4A_12/2017[1]

Judgment of September 19, 2017

First Civil Law Court

Composition:

Federal Judge Kiss (Mrs.), Presiding
Federal Judge Klett (Mrs.)
Federal Judge Hohl (Mrs.)
Federal Judge Niquille (Mrs.)
Federal Judge May Canellas (Mrs.)
Clerk of the Court: Mr. Carruzzo.

Parties to the proceedings:

X._____ Inc., represented by Mr. Laurent Maire,
Appellant,

v.

Z._____ Ltd., represented by Mr. Sébastien Desfayes,
Respondent.

Facts:

A.

By a final award of 23 November, 2016, a three-member Arbitral Tribunal, sitting in Geneva under the aegis of the *Swiss Chambers' Arbitration Institution* and applying Swiss law, ordered the defendant, X._____ Inc., a company based in the British Virgin Islands and active in the trading of petroleum products, to pay to the plaintiff Z._____ Ltd., a company based in Hong Kong (China) and active in the same field, USD 1'981'344,55, USD 335'495,34 and USD 9'250, plus interest, in different capacities, finding that a freezing order in the jurisdiction of the Canton of Geneva for the plaintiff's debts had been validly validated by the claim for acknowledgement of debt submitted to it and rejected any other or any

[1] Translator's Note: Quote as X._____ Inc. v. Z._____ Ltd., 4A_12/2017. The decision was issued in French. The full text is available on the website of the Federal Tribunal, www.bger.ch

further submissions of the parties.

B.

On January 9, 2017, X._____ Inc. (hereafter: X._____, or the Appellant) filed a Civil law appeal with the Federal Tribunal, together with an application for a stay enforcement, seeking the annulment of the award.

A stay of enforcement was granted by order of the Presiding Judge on February 20, 2017.

An application by Z._____ Ltd. (Hereafter: Z. _____, the Respondent) on January 21, 2017 for the provision of sec

At the end of its reply of March 28, 2017, the Respondent submitted that the appeal should be rejected insofar as the matter is capable of appeal.

Through its President, on April 10, 2017, the Arbitral Tribunal commented on one of the three grounds raised by the Appellant, without making a formal submission as to the appeal.

The Appellant did not file a brief in reply.

Reasons:

1.

According to Art. 54(1) LTF[2], the Federal Tribunal issues its decision in one of the official languages[3], as a rule in the language of the decision under appeal. When the decision was issued in another language (here English), the Federal Tribunal uses the official language chosen by the parties. Before the CAS they used English, while, in the appeal briefs sent to the Federal Tribunal, they used French, pursuant to the requirements of Art. 42(1) LTF in connection with Art. 70(1) Cst.[4](ATF 142 III 521 at 1). According to its practice the Federal Tribunal shall resort to the language of the appeal and so issue its judgment in French.

2.

In the field of international arbitration, a Civil law appeal is admitted against the decisions of arbitral tribunals pursuant to the requirements of Art.190 to 192 PILA[5] (Art.77(1) LTF). Whether as to the object of the appeal, the standing to appeal, the time limit to do so, the Appellant's submission or the grounds for appeal raised in the appeal brief, none of these admissibility requirements raises any problems in this case. The matter is therefore capable of appeal.

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

[3] Translator's Note: The official languages of Switzerland are German, French and Italian.

[4] Translator's Note: CST is the French abbreviation for the Swiss Federal Constitution.

[5] Translator's Note: PILA is the most frequently used abbreviation for the Swiss Private International Law Act of December 18, 1987

3.

3.1.

3.1.1. In a first argument, the Appellant, relying on Art.190(2)(b) PILA, submitted that the Arbitral Tribunal wrongly accepted jurisdiction, relying on the opinion of one legal commentary only (MICHEL OCHSNER: *The validation and conversion of the freezing order*, in SJ 2016 II 1 ss, 6) to validate the freezing order. If one were to follow the Appellant, the Arbitral Tribunal, just as it rightly refused to set aside the Appellant's opposition to the order of payment of which it was notified upon request of the Respondent on January 15, 2014, should have also declined to consider whether the freezing order had been properly validated or not, as it was a simple ancillary issue to be dealt with in collection enforcement proceedings.

More fundamentally, the Appellant argues that the problems of collection proceedings are not capable of arbitration, being the prerogative of the State. Thus, the consequences of a failure to validate the freezing order within the time limits imposed by Art. 279 of the Federal Law of April 11, 1889, on the Prosecution of Debt Enforcement and Bankruptcy (LP[6], RS 281.1) are governed exclusively by Art. 280 LP, i.e. by the law on collection proceedings. The LP and the case-law handed down in the matter of freezing orders entrust the collection authorities, and not the judge deciding on the merits, even if he were an arbitrator, with the task of determining the lapse of the freezing order.

