondent, in a letter of October 2, 2007 without any further explanations. The aforesaid witness statements, written in the first person of the indicative, contain three and four pages respectively and conclude with the following sentence: "I confirm that the facts in this Witness Statement are true"[9]. They are followed by the mention of the place (Milan) and the date (October 2, 2007) at which they were established, as well as the name, but not the signature of the person making the statement.

In a letter of October 31, 2007, the Respondent asked to interrogate the other party's witnesses ("cross-examination"[10]).

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

On November 8, 2007, the Appellant wrote to the Arbitrator to point out that it was most likely that its two witnesses would not appear at the hearing to take place in Geneva on November 19/20, 2007. Hence it sought his assistance on the basis of Art. 10 of the Specific Procedural Rules to ensure that the witnesses could be heard at the hearing.

On November 12, 2007, the Arbitrator invited V._____ and W._____ to appear at the hearing. On the 14th of the same month they answered that they were not able to, that they had already issued a written and signed statement to the Appellant's representatives, to which reference could be made and that they were available for a possible clarification.

On November 15, 2007, the Arbitrator held a phone conference with counsel. Counsel for the Claimant pointed out that the two witnesses had refused to sign the witness statements and that consequently the lack of signature on the documents was not the result of an oversight.

In a November 16, 2007 letter, the Arbitrator summarized the contents of the phone conference of the previous day, indicating the proposal by counsel for the Appellant to hear the witnesses in Milan by way of letters rogatories and counsel for the Respondent's surprise at learning that they had refused to sign their witness statements, from which counsel deducted that there were no witness statements from V._____ and W._____ and accordingly they could not be heard. The Arbitrator decided to proceed with the November 19, 2007 hearing to hear the Respondent's witnesses and to issue a decision on the Appellant's witnesses later. As decided at the end of the hearing, the Appellant and the Respondent expressed their views on that issue on November 26 and November 30, 2007 respectively. Among other documents, the Appellant attached to its brief a one-page statement dated September 20, 2007 and signed by V._____ and W._____, which they had jointly made to its attention (Exhibit C-119). It explained that the format and the contents of the statement dissuaded it to produce it as a witness statement and that it had accordingly been agreed that counsel would provide assistance to prepare two acceptable witness statements on the basis of the notes and internal memoranda from the two individuals that they would be given for correction and approval. The Appellant added that on the basis of assurances received during a phone conversation of October 2, 2007 as to the witness statements being shortly approved, signed and sent back, it kept in its file the written

statement of September 20, 2007 and sent to the Arbitrator the unsigned witness statements on October 2, 2007. However, for an unknown reason independent from the Appellant's will, both witnesses refused to sign the witness statements and to participate in the November 19, 2007 hearing, which led (the Appellant) to seek the Arbitrator's assistance.

On December 6, 2007 the Arbitrator issued Procedural Order n°2 in which he rejected the Appellant's request of November 26, 2007. According to the Arbitrator it was inappropriate for the Appellant to file on October 2, 2007 two documents entitled witness statements and to wait until November 15, 2007, *i.e.* four days before the hearing to point out that they refused to sign the statements. By doing so, the Appellant had given the erroneous impression that V._____ and W._____ were ready to cooperate. It had not availed itself of the possibility at Art. 8 of the Specific Procedural Rules to seek the arbitrator's assistance should witnesses refuse to cooperate, so that it had forfeited the right to avail itself of that provision. Failing some extraordinary circumstances within the meaning of Art. 10 of the Specific Procedural Rules or at least some circumstances which could be invoked by the Appellant, the Arbitrator held that he could not take the witness statements by V._____ and W._____ into consideration, their testimony being inadmissible. Finally, he emphasised that the Arbitrator's assistance as per Art. 10 (3) of the Specific Procedural Rules when a party seeks to have a witness heard that is not under its control differs from the steps which could be taken pursuant to Art. 8 of the same rules when a witness refuses to cooperate. In any event the Arbitrator recalled that he had given assistance to the Appellant on November 12, 2007 in order to invite V._____ and W._____ to appear at the hearing and that he had done so before learning that they had not approved the witness statements.

5.2.2 To question the reasons advanced by the Arbitrator in his Procedural Order of December 6, 2007, the Appellant claims firstly that on the basis of Art. 8 and 10 of the Specific Procedural Rules the filing of witness statements was merely optional and incidental as compared to the hearing of the witnesses nominated by the parties. Hence the filing of unsigned witness statements could not justify the Arbitrator's refusal to hear the two Italian witnesses particularly since (the Appellant) had acted in good faith and in error as to the full and entire collaboration of its former employees.

The Appellant also claims that in its letter of November 8, 2007 it timely sought the Arbitrator's assistance, namely eleven days before the hearing. It emphasises in this respect that the Rules are moot as to a possible time limit to seek the Arbitrator's assistance under penalty of forfeiture.

