4A_14/2012[1]

Judgment of May 2nd, 2012

First Civil Law Court

Federal Judge Klett (Mrs.), Presiding
Federal Judge Corboz,
Federal Judge Rottenberg Liatowitsch (Mrs.),
Federal Judge Kolly,
Federal Judge Kiss (Mrs.),
Clerk of the Court: Carruzzo.

X._____ GmbH (previously V._____ GmbH),
Represented by Mrs. Teresa Giovannini and Mr. Thomas Burckhardt,
Appellant,

v.

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

Facts:

A.
A.a In a contract of October 12, 2001 (hereafter: the Contract), V._____ GmbH (hereafter: V._____; presently: X._____ GmbH) undertook to deliver to Y._____ Sàrl (hereafter: Y._____) a production line for the production of non-woven materials. A non-woven is a textile the fibers of which are kept together chemically at random, thermically (thermobonding), mechanically (needling) or hydraulically (hydrobonding). The production line would serve to produce a hydrophobic non-woven for medical use, which Y._____ purported to sell to international companies to manufacture surgical overalls, surgical kits and operating fields among other things.

The aforesaid contract contains the following clauses in particular, which will be discussed hereunder.

Art. 10.2 (4)
"The warranty period starts running from the date of receipt"

Art. 12.2
"The duration of the warranty extends to:

- A period of 12 (twelve) months from receipt of the equipment by the Client User and in any event

[1] Translator's note: Quote as X._____ GmbH *v.* Y._____ Sàrl, 4A_14/2012. The original of the decision is in French. The text is available on the website of the Federal Tribunal www.bger.ch

- At the latest to a period of 22 (twenty-two) months from the date of loading of the equipment for shipment; as per the date of the bill of lading or of the taking-over certificate".

A.b On January 20, 2009, Y._____ initiated arbitration proceedings relying on the arbitration clause contained in the Contract. In its last submissions it sought on the one hand payment of € 5'127'646 by V._____, because the production line would never have been received or be in condition to produce the anticipated non-woven and, on the other hand, a finding as to the supply of spare parts over a period of ten years.

V._____ argued that the arbitral proceedings were not admissible and submitted on the merits that the claim should be rejected entirely.

An *ad hoc* arbitral tribunal of three members was constituted. Sitting in Geneva and applying Swiss law it issued a final award on December 3, 2010, rejecting the Defendant's preliminary submissions and partially granting Y._____'s claim to the extent that V._____ was ordered to pay € 3'250'000 with interest and to supply spare parts against payment until December 31st, 2015.

A.c On January 21st, 2011 V._____ filed a Civil law appeal with the Federal Tribunal (docket number 4A_46/2011). Invoking Art. 190 (2) (b), (d) and (e) PILA[2] it sought the annulment of the final award.

In a judgment of May 16, 2011, the First Civil Law Court of the Federal Tribunal granted the appeal in part to the extent that it was admissible and annulled the award under appeal[3]. This Court stated the following with regard to the limitation period of 22 months at Art. 12.2 second paragraph of the Contract, which is the only issue on which the appeal was granted (aforesaid judgment at 4.3.2 p. 19 ff):
"Yet one vainly seeks in the text of the award a rejection, albeit implicit, of the arguments developed by the Appellant as to the absolute time limit. (…) The award does not contain any reference, even by allusion, to the absolute time limit of 22 months, whether as to the applicability of that time limit or its requirements, in particular its starting point. Contrary to what the Arbitral tribunal states in the aforesaid observations, it does not appear either that the arbitrators would have found that the Respondent had answered the argument that the claim was time barred "substantially and convincingly". Accordingly, one would have to rely on the mere allegations of the Arbitral tribunal in the federal proceedings as to whether it dealt with the issue in dispute or not. Yet if it is true that the obligation to give reasons is not one of the aspects of the guarantee of the right to be heard within the meaning of Art. 190 (2) (d) PILA, relying on the mere allegation of the Arbitral tribunal that it dealt with the issue in dispute when faced with the Appellant's denials would deprive of its contents the minimum duty of the arbitrators to deal with the pertinent issues, which the aforesaid case law deducted from that guarantee.
(…)
Under such conditions the argument based on the violation of the right to be heard must be admitted and consequently the award under appeal must be annulled.

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[2] Translator's note: PILA is the most commonly used English abbreviation for the Federal Statute on International Private Law of December 18, 1987, RS 291.

[3] Translator's note: See the full translation at http://www.praetor.ch/arbitrage/no-breach-of-pre-arbitral-procedures-failure-to-deal-with-an-arg/

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

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

B.
B.a By e-mail and letter of May 27, 2011 the Arbitral tribunal took notice of the annulment of the award, advised the Parties that it would issue a new award and invited them to let it know if they intended to supplement in any way the arguments they had already developed in the proceedings.