Moreover, the Appellant rejects, in advance, the reproach that could be made to it for not having challenged the jurisdiction of the Arbitral Tribunal on this point sufficiently early. If it did not do so, it is because most of the conclusions reached by the Respondent concerned substantive claims that could be submitted to the arbitrators. In any event, the fact that the Arbitral Tribunal had granted itself jurisdiction reserved to the prosecuting authorities constitutes, in its opinion, a cause of nullity rather than of annulment.

3.1.2., Against this line of argument, the Respondent insists in its response that the claim to validate a freezing order is a substantive action to prove the existence of the debt at the origin of the freezing order. In its view, Federal case law and unanimous legal opinion admit the possibility of replacing an action for the acknowledgement of debt before a state tribunal with arbitral proceedings, so that it is not clear why the Arbitral Tribunal should have refused to examine the merits of the matter.

Moreover, the Appellant has never challenged the jurisdiction of the Arbitral Tribunal to decide on the validity of the freezing order. It also did not argue, and would not argue either in its appeal, that the *ad hoc* claim had not been submitted in a timely manner under Art. 279 LP. Thus, it would not be acting in

[6] Translator's Note: LP is the is the French abbreviation for the Federal Statute on Debt Enforcement and Bankruptcy debt collection bodies.

good faith by raising this question for the first time before the Federal Tribunal (*venire contra factum proprium*).

The Respondent adds that the freezing order must in any case still be validated, once the award under appeal has come into force, by means of a final application to set aside the debtor's opposition that will be the responsibility of competent state court to deal with.

3.2.

3.2.1.

As an urgent conservatory measure intended to prevent the debtor from disposing of assets to protect them from the future claims of creditors, the freezing order must be validated, in that the creditor must obtain an enforceable title within the time prescribed by the law (Art. 279 LP, Judgment 5A_220 / 2013 of September 6, 2013, at 5.2 and references). If this is not the case, the effects of the freezing order cease automatically (Art. 280 LP, ATF 126 III 293 at 1 i.f.). The collection enforcement authorities must then immediately release the frozen objects, if they do not do so of their own accord, the debtor may invite them at any time to proceed with the release (ATF 106 III 92 at 1, 93 III 72 at 1 p. 75 and the judgments cited).

The creditor who has initiated a freezing order without filing a suit or a claim beforehand, and after ten days from the receipt of the minutes of the freezing order, has notified the debtor (Art. 279 (1) LP) of a payment order which has been contested but which it did not seek to set aside, is required to file a claim on the merits for the purpose of enforcing its rights within ten days from the date on which it received notification of the duplicate of the payment order (Art. 279 (2) LP). To maintain the freezing order in place, it is obliged to seek a final application to set aside the opposition for acknowledgement of debt, if possible, or, if not, to seek it within ten days from the communication of the decision issued on this action (ATF 135 III 551 at 2.3 pp. 555 et seq. and references). Once the opposition has been set aside, it must seek the continuation of proceedings within twenty days of the decision to set aside the opposition coming into force (Art. 279 (3) 2nd sentence, LP, see OCHSNER, op.cit., pp. 7/8, (b) and (c)), the proceedings continuing by way of seizure or bankruptcy depending on the quality of the debtor (Art. 279 (3), 3rd sentence, LP). In any event, Art. 279 (5) Ch.1 LP provides that the time limits provided for in this Article shall not run during the opposition proceedings or during the appeal proceedings against the decision to set aside the opposition in the event, which has been confirmed *in casu*, where the attachment order was opposed (section 278 LP).

The action to validate a freezing order, within the meaning of Art. 279 LP, is an action on the merits that seeks to establish the existence of the debt at the origin of the freezing order (OCHSNER, supra, at 5). Similar to the acknowledgement of debt proceedings of Art. 79 LP, it must have as its object the same

claim as the one at the origin of the freezing order (OCHSNER, ibid.).

In order for the creditor to be entitled to seek the continuation of proceedings without going through the set-aside procedure, the operative part of the judgment made on this action must not only establish the existence of the debt at issue, but also refer precisely to the proceedings in progress and formally set aside the opposition to them, as this is a claim on the merits brought in Switzerland (ATF 135 III 551 at 2.3 and p. 355, cited above).