According to the Appellant the Arbitrator's reasons under review would also be contradictory. Indeed, in his Procedural Order, the Arbitrator finds that the Appellant forfeited the right to obtain his assistance although he had already provided such assistance without reservations previously by inviting the two witnesses to appear at his hearing in his letters of November 12, 2007.

Still according to the Appellant it would not be disputed anyway that both witnesses were no longer under its control since it had been placed in liquidation in 1997. Hence their refusal to sign the witness statements and to come to Geneva to be interrogated should have led the Arbitrator to seek the assistance of the court to have letters rogatories issued with a view to hearing the witnesses in Italy.

Finally, emphasising that the relevance of the evidence had not been challenged by the Respondent or by the Arbitrator, the Appellant concludes that its right to propose evidence was violated and that the Award should accordingly be annulled and sent back in order for the necessary steps to be taken for the witnesses to be heard by a Court in Milan.

5.2.3 Whatever the Appellant says, it cannot be found that its right to produce evidence was violated under the specific circumstances of this case as summarized above.

The mere wording of the two provisions of the Specific Procedural Rules – Art. 8 and Art. 10 (1) and (3) – and the alleged optional character of the witness statements are manifestly insufficient to demonstrate the alleged violation of those provisions by the Arbitrator.

Indeed the Appellant does not give great weight to its own behaviour during that phase of the evidentiary proceedings, except to rule out, doubtlessly somewhat too swiftly, the very idea that it could have violated the rule of good faith, which also governs the realm of procedure (ATF 123 III 220 at 4d p. 238; 111 II 62 at 3, 429 at 2d p. 438; 107 Ia 206 at 3a).

Yet it received a statement dated September 20, 2007 and signed by witnesses V._____ and W._____, the existence of which it disclosed to the Respondent and to the Arbitrator only on November 26, 2007. In the meantime, dissatisfied with the contents of the written statement it wrote itself two detailed written statements, obviously in favour of its position, which it attempted without success to have signed by the two individuals who were supposed to have made them. Then it communicated them to the Arbitrator and to the Respondent without any further explanations. It is only during the phone conference of November 15, 2007 that it disclosed the reason for which the witness statements had not been signed by their alleged authors. Under such circumstances, the Appellant can blame only itself if the Arbitrator held that its right to have the two aforesaid individuals heard had been forfeited. In any event it cannot claim a violation of its right to produce evidence as it did not proceed according to the applicable procedural requirements.

Moreover, the alleged contradiction in the Arbitrator's reasoning is merely an appearance. Indeed, when the Arbitrator finally refused to assist the Appellant, although he had previously approached the two witnesses to invite them to participate in the hearing, he did so because in the meantime he had learned that the documents produced by that party under the title of witness statements had not been approved by the witnesses as he stated at the last paragraph of his Procedural Order of December 6, 2007.

5.3 In the second part of the same grievance, the Appellant claims that as to three items the Arbitrator violated his minimal duty to address the issues submitted.

5.3.1 The Arbitrator held that the Appellant had failed to establish the existence of a second withholding relating to EGP 590'341.- so that the claim could only be rejected in this respect. He explained his position at paragraphs 163 to 169 of the Award. In particular, he emphasised that the amount in question was not in the Respondent's letter of April 9, 1997 on which the Appellant relied (par. 165), which was reproduced in the Award (par. 111). Then he explained the reason for which the only document mentioning that amount – a letter from the Appellant of September 10, 1997 – did not constitute in his opinion sufficient evidence to conclude that the withholding in dispute had taken place (par. 166).

On the basis of the excerpt of the Award under dispute just quoted, it appears clearly that the Arbitrator set forth the reasons for which he held that the Appellant had failed to establish that the Respondent had withheld the aforesaid amount. The grievance by the Appellant that he would not have dealt with the arguments it raised with regard to that issue is accordingly groundless.

5.3.2 At Art. 3 (a), the Consortium Agreement gave each partner a veto right, making it possible to oppose the commitments made by the other partner to its detriment and without its prior agreement. The Appellant claims to have used its veto right in its letters of November 21, 1994 and January 30, 1995. It blames the Arbitrator for not reviewing seriously the arguments it raised in this respect and for merely admitting in a one liner that the veto right had become purposeless after finding on the basis of a discriminatory allocation of the burden of proof that (the Appellant) had been a party to the discussions conducted by the Respondent with A._____.

The alleged breach of the principle of equal treatment of the parties within the framework of the allocation of the burden of proof has already been rejected by this Court (see 4.2.2 above). The Appellant vainly comes back to the finding at paragraph 85 of the Award under appeal. On the basis of the factual finding, the Arbitrator concluded at paragraph 175 of the Award that the veto right invoked by the Appellant did not apply in this case considering that the Appellant had been involved in the negotiations conducted by the Respondent with A._____ as to the changes in the orders for spare parts. Therefore, he undoubtedly addressed the issue of the veto right, albeit in an elliptical manner, and one understands without great effort by reading the pertinent paragraph that to the extent that the exercise of that right supposed that one of the partners would have dealt with a third party without referring to the other party, that requirement was not met in this case since the Appellant had participated in the discussions conducted by the Respondent with the Egyptian Project Manager.