On the same day counsel for V._____ wrote to the Arbitral tribunal to ask in what capacity it considered itself seized of the matter as the case had not been sent back to the Arbitral tribunal by the Federal Tribunal.

On May 30, 2011 the Arbitral tribunal invited the Parties to submit their comments as to its jurisdiction and the next steps in the proceedings.

By letters of counsel of June 10, 2011 the Parties complied with this request.

Y._____ explained why it considered that the Arbitral tribunal had jurisdiction to issue a new award, adding that it was not necessary to reopen the case as to the issue of the absolute time limit of 22 months. For its part V._____ stated the reasons for which the Arbitral tribunal had no jurisdiction to issue a new decision in its view. It argued moreover that the Arbitral tribunal was no longer independent or impartial because it had already expressed its opinion as to the limitation period defense. Thus it demanded that the Arbitral tribunal recuse itself *in corpore*. Finally, according to V._____, the proceedings as to the merits of the case had to be stayed until the objections as to the lack of jurisdiction and the irregular composition of the Arbitral tribunal would be decided, so that V._____ "already reserved all its rights in this respect".

Upon being invited to do so by the Arbitral tribunal each Party submitted its commentaries on the other Party's position in briefs dated June 29, 2011.

By letter and e-mail of August 4, 2011 the Arbitral tribunal closed the proceedings and gave the Parties a time limit to communicate any submissions concerning the costs incurred since the judgment of the Federal Tribunal.

The same day, V._____ advised the Arbitral tribunal that if it intended to issue a new award, V._____ wanted to present its arguments on the merits of the issue in dispute, which it had specifically reserved in its previous statement, adding that this would necessarily have an impact on the costs of the arbitration.

On August 5, 2011 Y._____ submitted its commentaries as to V._____'s letter to the Arbitral tribunal.

Referring to these two letters the Arbitral tribunal, on August 8, 2011, asked the Parties to submit their statements of costs for the period after the federal judgment. The Parties submitted their statements of costs on August 15, 2011, with V._____ abstaining from any submissions in this respect due to the lack of jurisdiction and impartiality of the Arbitral tribunal.

B.b. On August 22, 2011 V._____ applied to Court of First Instance of the Canton of Geneva to challenge the three members of the Arbitral tribunal. It also sought and obtained from the Arbitral tribunal a stay of the proceedings until the challenge would be adjudicated.

The Court of First Instance rejected the challenge in a decision of October 31st, 2011 after giving Y._____ and the members of the Arbitral tribunal an opportunity to state their views.

B.c By letter of November 2, 2011 V._____ sought from the Arbitral tribunal "a time limit to express its position on the merits of the dispute (issue of the absolute limitation period) as it had reserved the right to do by letters of June 22, 2011 and August 4, 2011". In a letter of November 3, 2011 Y._____ opposed this request.

By letter of November 16, 2011, the Arbitral tribunal, referring to these two letters, advised the Parties that after deliberating it considered that it was not necessary to give them an additional opportunity to supplement their arguments as to the issue of the absolute limitation period. Indeed the Arbitral tribunal felt that they had had ample opportunity to do so in the proceedings, particularly in their briefs and that there was no new element justifying to reopen the case in this respect.

B.d In a final award of November 20, 2011 the Arbitral tribunal found that it had jurisdiction to resume and bring to an end the arbitral proceedings after the judgment of May 16, 2011 (§ 1 of the award); it took notice of the rejection of the challenge by the Court of First Instance of the Canton of Geneva (§ 2 of the award) and stated that there was no reason to reopen the case as to the defense of the absolute limitation period (§ 3 of the award). Moreover the Arbitral tribunal took over the contents of the award of December 3, 2010 with new numbers (§ 4 to 10 and § 12 of the award), adding that each Party would bear its costs and fees for the phase after the judgment of May 16, 2011 (§ 11 of the award).

As to the argument concerning the absolute limitation period the Arbitral tribunal rejected it for the reasons summarized hereafter (see award under appeal, nr 345).

Firstly, the limitation period of 22 months set at Art. 12.2 second paragraph of the Contract makes sense only in a normal situation in which the seller fulfills its principal obligation by delivering the goods sold, albeit with some defects. However it makes no sense if, as the Appellant did, the seller does not comply with this obligation. Holding the contrary would be tantamount to authorizing the seller to rely on the limitation period as to the warranty even before delivering the goods sold. Moreover the Appellant

did not answer the Respondent's arguments as to the aforesaid contractual provision; in particular it did not refute the argument according to which it appears difficult to explain how the absolute limitation period of 22 months could be applied coherently in a situation where this period runs out before the production line is received. Secondly, the fact that, in order to bring an end to an unbearable situation, the Respondent was forced to accept delivery of a line failing to meet the contractual requirements could not by itself modify the legal regime and retroactively cause the limitation period of the warranty to be reborn. Thirdly the absolute limitation period would have been reached in this case when the production line was still being tested; the tests conducted by the Parties would thus have lost any meaning if the warranties for defects had already been time-barred. Fourthly, the silence of the Parties as to the warranty period of 22 months when the period of 12 months had been the object of discussions and had been extended several times confirms that only the latter period could have been applied in this case. Fifthly, the Appellant's argument is even less acceptable because the difficulties encountered were due to this Party in its capacity as seller in charge of the assembly of the production line. Finally, the warranty terms were suspended pursuant to Art. 12.3 of the Contract as long as the line would not produce what had been promised, namely hydrophobic non-wovens.