The action for validation of the freezing order may be submitted to an arbitration tribunal. Federal case law has long recognized it (ATF 112 III 120 at 2, 101 III 58 at 2) and legal opinion has followed suit, a quasi-unanimity that can be observed in this respect between legal scholars specializing in enforcement and bankruptcy (see, among others, in addition to OCHSNER, supra: PIERRE-ROBERT GILLIERON, *Commentary on the Federal Law on Proceedings of Debt and Bankruptcy*, vol. 4, 2003, No. 32 ad art. 279 LP, STOFFEL / CHABLOZ, *Precis de droit des suits (Enforcement Proceedings)*, 3rd ed. 2016, § 8, n. 135, SYLVAIN MARCHAND*, Precis de droit des poursuites*, 2nd ed. 2013, p. HANS REISER, in *Basel Commentary*, Bundesgesetz über Schuldbetreibung und Konkurs II, 2nd ed. 2010, No. 15 ad art. 279 LP, JOLANTA KREN KOSTKIEWICZ, SchKG Kommentar, 19th ed. 2016, nos.17 and 26 ad art.279 LP, FELIX C. MEIERDIETERLE, in SchKG Kurzkommentar, Hunkeler [ed.], 2nd ed. 2014, nos.10 and 12 ad art.279 LP) and those of the law of arbitration, both national (see, among others: COURVOISIER / WENGER, in *Kommentar zur Schweizerischen Zivilprozessordnung*, 3rd edition 2016, No. 15 ad art 354 of the Code of Procedure [CPC, RS 272], URS WEBERSTECHER, in *Basel Commentary*, Schweizerische Zivilprozessordnung, 2nd ed., 2013, No. 34 ad Article 354 CPC, STEFANIE PFISTERER, in *Bernese Commentary*, Schweizerische Zivilprozessordnung, Vol III, 2014, No. 17 ad 354 CPC, 21, TARKAN GÖKSU, Schiedsgerichtsbarkeit, 2014, 362, MARCO STACHER, in Schweizerische Zivilprozessordnung, Brunner / Gasser / Schwander [ed], 2nd edition 2016, No. 10 ad art. 354 CPC) and international (see, among others: KAUFMANNKOHLER / RIGOZZI, I*nternational Arbitration, Law and Practice in Switzerland*, 2015, 104, footnote 82, BERGER / KELLERHALS*, International and Domestic Arbitration in Switzerland*, 3rd ed., 2015, No. 241; POUDRET / BESSON, *Comparative Law of International Arbitration,* 2nd ed., 2007, No. 363 p 307; MABILLARD / BRINER, in *Commentaire bâlois*, Internationales Privatrecht, 3rd ed. 2013, No. 14b ad art. 177 PILA, the latter authors also citing, *in fine*, two dissenting opinions). In this hypothesis, if the arbitral tribunal is not yet constituted, it is incumbent on the creditor to undertake, within ten days, all the steps for the appointment of the arbitrators. As soon as the arbitral tribunal is constituted, the creditor must file its claim on the merits for acknowledgement of debt within ten days in order to ensure timely continuation between the collection proceedings following the attachment order and the case on the merits (ATF 112 III 120 at 2, 101 III 58 at 2).

That an arbitral tribunal has jurisdiction to rule on the existence of the debts that is the object of the validation proceedings for the freezing order and to order the debtor to pay does not necessarily imply that it may also pronounce on the claimant's submissions that the opposition be set aside definitively. The contrary is true. It is not the purpose of the set-aside decision to decide the merits of the parties: it only concerns whether or not the proceedings opposed should continue. Such a decision is purely a matter of collection enforcement proceedings, which falls exclusively within the jurisdiction of a state authority (see ATF 107 III 60 at 3) and thus escapes the jurisdiction of an arbitral tribunal, for want of arbitrability (Judgment 5P_55 /1990 of 7 March, 1990, at 2). Also, even though the claim for acknowledgement of debt can be judged by an arbitral tribunal, it does not have jurisdiction, unlike the state court, to definitively set aside the opposition in the operative part of the award (ATF 136 III 583 consider 2.1 and references).