Thus the Arbitrator abided by his minimal duty to entertain the pertinent issues in this respect as well.

5.3.3 The Appellant further blames the Arbitrator for failing to review the impact of the lack of signature of an amendment required by the Consortium Contract in order to validate a change of an order between the parties.

As submitted, the grievance is not acceptable due to the lack of sufficient reasoning. Indeed, the Appellant does not explain where, when or how it would have submitted such an argument to the Arbitrator and it does not behoove the Federal Tribunal to supplement that omission by consulting the arbitration file itself.

5.3.4 Finally, the Appellant relies on Art. 2.1 of the Consortium Agreement, which it interprets as meaning that no free additional delivery could be charged to a member of the Consortium when it was caused by insufficient or faulty information by the other partner. In this respect, it claims to have transcribed in details the "full confession by Mr U._____ who acknowledged an inadequate appraisal of the situation by Y._____ with regard to that specific item of the preparation of the offer". According (to the Appellant), the admission of such faulty negligence by the Respondent was entirely omitted by the Arbitrator who inadvertently held that no specific allegation or evidence had been adduced in this respect when in fact the circumstance was decisive to the issue as to whether or not the Appellant should deliver the additional spare parts at no charge .

The argument relating to the alleged lack of information by the Respondent was specifically rejected by the Arbitrator at paragraph 190 of the Award under appeal, which the Appellant incidentally quotes in its brief. The Arbitrator cannot therefore be blamed for failing to deal with the issue. That according to the Appellant he may have rejected it in an untenable way due to an alleged oversight is another issue unrelated to the grievance under consideration.

5.4 On the basis of the aforesaid explanations, the grievance based on the violation of the right to be heard does not withstand scrutiny.

6.

6.1 In a final grievance, the Appellant claims that the Award under appeal is contrary to public policy (Art. 190 (2) (e) PILA) due to the serious failures in the conduct of the case by the Arbitrator which were committed systematically to its detriment. It also claims that the

Award under appeal, issued at the end of an unfair trial, leads to a shocking result because it compels (the Appellant) to assume all the costs of an additional order made by the Respondent unilaterally in contempt of its duty of diligence and trust and pursuant to faulty negligence in preparing the corresponding offer.

6.2

6.2.1 An award is inconsistent with public policy if it disregards the essential and largely recognised values which, according to prevailing concepts in Switzerland, should constitute the basis of any legal order (ATF 132 III 389 at 2.2.3). Material public policy and procedural public policy must be distinguished. In its most recent case law, the Federal Tribunal gave the following definition of this twofold concept (same judgment at 2.2.1).

Procedural public policy guarantees to the parties the right to an independent judgment on the submissions and facts in front of the arbitral tribunal in compliance with applicable procedural rules; procedural public policy is violated when some fundamental and generally recognised principles were disregarded, leading to unbearable contradiction with the feeling of justice, so that the decision appears inconsistent with the values recognised in a state ruled by laws.

An award is inconsistent with material public policy when it violates some fundamental principles of material law to such a degree that it is no longer consistent with the determining legal order and system of values; among such principles are in particular contractual trust, compliance with the rules of good faith, the prohibition of abuse of rights, the prohibition of discriminatory or confiscatory measures and the protection of incapables.

6.2.2 On the basis of such principles, the Appellant's grievance appears if not inadmissible, in any case groundless.

As to procedural public policy, the Appellant merely recalls a number of essential principles, such as the right to a fair trial and claims that it would have lamented their violation

repeatedly. In that context, it puts forward no concrete argument which would be different from the ones submitted in the other chapters of its appeal without success.

Finally, with regard to the merits, the Appellant merely restates its thesis that the Arbitrator rejected and deducts that the Award would have led to a shocking result. Needless to say, such an argument is completely inadequate to demonstrate a violation of material public policy that the Appellant implicitly claims.

7.
This being so, this appeal cannot but be rejected to the extent that the matter is capable of appeal. Consequently, the Appellant shall pay the judicial costs (Art. 66 (1) LTF) and compensate its opponent (Art. 68 (2) LTF).

Therefore, the Federal Tribunal pronounces:

1. The appeal is rejected to the extent that the matter is capable of appeal.

2. The judicial costs, set at CHF 8'000.- shall be borne by the Appellant.

3. The Appellant shall pay to the Respondent an amount of CHF 9'000.- for the federal judicial proceedings.

4. This judgment shall be notified in writing to the representatives of the parties and to the ICC sole Arbitrator.

Lausanne, February 19, 2009

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

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