C.

On January 9, 2012 V._____ (hereafter: the Appellant) filed a Civil law appeal with the Federal Tribunal. Invoking Art. 190 (2) (a), (b), (d) and (e) PILA it submits as to jurisdiction that the Federal Tribunal should find that the Arbitral tribunal had no jurisdiction on the dispute after the judgment of May 16, 2011 and consequently annul the final award of November 20, 2011. As to the merits it repeats the latter submission and invites the Federal Tribunal, to the extent necessary, to hold that the three Arbitrators are recused. Moreover the Appellant sought a stay of enforcement until a decision on the appeal and also by way of provisional measures *ex parte*. The latter request was granted by decision of the Presiding Judge of January 12, 2012, whilst the request for an ordinary stay of enforcement is still pending.

In its answer of February 13, 2011 Y._____ (hereafter: the Respondent) submits that the appeal should be rejected.

The same day, the Arbitral tribunal submitted its file in the case and stated that it would take no position as to the appeal.

On February 29, 2012 the Appellant filed some observations (hereafter: the Reply) as to the Respondent's answer.

The Respondent made some remarks as to these observations in a filing of March 16, 2012 (hereafter: the Rejoinder).

Furthermore the Parties filed briefs and exhibits in connection with the Appellant's request for a stay of enforcement.

Reasons:

1.
1.1
In the field of international arbitration a Civil law appeal is possible against the decisions of arbitral tribunals pursuant to the requirements of Art. 190 to 192 PILA (Art. 77 (1) LTF[4]). Whether as to the object of the appeal, the standing to appeal the time limit to do so, the Appellant's submissions or the grounds for appeal invoked, none of the admissibility requirements raises any problems in this case. Accordingly there is no reason not to address the appeal.

1.2
The Appellant raises several arguments against the award of November 20, 2011, some of which relate to the Arbitral tribunal itself, some others to the arbitral proceedings conducted by the Arbitral tribunal and the last ones to the decision issued by the Arbitrators on the merits. The grievances raised shall be reviewed in that order successively, as proposed.

2.
2.1
In a first group of arguments the Appellant submits that the Arbitral tribunal should not have seized itself of the case again after the final award of December 3, 2010 was annulled by the judgment of the Federal Tribunal of May 16, 2011 when by its own admission it had already decided the issue of the absolute limitation period within the meaning of Art. 12.2 second paragraph of the Contract and that consequently it no longer presented the guaranties of independence and impartiality arising from Art. 30 Cst.[5]. Hence according to the Appellant the Arbitral tribunal was irregularly composed (Art. 190 (2) (a) PILA). Moreover it would have breached Art. 190 (2) (e) PILA, specifically procedural public policy as sanctioned by that provision, by failing to issue an independent judgment on the legal and factual submissions made.

The Respondent challenges both the admissibility and the merits of the arguments. As to the former it relies on federal case law, which rules out even an indirect judicial review of the decision made by the State Court as to a challenge and which regards procedural public policy as a subsidiary guarantee. These two arguments must be reviewed first as their admission would indeed render the grievances inadmissible, which would no longer require them to be examined on the merits.

2.2
Art. 180 (3) PILA provides that in case of dispute and when the parties did not agree on the rules with regard to a challenge, the court of ordinary jurisdiction at the seat of the arbitral tribunal decides definitively.

2.2.1 According to case law of the Federal Tribunal when the Cantonal Court – also referred as the Court in support – decides a challenge on the basis of the provision quoted, its decision is final and cannot be appealed directly or indirectly in the framework of an appeal based on Art. 190 (2) (a) PILA against the final award of the arbitral tribunal (ATF 128 III 330 at 2.2). Conversely, the decision issued

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

[5] Translator's note: Cst. is the French abbreviation for the Swiss Federal Constitution.

by a private body, such as the Court of Arbitration of the International Chamber of Commerce (ICC) or the International Council of Sport Arbitration (ICSA) as to the challenge of an arbitrator, while not immediately appealable to the Federal Tribunal, may nonetheless be reviewed in the framework of an appeal against the award based on the alleged irregular composition of the arbitral tribunal (judgment 4A_644/2009 of April 13, 2010 at 1 and references)

To justify this difference in treatment depending on whether the decision emanates from a private body or from the state court, the Federal Tribunal explains as to the former that any legal order must reserve the possibility to review the awards or the arbitral proceedings from the point of view of their conformity with its fundamental legal principles, among which is the right to an independent and impartial arbitrator. However when a state court already reviewed whether the arbitrator challenged met these requirements or not, there is no need for new state control. In conformity with the goal of Swiss law on international arbitration, which is to limit as much as possible the possibilities to challenge arbitral proceedings, it must accordingly be admitted with the majority of legal writers that the finality of the decision of a Cantonal Court as to a challenge pursuant to Art. 180 (3) PILA means that a subsequent review of that decision within the framework of an appeal to the Federal Tribunal against the final award of the arbitral tribunal is excluded (ATF 128 III 330 at 2.2 and the legal writers quoted).