For the rest, and more generally, any court, when a claim for validating a freezing order is submitted, rules only on the existence of the debt which is the object of the claim. It does not have jurisdiction to rule on the validity or enforcement of the freezing order (ATF 85 II 359 at 3, GILLIERON, op cit, No. 33 ad art 279 LP, STOFFEL / CHABLOZ, in *Commentaire romand, Prosecution and Bankruptcy,* 2005, No. 16 ad Art. 279 LP), these issues being the exclusive responsibility of the collection authorities. As a result, the decision made by the judge deciding on the merits of the freezing order binds those bodies only to the extent that it decides whether a timely procedural step by the creditor according to the LP may or may not have met the requirements of the rules of Civil procedure. On the other hand, it is up to the collection authorities to decide whether the procedural step that the court deciding on the merits of the freezing order considered as having had the effect of binding the bodies was accomplished within the time limits in the light of the relevant provisions of the law on debt collection (ATF 80 III 93 p.95, KREN KOSTKIEWICZ, op cit, No. 28 ad art 279 LP). They alone have the power to declare the expiry of the freezing order because, in particular, of the lapse of time that Art. 279 LP gives to the creditor (article 280 Ch.1 LP) to withdraw the measure, which does not require a formal judgment (GILLIERON, op cit, No. 8 ad Art. 280 LP). It is up to the relevant debt enforcement office, to which the creditor after having requested and obtained the final application to set aside the opposition to the enforcement proceedings on the basis of the arbitration award acknowledging the existence of the debt at the origin of the freezing order (Art. 81 (1) LP) will, within the time limit set forth in Art. 279 (3) LP, submit a request to continue the enforcement proceedings (Art. 88 LP), to verify compliance with these deadlines before following up and converting the freezing order into seizure (section 89 LP). It will also be up to the said office, assuming that the debtor seeks restitution of the assets frozen, to check if the creditor allowed the period in question to expire, then, if necessary, to release such property, otherwise the debtor may request the withdrawal of the freezing order by filing a complaint and appealing to the

supervisory authorities (GILLIERON, op cit, No. 10 ad art 280 LP, ATF 66 III 57 at 1). In any event, the lapse of the freezing order will not affect the enforcement as such, the expiry of which is governed by Art. 88 al. 2 LP, any more than the existence of the debt that was the object of the claim for validation of the freezing order, but will have as sole consequence that the debtor may freely dispose of the assets previously attached as long as they were not seized (Judgment 5P_265/2005 of 8 December 2005 at 4.1), unless, for the same debt, the creditor obtains a second freezing order on the same property as that to which the first freezing order, already enforced and validated under Art. 52 LP, applied (Judgment 5A_220/2013, cited above, at 5.3). This is one of the consequences of the lack of interdependence between the fate of the freezing order, a simple urgent precautionary measure, and that of the independent Civil action in substantive law constituted by the validation of the freezing order, i.e., a claim of acknowledgement of debt, according to the terminology of Art. 279 (2) LP, which leads to a decision with the authority of *res judicata* (KREN KOSTKIEWICZ, op cit, Nos. 3 and 4 ad Art. 279 LP).

3.2.2.

3.2.2.1

According to Art.186 (2) PILA, the objection to lack of jurisdiction must be raised prior to any defense on the merits. This is a case of applying the principle of good faith, anchored in Art.2(1) CC[7], which governs all areas of law, including Civil procedure (see Art. 52 CPC). Stated differently, the rule laid down in Art.186(2) PILA, like the more general one of Art.6 of the same law, implies that the arbitral tribunal before which the defendant proceeds on the merits without reservation has jurisdiction on those grounds alone.

Therefore, a person who proceeds on the merits without reservation (*vorbehaltlose Einlassung*) in contradictory arbitral proceedings relating to an arbitrable case recognizes, by this conclusive act, the jurisdiction of the arbitral tribunal and definitively loses the right to raise the objection of the lack of jurisdiction of that tribunal(Judgment 4A_98 / 2017 of 20 July 2017 at 2.3, for publication, ATF 128 III 50 at 2c/aa and references).

In the present case, the Arbitral Tribunal notes that the Appellant, defendant in the action for validation of the freezing order, raises no objection as regards its jurisdiction (Judgment, no. 180). The findings of the Arbitral Tribunal as to the course of the proceedings also bind the Federal Tribunal, in principle, whether they relate to the parties' submissions, the alleged facts or the legal explanations given by the parties, the statements made in the course of the proceedings as well as to the contents of a testimony or an expert opinion or the information gathered during an on-site visit (Judgment 4A_316/2017 of 2

[7] Translator's Note: CC is the French abbreviation for "Code Civil," the Federal Statute of 10 December 1907 on the civil law, RS 210.