This case law is approved by a good share of the legal writers (in addition to the commentators mentioned in the case already quoted, referred to as the majority legal writing, also see the following writers who, for some of them, expressed their view in connection with the provision addressing the issue in the Civil Code of Procedure [CCP; see Art. 369 (5) worded as follows: “the decision as to a challenge may be reviewed only in connection with the first appealable award.”] (Pierre-Yves TSCHANZ, in Commentaire romand, Loi sur le droit international privé - Convention de Lugano, 2011, nr 62 ad Art. 180 PILA; Philippe SCHWEIZER, in Knoepfler/Schweizer, Arbitrage international, 2003, p. 680; MATTHIAS LEEMANN, Challenging international arbitration awards in Switzerland on the ground of lack of independence and impartiality of an arbitrator, in Bulletin de l'Association Suisse de l'Arbitrage [ASA] 2011 p. 10 ff, 16 1st §; BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 2nd ed. 2011, nr 839a in fine; IVO SCHWANDER, in Schweizerische Zivilprozessordnung [ed. Brunner/Gasser/Schwander], 2011, nr 10 ad Art. 369 CCP; GASSER/RICKLI, in Schweizerische Zivilprozessordnung, Kurzkommentar, 2010, nr 3 ad Art. 369 CCP; STAEHELIN/STAEHELIN/GROLIMUND, Zivilprozessrecht, 2008, nr 11 ad § 29; PLANINIC/KUBAT ERK, in ZPO Kommentar [ed. Gehri/Kramer], 2010, nr 11 ad Art. 369 CCP). It must be pointed out that some of these commentators still admit the possibility to make a Civil law appeal within the meaning of Art. 77 LTF against the decision of the State Court if to raise other arguments than that of the lack of independence of impartiality of the arbitrator challenged, such as the violation of the rule that the parties should be treated equally or of their right to be heard in the proceedings challenged (LEEMANN, ibid.; BERGER/KELLERHALS, op. cit., nr 840; see also: GIRSBERGER/VOSER, International Arbitration in Switzerland, 2nd ed. 2012, n° 564).

Other authors criticize federal case law. Thus for KAUFMANN-KOHLER/RIGOZZI (Arbitrage international, 2nd ed. 2010, nr 402/ 808a and footnote 633 p. 504) the adverb “definitively” at Art. 180 (3) PILA merely excludes a direct appeal against the decision of the state court and could not consequently suppress a ground for appeal contained in the law, namely Art. 190 (2) (a) PILA (in the same direction see POUDRET/BESSON, Comparative law of international arbitration, 2nd ed. 2007, nr 791 p. 729), such a delegation to the Cantonal Court of the power of the Federal Tribunal being inconsistent with the exclusive jurisdiction of the Federal Tribunal as to such appeals and incompatible

with the very strict conditions as to the opting out of an appeal pursuant to Art. 192 PILA. Thus these commentators recommend that by analogy with Art. 369 (5) CCP the Federal Tribunal should be empowered to review the decision of the State Court as to the challenge in the framework of an appeal against the first appealable sentence (in the same direction see Jean-François POUDRET, Présentation critique du projet de réglementation de l'arbitrage interne (art. 351 à 359 P-CPC), in Le Projet de Code de procédure civile fédérale [éd. Lulic], Cedidac 2008, p. 253 ss, 244 s. let. L). Sébastien BESSON (Réflexions sur la jurisprudence suisse la plus récente rendue en matière d'arbitrage international, in Bulletin ASA 2003 p. 463 ff) also criticizes this case law for creating a difference of treatment hard to understand between institutional arbitration and *ad hoc* arbitration as an appeal based on Art. 190 (2) (a) PILA would always be possible in the former type of arbitration even if there is a negative decision by the private body as to the challenge (p. 471 ff nr 14). Consequently, for this commentator, such an appeal should always be possible when a challenge is rejected during the arbitration whether the decision is issued by a private body or by the state court (p.472 nr 14; in the same direction PETER/BESSON, in Basler Kommentar, Internationales Privatrecht, 2nd ed. 2007, nr 36 ad Art. 180 PILA).

2.2.2 A change of jurisprudence may be justified in particular when it appears that the circumstances or the legal concepts evolved or that another practice would better heed the intent of the legislature. The reasons for a change of jurisprudence must be objective and the more serious that the jurisprudence is older in order not to affect certainty as to the law without reason (ATF 136 III 6 at 3; 135 II 78 at 3.2).

In view of these principles there is no reason to change the jurisprudence as to Art. 180 (3) PILA. The grounds on which it relies date back to about ten years and are approved by many legal writers; they are still valid. On the one hand the issue as to the impartiality and independence of the members of an arbitral tribunal must be capable of submission to a State Court as opposed to being decided finally by a private body whilst on the other hand the possibilities to contest the proceedings challenging arbitrators must be restricted to the minimum strictly necessary. As to the latter, experience teaches that the parties to international arbitration proceedings will fall far short of leaving aside the means with which they can delay, if not paralyze, the efficient conduct of the proceedings (see among others Pierre LALIVE, Dérives arbitrales, in Bulletin ASA 2005 p. 587 ff). Thus the principle of celerity of arbitration requires ensuring to the extent possible that a challenge of arbitrators should be disposed of *in limine litis* once and for all. In this respect the practical impact of present case law should not be overestimated when one bears in mind that a large part of international arbitration, such as the arbitrations conducted under the aegis of the ICC (Art. 14 of the ICC Rules in force since January 1st, 2012) or the sport arbitrations in front of the CAS (see Art. R34 of the sport arbitration Code) is excluded from its scope. It is true that the adverb “definitively” used at Art. 180 (3) PILA does not impose the solution adopted by case law but neither does it exclude it (LALIVE/POUDRET/REYMOND, Le droit de l'arbitrage interne et international en Suisse, 1989, nr 12 p. 345). Moreover one does not see why the jurisprudence under such criticism would imply a (factual) delegation of the power of the Federal Tribunal to the cantonal court in addition to the deprivation of one of the appeal grounds provided by the law. Indeed there is no reason why Art. 180 (3) PILA should not be considered as *lex specialis* by reference to Art. 190 (2) (a) PILA to the extent that the decision taken by the Cantonal State Court – pursuant to a specific request and not in an appeal as to the challenge of an arbitrator – closes the specific proceedings in this respect and accordingly can no longer be reviewed indirectly in the framework of an appeal against a subsequent award. It goes without saying that the grounds for challenge which would have appeared after the decision by the State Court can be invoked in the framework of the appeal against such an award on the basis of Art. 190 (2) (a) PILA.

Moreover the difference in treatment between institutional and *ad hoc* arbitration is easily explained by the pertinent fact that in the former case the decision as to the challenge is issued by a private body to which the Swiss legal order cannot entrust the verification of compliance with the essential guarantee of the independence and impartiality of the members of an arbitral tribunal whilst in the latter it is taken by a State Court. Finally the parallel that some would draw with the aforesaid Art. 369 (5) CCP is not necessarily pertinent. Firstly the solutions adopted for national arbitration do not necessarily apply to international arbitration as in the latter the control of the State Court on the arbitral proceedings is generally not as broad as in the former. Moreover it must be held that the wording of this provision doubtlessly goes much further in the meaning suggested by those who hold that opinion than the text of Art. 180 (3) PILA. Notwithstanding the foregoing, legal commentators are far from unanimous as to the issue – which needs not be decided here – as to whether the decision on the challenge issued by the State Court may be reviewed indirectly in the framework of an appeal against the first appealable award (as to legal commentators admitting this possibility: see KAUFMANN-KOHLER/RIGOZZI, op. cit., p. 504, footnote 633; Urs WEBER-STECHER, in Schweizerische Zivilprozessordnung [ed. Spühler/Tenchio/Infanger], 2010, nr 38 ad art. 369 CCP; SCHNYDER/PFISTERER, in Kommentar zur Schweizerischen Zivilprozessordnung [ed. Sutter-Somm/Hasenböhler/Leuenberger], 2010, nr 11 ad Art. 369 CCP; PLANINIC/KUBAT ERK, ibid.; Félix DASSER, in Kurzkommentar ZPO [éd. Oberhammer], 2010, nr 11 ad Art. 369 CCP; as to legal writers excluding this possibility, see BERGER/KELLERHALS, ibid.; SCHWANDER, ibid.; GASSER/RICKLI, ibid.).

2.2.3 In a judgment of October 31st, 2011 the Tribunal of First Instance of the Canton of Geneva rejected the challenge made by the Appellant. Hence pursuant to its jurisprudence the Federal Tribunal cannot address the grievance derived from the violation of Art. 190 (2) (a) PILA seeking to challenge that judgment indirectly. It is not pertinent in this respect that in the reasons (see p. 11 second paragraph before last) the Cantonal Court reserved the possibility of an indirect appeal based on this provision by reference to the commentary of KAUFMANN-KOHLER/RIGOZZI quoted above. The Appellant cannot rely on the opinion of the Cantonal Court to make an appeal the admissibility of which is excluded by federal case law.