August, 2017, at 3.2.2, and the precedent cited therein). The Appellant, therefore, argues unsuccessfully that it challenged the jurisdiction of the Arbitral Tribunal in respect of certain submissions made by the Respondent, who was the plaintiff in the said action (Appeal, No. 7 i.f.). In fact, in the passage of the Appeal Brief, purporting to support this assertion (*Statement of Defense and Counterclaim of June 26*, 2015, pp. 31 ff), it only challenged the arbitrability of the findings in 1.7 of the *Statement of Claim* of March 27, 2015, through which the Respondent intended to have the Arbitral Tribunal find that the defendant had committed a criminal offence to its detriment, which led to the withdrawal of the impugned submission. On the other hand, the Appellant did not plead that the arbitrators lacked jurisdiction when examining the findings of 1.5 of the Appeal Brief through which the Respondent expressly requested the validation of the freezing order in dispute. Nor did the Appellant do it at a later stage. Therefore, in principle, it has forfeited the right to raise the argument before the Federal Tribunal.

It has been held for a long time that the objection that the dispute cannot be arbitrated follows the same rule as the objection of lack of jurisdiction, so that, like it, it must be raised prior to any defense on the merits under penalty of forfeiture (Judgments 4A_654 / 2011 of 23 May, 2012, at 3.2, 4A_370/2007 of 21 February, 2008, at 5.2.2 and 4P_217/1992 of 15 March, 1993, at 5). However, in the judgment published at ATF 128 III 50 at 2c/aa as well as in the Judgment 4A_98/2017 of 20 July, 2017, at 2.3, for publication, both supra, the applicability of Art. 186(2) PILA has been reserved for arbitrable cases. In an *obiter dictum* of the Judgment 4P_267/1994 of June 21, 1995, it is even a question of the absolute nullity of the sentence in case of lack of arbitrability of the dispute (at 3a, 1st §, and the authors quoted see also: BERNARD CORBOZ, in LTF Commentary, 2nd ed., 2014, No. 108 ad Art. 77 LTF). Legal opinion, for its part, is divided as to whether the lack of arbitrability should prevent the Arbitral Tribunal from examining *ex officio* if the matter is arbitrable (for a list of supporters and opponents of these arguments, see MABILLARD / BRINER, op. cit., No. 20 ad Art. 177 PILA). For the reason given below (see 3.2.2.2), it is not necessary to settle this controversy definitively here. At the very most, it can be pointed out, by common sense, that, if objective unenforceability is the result of a legal restriction on the will of the parties, proceeding on the merits without reservation by the defendant should not preclude the Arbitral Tribunal from examining the lack of arbitrability of the dispute *ex officio*, nor preclude that party from submitting an appeal on this point before the Federal Tribunal (see KAUFMANNKOHLER / RIGOZZI, op.cit., no 3.39), except to allow the Arbitral Tribunal to claim jurisdiction, for example, to hand down a criminal conviction, to give effect to a petition for divorce, to set aside definitively the opposition to an order to pay or to decide on a petition for bankruptcy.

In this case, the arbitrability of the claim for acknowledgement of debt, within the meaning of Art. 279 LP, which the Respondent filed with the Appellant, is indisputable. As has been demonstrated above,

the possibility of submitting such a dispute to an arbitral tribunal is admitted by Federal case law and by almost unanimous legal opinion (see at 3.2.1, §4(e)). The property nature (Article 177 PILA) of the case in dispute, which relates to claims arising from the non-performance of a private law contract, does not, moreover, suffer any discussion. Accordingly, if indeed the Appellant intends to challenge the matter at this stage of the procedure, which is not very clear from a reading of no.5 in its Appeal Brief but does not appear to be the case, its grievance based on Art. 190 (2) (b) PILA would be forfeited for failing to comply with Art. 186 (2) LDP. Thus, in the most favorable hypothesis for it, only the part of the complaint relating to the grounds of the operative part of the award where the tribunal finds that the freezing order was validly validated would be excluded from this forfeit of the right to raise the grievance.

3.2.2.2

According to Art. 76 (1) (b) LTF, the Appellant must, in particular, have an interest worthy of protection from the annulme appeal would cause it (ATF 137 II 40 at 2.3). The interest must be present, i.e., it must exist not only at the time the appeal is lodged, but also at the moment when the judgment is given (ATF 137 I 296 at 4.2; 137 II 40 at 2.1 p. 41). The provision cited, which is not among those that Art. 77(2) LTF declares inapplicable, also governs the procedure of appeal against an award given in an international arbitration (Judgments 4A_50/2017 of 11 July, 2017, at 3.3 and 4A_524/2016 of 20 September, 2016, at 3.1).