2.3
The Appellant's attempt to submit the same argument to the Federal Tribunal by way of a grievance derived from an alleged breach of procedural public policy is doomed from the start. According to constant case law, public procedural policy within the meaning of Art. 190 (2) (e) PILA is only a subsidiary guarantee which can be invoked only if none of the means of recourse provided at Art. 190 (2) (a) to (d) PILA can be considered (judgment 4A_530/2011[6] of October 3, 2011 at 3.2). Conceived in this way the guarantee is a precautionary norm for procedural breaches which the legislature would not have considered when adopting the other parts of Art. 190 (2) PILA. It does not purport at all to enable a party to raise an argument falling within Art. 190 (2) (a) to (d) PILA yet inadmissible for another reason.

Consequently the grievance derived from the alleged breach of procedural public policy is inadmissible as well. This means that the Appellant vainly tried to challenge the composition of the Arbitral tribunal.

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[6] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/failure-to-raise-a-violation-of-the-right-to-be-heard-immediatel/

3.
In a second group of arguments the Appellant claims a violation of Art. 190 (2) (b) PILA. First of all it argues that the Arbitral tribunal should not have seized itself of the dispute again on its own initiative after the notification of the judgment of the Federal Tribunal of May 16, 2011 when no statutory or contractual basis would create its jurisdiction to issue a new award. Furthermore it argues that the Arbitral tribunal decided *extra potestatem* by adjudicating the issue in dispute *ex aequo et bono* when it was not authorized to do so by the Parties. These two grievances, the pertinence of which is challenged by the Respondent, must be examined successively.

3.1
In the award under appeal the Arbitral tribunal sets forth in details the reasons that led it to find in favor of jurisdiction to decide the issue of the absolute limitation period of the claim (p. 53 to 61, nr 236 to 251). Its demonstration appears convincing in all respects and the Appellant's arguments to the contrary are not such as to call it in question.

3.1.1 From a theoretical point of view it is true that, as the Appellant emphasizes, the maxim *lata sententia iudex desinit esse iudex* means that a judge is no longer seized of the matter from the time when a judgment is issued, to the extent that he can no longer modify it (ATF 130 IV 101 at 2.1; 122 I 97 consid. 3a/bb p. 99; on *functus officio* [Unabänderlichkeit][7] and the disputed issue of the decisive time in this regard – the time the decision is made or communicated – see among others: Fabienne HOHL, Procédure civile, tome I, 2001, nr 1232 to 1234 and 1265 to 1268). That which applies to a Court is also valid for an arbitrator, in international arbitration as in national arbitration: the award is final from its communication (Art. 190 (1) PILA), which is when it has the same effects as an enforceable judicial decision (Art. 387 CCP). Thus, once the final award is issued, the arbitral tribunal sees its jurisdiction disappear and becomes *functus officio*, with some exceptions (BERGER/KELLERHALS, op. cit., nr 915a; PHILIPPE SCHWEIZER, in Code de procédure civile commenté, 2011, nr 7 ad Art. 395 CCP).

Procedural *res judicata* (formelle Rechtskraft)[8] created by the communication of the award and giving it substantive *res judicata* (materielle Rechtskraft)[9] ceases if the award is annulled pursuant to an extraordinary recourse within the meaning of Art. 77 (1) LTF (Dieter GRÄNICHER, in Kommentar zur Schweizerischen Zivilprozessordnung [ed. Sutter-Somm/Hasenböhler/ Leuenberger], 2010, nr 22 ad Art. 387 CCP). In such circumstances the legal situation is tantamount to that which existed before the final award was communicated to the parties. As a consequence of the annulment the latter are again in the expectation of a final award which will decide their dispute and put an end to the arbitral proceedings. As to the arbitrators who conducted the proceedings their mission is not finished or, if one considers that it was temporarily, it is reactivated. Hence it is not illogical to find that in such a case the arbitral tribunal that issued the award annulled and which is in charge of issuing a new one, never was *functus officio* (see in this direction the very commentator quoted by the Appellant: Alexis MOURRE, Is There a Life after the Award?, in Post Award Issues [ed. Tercier], ASA Special Series nr 38, 2011, p. 1 ss, 13/14 and 18) or was so only during the time between the communication of the award and its annulment.

[7] Translator's note: In German in the original text.
[8] Translator's note: In German in the original text.
[9] Translator's note: In German in the original text.

As a matter of principle there is accordingly no objection to the same arbitrators deciding the matter again when their final award was annulled, provided of course that the ground of annulment is not the irregular composition of the arbitral tribunal (Art. 190 (2) (a) PILA) or the lack of jurisdiction (Art. 190 (2) (b) PILA) and provided that they were not validly challenged in the meantime (Art. 180 PILA). Requesting a specific statutory basis for this purpose or in its absence an agreement of the parties, as the Appellant advocates is neither necessary as to the former nor realistic as to the latter. As to the former, if one admits that the mission of the arbitrators continues as a consequence of the annulment of the final award, it should be sufficient that the jurisdiction of the arbitral tribunal to decide the matter again should not be excluded by the law of the seat of the arbitral tribunal, by the applicable rules of an arbitral institution or by the intent of all parties expressed before or after the communication of the award annulled. As to the latter, a party's refusal to agree may not stall the arbitral proceedings but it will delay them significantly because new arbitrators will have to be appointed and hear the case again entirely or in part, as the case may be.