In Nr.. 3 of the operative part of its award, the Arbitral Tribunal notes that the freezing order dated 14 January, 2014, issued by the Geneva Court of First Instance, was validly validated by the claim in acknowledgement of debt brought before it *("The freezing order dated 14 January 2014, reference..., minutes..., issued by the Tribunal of first instance of Geneva has been validly validated..."*). To the extent that it thus establishes, at the very least indirectly, a relationship between the debts, capital and interest, of which it acknowledged the Appellant as a debtor with regard to the Respondent in Nr.1 and 2 of the same award, on the one hand, and the freezing order, on the other hand, it did not do anything that could be criticized, since the claim which forms the object of the action in acknowledgement of the debt must be the same as the one at the origin of the freezing order. It is true that it did not stop there, since it found, moreover, in a pleonastic formulation, that the freezing order was validly validated. It appears from the reasons of the award concerning this ground that the arbitrators, after verifying the matter, found that the freezing order was duly validated within the time-limits set in Art. 279 LP (Judgment, No. 281ff, 290/291). Admittedly, it was not up to them to do so, but, where appropriate, up to the enforcement authority with jurisdiction (see at 3.2.1, §5 and §6 above). This excess of power, however, was not relevant in this case. The criticized finding is at the same time superfluous and without significance of its own: not only does no legal provision provide for it, since there is no specific claim whereby a creditor can seek judicial notice of compliance with the time limit for the opening of

proceedings of the claim for validation of the freezing order fixed in Art. 279 (2) LP, but, what is more, it cannot remedy a possible non-observance of the time limit, which might have escaped the arbitrators. Moreover, and above all, the finding at issue does not affect the legal position of the debtor whose assets have been frozen, i.e., the Appellant.

In fact, if the latter considers that, contrary to the said finding, the claim for validation of the freezing order was introduced belatedly by the Respondent—which, in any case, has not been claimed so far—it is open to it to address at any time to the collection office responsible for the enforcement of the freezing order a request for the release of the frozen assets, based on the automatic expiry of the freezing order (Art. 280 Ch.1 LP), and to recover in this way the free use of the assets, notwithstanding the finding subject to complaint—by, if necessary, filing a complaint with the supervisory authority under Art.17 (1) LP, or even with the Federal Tribunal as a last resort.

The Respondent is therefore right to deny the Appellant any interest in admitting the grievance in question being upheld. Indeed, to conclude that an arbitral award is annulled solely on the grounds that its operative part contains an unnecessary finding and has no significance of its own does not satisfy any interest worthy of protection.

4.

In a second argument, divided into two branches, the Appellant, invoking Art. 190 (2)(d) PILA, complains of the violation of its right to be heard in contradictory proceedings in different respects; it denounces, successively, the non-respect by the Arbitral Tribunal of its right to present evidence in support of its case as well as of its duty to examine the arguments of the parties.

4.1.

The right to be heard, as guaranteed by Art. 182 (3) and 190 (2)(d) PILA is not different in principle from that which is available in constitutional law. Thus, it was held in the field of arbitration that each party had the right to express its views on the facts essential for the decision, to present its legal arguments, to propose evidence on pertinent facts and to participate in the hearings of the arbitral tribunal. On the other hand, the right to be heard does not include the right to oral pleading. Similarly, it does not require that an international arbitral award be reasoned. However, case law has also deduced a minimum duty for the arbitral tribunal to consider and deal with the relevant issues. This duty is violated when, inadvertently or with misunderstanding, the arbitral tribunal does not take into consideration the allegations, arguments, evidence submitted or tendered by one of the parties and important to the award to be issued (ATF 142 III 360 at 4.1.1 and the above mentioned).

The party claiming that its right to be heard was violated or raising another procedural error must invoke

it immediately in the arbitral proceedings under penalty of forfeiture. Indeed, it is contrary to good faith to invoke a procedural error only in the framework of an appeal against the arbitral tribunal when the error could have been signaled during the proceedings (Judgment 4A_668/2016 of 24 July, 2017, at 3.1).

4.2.

4.2.1

In the first branch of the argument under consideration, the Appellant alleges that the arbitral proceedings, as organized, did not allow it to call a decisive witness—A._____, the Respondent's economic beneficiary—whose testimony would have been sufficient to establish that, on a number of specific points, the written contract binding the parties did not reflect the true and common intention of those parties, decisive under Art. 18 (1) CO[8], which intention resulted, however, from an oral agreement between the person mentioned above and the economic beneficiary of the Appellant, D._____.

In the Appellant's opinion, the formal rules put in place in the context of the arbitration, in particular the one requiring the production of a witness statement prior to the hearing of any witness, prevented it from calling A._____ for the purposes of *cross-examination* because the Respondent had not attached to its written submissions a written statement signed by that person.