Moreover there was and there is still a "statutory" basis in national arbitration, which establishes such a jurisdiction of the arbitral tribunal. Previously it was at Art. 40 (4) of the Concordate on arbitration of March 27, 1969 (hereafter: CA or the Concordate) and it has been superseded by Art. 395 (2) CCP, both provisions stating that the arbitrators issue a new decision when the award is annulled. Moreover, in a case published in 1991 the Federal Tribunal already stated by reference to Art. 40 (4) CA that with regard to international arbitration there was no corresponding rule in PILA, as a consequence of which the same rule should be applied to this type of arbitration (ATF 117 II 94 at 4, 2nd § *in fine*). In order to answer an argument of the Appellant (appeal nr 111 (i) (a)) that the Federal Tribunal did so by generally extending this principle of case law without regard to the fact that the aforesaid judgment involved an interlocutory decision by which the Arbitral tribunal had wrongly denied jurisdiction. Moreover it must be pointed out that the aforesaid commentator, invoked by the Appellant to substantiate its argument, precisely quotes this precedent to classify the Swiss legal order among those that accept that the matter be sent back to the same arbitral tribunal (MOURRE, op. cit., p.13).

3.1.2 Based on the aforesaid explanations the Appellant's argument, drawn from the fact that the Federal Tribunal did not formally send the matter back to the Arbitral tribunal *a quo* in its judgment of May 16, 2011 does not withstand scrutiny. Moreover by refraining from doing so the First Civil Law Court acted according to well established practice (judgment 4P.100/2003 of September 30, 2003, published in ATF 130 III 35; judgment 4P.172/2006 of March 22, 2007, published in ATF 133 III 235; judgment 4A_400/2008[10] of February 9, 2009; judgment 4A_600/2010[11] of March 17, 2011), from which this Court apparently departed only once (judgment 4A_433/2009[12] of May 26, 2010 at 4 and ch. 2 of the holding).

Consequently, contrary to the Appellant's view, the fact that the matter was not specifically sent back to the arbitral tribunal having issued the award annulled cannot be interpreted as an implicit prohibition to the arbitrators who issued the aforesaid award to decide the matter again.

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[10] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/annulment-of-an-award-by-the-federal-tribunal-because-of-the-use/

[11] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/cas-award-allocating-fees-and-costs-in-violation-of-the-right-to/

[12] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/award-annulled-for-violation-of-due-process/

3.1.3 To the extent that this can be assessed, the solution according to which when an award is annulled the arbitral tribunal previously seized of the dispute retains jurisdiction to issue the new award is approved by all legal commentators (BERGER/KELLERHALS, op. cit., nr 915a and 1654; KAUFMANN-KOHLER/RIGOZZI, op. cit., p. 484, footnote 567; POUDRET/BESSON, op. cit., n° 835 p. 776; LALIVE/POUDRET/REYMOND, op. cit., nr 3.6 ad Art. 191 PILA; ANDREAS BUCHER, in Commentaire romand, Loi sur le droit international privé - Convention de Lugano, 2011, nr 56 ad art. 191 PILA; CESARE JERMINI, Die Anfechtung der Schiedssprüche im internationalen Privatrecht, 1997, nr 681). In this respect the Appellant's attempt to demonstrate that the precedents relied upon by the commentators quoted by the Arbitral tribunal at nr 248 of the award under appeal would not be pertinent changes nothing to the fact that these commentators concurred in supporting the aforesaid solution.

3.1.4 Ensuring an economy of procedure also justifies the solution criticized by the Appellant. To constitute a new arbitral tribunal to decide a specific issue that was not dealt with in the award annulled, after hearing the case again completely or in part as the case may be, would contradict the principle of celerity and merely delay the outcome of proceedings that will often have been started some years before, all of which to the detriment of the party prevailing in the end.

3.1.5 It must accordingly be found that the Arbitral tribunal was right to accept jurisdiction to decide the issue it had omitted to decide in the final award of December 3, 2010, which led to the annulment of the award.

Moreover the Federal Tribunal formulated its reasons at 4.3.2 last paragraph in the judgment of May 16, 2011 (see *litt.* A.c above) in a way that clearly implied that the new award would have to be issued by the same arbitrators. Had it not been so, it goes without saying that the Court would not have referred to the "arbitrators" and to "their new award" but would have spoken of "new arbitrators" or of "a new arbitral tribunal to be constituted" or used any other equivalent expression as this was an important issue that the Court could not have let pass. Hence the Appellant is not credible in its attempt to attribute another meaning to the aforesaid excerpt.