4.2.2

There is no need to consider whether the method of the *witness statement* (see Judgments 4A_709/2014 of 21 May, 2015, at 5.2.4 and 4A_199/2014 of 8 October, 2014, at 6.2.3), as it was designed and/or applied in this case (see *Procedural Order No. 2* of 29 January, 2015, No. 4), was appropriate to have the drastic effect described by the Appellant or, conversely, if it did not exclude the right of the Arbitral Tribunal to summon a witness on the simple request of a party, assuming that the other party refused to produce a witness statement signed by the witness in question.

On 23 January, 2015, the Arbitral Tribunal held a hearing during which it discussed with the parties the draft Procedural Order No. 2, among other things. Four lawyers, including the signatory of the present appeal, assisted the Appellant at this hearing, after which the Procedural Orders Nos. 1 and 2 were notified to the parties on the 29th of the same month (Judgment, Nos. 93 to 96). The Appellant's current counsel again represented this party at the hearing on 18 November, 2015, in which the Arbitral Tribunal heard four witnesses before hearing the parties' lawyers and closing the trial, ensuring that the latter had no objection to raise as to the course of the arbitral proceedings (Award, Nos. 110 to 115).

However, neither at the beginning, during, nor at the end of it, did the Appellant ever complain of a possible violation of its right to be heard. Not only did it not challenge, at any time, the validity of the

[8] Translator's Note: CO is the French abbreviation for Swiss Code of Obligations.

rules of procedure established by the Arbitral Tribunal with the assistance of the parties pursuant to Art. 8.2 of the contract between them and the *Swiss Rules of International Arbitration* (2012), but it does not claim that it has ever attempted to have a *witness statement* signed by A._____ nor requested the Arbitral Tribunal to proceed with hearing the testimony of the said witness by disregarding this requirement and requesting, if necessary, the assistance of the state-appointed judge in order to achieve the same result, even by means of a letter rogatory (see Article 184 (2) PILA).

In these circumstances, the Appellant has forfeited the right to come and argue today, now the outcome of the arbitral proceedings is known, that its right to present evidence in support of its case has not been respected.

4.3

Lastly, the Appellant complains that the Arbitral Tribunal failed to consider two essential and decisive arguments for the resolution of the dispute that it, the Appellant, had raised before it. To make its assessment, the First Civil Law Court will dispense with recapitulating the ins and outs of the present case, which are, moreover, relatively complicated, such as they appear from the text of the award under appeal and the summary that the President of the Arbitral Tribunal made, on behalf of the three arbitrators, on pages 2 to 7 of his answer (Nos. 1 to 15). It will be content, rather, to state only the facts necessary for the understanding of this second branch of the grievance based on Art.190 (2)(d) PILA. In addition, since the Appellant has declined to submit a Reply, the detailed explanations provided in the Arbitral Tribunal's response to this party's arguments (pp. 9-11) should be sufficient, unless they do not appear credible in light of the facts and the relevant evidence.

4.3.1

It will be taken for granted, in relation to the first part of this final two-headed grievance, that an amount of USD 1'150'000 in favor of the Appellant, out of a balance of USD 2'300'000 credited to it, was to be deducted from a claim of USD 4'397'018.70 held by the Respondent against the aforementioned party. To this claim, the Arbitral Tribunal added the sum of USD 386'222.91 corresponding to a claim of the Respondent's freight company (B._____, for short) to the freight company of the Appellant (C._____ for short), the parties agreeing to settle their accounts by including those of their respective freight companies. This resulted in an amount of USD 4'783'241.61 which, after offsetting the aforementioned USD 1'150'000, reduced the Respondent's residual claim to USD 3'633'241.61.

The Appellant explains that it argued in arbitral proceedings that the amount of USD 386'222.91, included in the Respondent's claim of USD 3'633'241.61, was the result of a simulated act, in the sense that, for internal reasons, B._____ had wished to present a positive balance in its favor, to which it,

the Appellant, had consented despite the fact that its subsidiary, C._____, was, in fact, not a debtor but a creditor of B._____, based on their assurances, given by A._____, that the USD 386,222.91 would never be claimed. However, again according to the Appellant, the Arbitral Tribunal allegedly ignored this argument.

It is not so. It must be noted, as a preliminary point, that the extracts of documents reproduced under No. 27 of the Appeal Brief do not mention the terms of a simulated act or a simulation. For the rest, it is clear from the explanations provided on pages 9 and 10 of the Arbitral Tribunal's response, with supporting references, that the arbitrators did not ignore the argument by which the Appellant attempted to make them acknowledge the existence of a simulated act. Thus, without being contradicted by the Appellant, the President of the Arbitral Tribunal notes, quite rightly, that under No. 27, the award mentions the said argument, stating that the Appellant intended to use it to deny any evidentiary value of Exhibit R25, namely a summary, signed by the two freight companies of the parties in December 2012, showing a claim of USD 386'223.41 in favor of B._____. Yet again, it draws the attention of the Federal Tribunal to No. 28 of the award in which the Arbitral Tribunal states that, according to the Respondent, Exhibit R25 revealed the existence of the one and only agreement between B._____ and C._____, since it contained the signature and the seal of these two companies.

The President of the Arbitral Tribunal refers, in addition, to No. 266 (i) to (v) of the award under appeal where the arbitrators included the amount of USD 386'222.91 in the award of the Respondent's claim against the Appellant, with reference to Exhibit R25, and expressly rejected the argument of the Appellant that the Respondent, in claiming payment of the amount, actually deducted USD 763'776.59 (i.e., USD 1'150'000 – USD 386'223.41) rather than the agreed amount of USD 1'150'000.

The Arbitral Tribunal, holding that the statement produced in Exhibit R25 was in accordance with the will of the parties, refuted, at least implicitly, the Appellant's argument relating to the simulation.

The argument that it disregarded the party's right to be heard, therefore, is inappropriate.

4.3.2

As regards the second half of the Appellant's total claim against the Respondent, which also amounted to USD 1'150'000 (i.e., USD 2'300'000: 2), the parties did not anticipate its direct charge against the Respondent's claim, as it had done for the first USD 1'150'000. They agreed that it would be reimbursed gradually through the execution of the sales contract entered into on 12 December, 2012, under which the Appellant was to deliver to the Respondent 50,000 metric tonnes of kerosene between 13 December, 2012 and 30 June, 2013, the stipulated profit margin allowing it to gradually recover the USD 1'500'000 owed to it by the Respondent.

Before the Arbitral Tribunal, the Appellant argued that this reimbursement could only take place if the kerosene was delivered at the latest by 30 April, 2013, at the rate of 10'000 metric tonnes per month, in order to avoid that the lease and capital costs of the 230 wagons required to transport the merchandise not negate its profit margin. In this context, it argued that, notwithstanding the term of 30 June, 2013, indicated in the contract of sale to coincide with contracts binding it to a third party, the parties had made an oral agreement whereby the Respondent would take delivery of the kerosene before April 30, 2013. And the Appellant added that the Respondent did not respect this period, so that its claim of USD 1'150'000 towards the latter was never reimbursed, the rental and detention costs of the wagons having absorbed the profit margin. According to it, the Arbitral Tribunal paid no attention to this argument.

The Appellant is wrong here too. Indeed, as its president rightly points out on pages 10 and 11 of its Response, the Arbitral Tribunal, after setting out the parties' differing views on the delivery of the kerosene (Judgment, page 8, footnote 7, and 35), considered that the Appellant had not established to the satisfaction of the Court that the terms of the contract of 12 December, 2012, did not correspond to the real and common will of the parties and that was the case, moreover, even if one accepted the Appellant's argument that the company should at least have made certain profits by executing the contract (Judgment, No. 266 (vi) to (ix)). In so doing, the Arbitral Tribunal considered the argument that the profit margin would have been reduced to nil as a result of the extended period of rental and detention of the wagons. More specifically, it admitted, at least implicitly, that to the extent that the Respondent had performed the contract of 12 December, 2012, according to its letter, which corresponded to the real and common intention of the co-contractors, the Appellant could not blame the opposing party for preventing it from obtaining the profit it hoped to achieve in a period of time less than the term stipulated in the contract.

Hence it follows that the Arbitral Tribunal issued the award under appeal without prejudicing the Appellant's right to be heard.

5.

The present appeal will therefore be rejected insofar as it is capable of appeal. The Appellant, who is unsuccessful, shall bear the costs of the Federal proceedings (Art.66 (1) LTF) and pay the Respondent’s costs (Art.68 (1) and (2) LTF).

For these reasons, the Federal Tribunal pronounces:

1.

The appeal is rejected insofar as the matter is capable of appeal.

2.

The judicial costs, set at CHF 18’000, shall be borne by the Appellant.

3.

The Appellant shall pay the Respondent compensation of CHF 20’000 as costs.

4.

This judgment shall be notified to the parties’ representatives and to the President of the Arbitral Tribunal.

Lausanne, 19 September, 2017

On behalf of the First Civil Law Court of the Swiss Federal Tribunal

The Presiding Judge:

Kiss

The Clerk of the Court:

Carruzzo