3.2

3.2.1 Still from the point of view of Art. 190 (2) (b) PILA and in a second argument, the Appellant claims that the Arbitral tribunal decided *extra potestatem* by resorting to *ex aequo et bono* without being authorized to do so by the Parties (see Art. 187 (2) PILA). It bases its argument on a sentence in the award under appeal (nr 345 b, p. 104) worded as follows:

"- *applying the absolute limitation period would be unfair as it was demonstrated above that it is undisputed that the claim for damages filed by the Claimant was not covered by the statute of limitations when the action was initiated"*

3.2.2 The appeal based on Art. 190 (2) (b) PILA is available when the arbitral tribunal decided claims it had no jurisdiction to address, whether because there was no arbitration agreement or because it was limited to certain issues that did not include the claims at hand (*extra potestatem*) (ATF 116 II 639 at 3 *in fine* p. 642). Indeed an arbitral tribunal has jurisdiction only if, among other conditions, the dispute falls within the anticipations of the arbitration agreement and if it does not exceed the limits given by the

request for arbitration and the terms of reference as the case may be (judgment 4A_210/2008[13] of October 29, 2008 at 3.1).

In its jurisprudence with regard to the Concordate the Federal Tribunal connected the unauthorized use of the power to decide *ex aequo et bono* to Art. 36 (b) CA concerning jurisdiction of the arbitral tribunal (ATF 110 IA 56 at 1b p. 57). Such an approach has been approved by legal commentators in part (Daniel Lucien BÜHR, Der internationale Billigkeitsschiedsspruch in der privaten Schiedsgerichtsbarkeit der Schweiz, 1993, p. 78 ff; Andreas BUCHER, Le nouvel arbitrage international en Suisse, 1988, nr 344; the same, although les categorical, in Commentaire romand, préc., nr 55 ad Art. 187 PILA; BERTI/SCHNYDER, in Basler Kommentar, Internationales Privatrecht, 2nd ed. 2007, nr 39 ad Art. 190 PILA) and criticized by other legal writers (LALIVE/POUDRET/REYMOND, op. cit., nr 5b ad Art. 190 PILA; RÜEDE/HADENFELDT, Schweizerisches Schiedsgerichtsrecht, 2nd ed. 1993, p. 347; Markus WIRTH, in Basler Kommentar, Internationales Privatrecht, 2nd ed. 2007, nr 312 ad Art. 187 PILA; BERGER/KELLERHALS, op. cit., nr 1556; KAUFMANN-KOHLER/RIGOZZI, op. cit., nr 651; CORBOZ, in Commentaire de la LTF, 2009, nr 110 ad Art. 77 LTF). Under the aegis of PILA the Federal Tribunal left open the issue as to whether the violation in question should be connected to Art. 190 (2) (b) PILA in the absence of a corresponding grievance (see the reasons at 2 (unpublished) of the judgment published in part at ATF 116 II 634). Seized of an alleged violation of Art. 190 (2) (e) PILA as to the same violation however, the Court considered the possibility to annul the award on this basis if it produced a result inconsistent with public policy (ATF 116 II 634 at 4a p. 637). In a more recent judgment the Court described the issue as disputed while leaving open the question as to whether or not usurping the power to decide *ex aequo et bono* breaches public policy within the meaning of Art. 190 (2) (e) PILA when the award does not produce a result incompatible with public policy (judgment 4A_370/2007[14] of February 21st, 2008 at 5.6).

Usurping the power to adjudicate *ex aequo et bono* is an irregularity that does not affect the jurisdiction of the arbitral tribunal but it raises the issue of the legal principles or the method according to which the dispute between the parties must be decided (BERGER/KELLERHALS, ibid.). In other words knowing which are the rules of procedure and the substantive law that the arbitral tribunal must apply is not an issue of jurisdiction (CORBOZ, ibid.). The corresponding grievance is accordingly not at Art. 190 (2) (b) PILA. It may at most fall within Art. 190 (2) (e) PILA although this is disputed (see BERGER/KELLERHALS, op. cit., nr 1556, p. 448, et 1603, denying that the provision can be applied when the arbitral tribunal decides *ex aequo et bono* without being authorized to do so by the parties). However it is not necessary to proceed any further in analyzing this issue because the Appellant does not rely on the latter provision to substantiate its grievance. Accordingly the argument based on a violation of Art. 190 (2) (b) PILA is inadmissible. Had it been admissible that it would not have succeeded anyway. Indeed it appears clearly from the award under appeal (nr 345 a, c, d, e and f, p. 103 to 105) and from the Respondent's remarks (answer nr 52 to 55) that the Arbitral tribunal relied on legal considerations to reach the conclusion that the limitation period of 22 months contained at Art. 12.2 second paragraph of the Contract was not applicable in this case. By qualifying the contrary solution, advocated by the Appellant, as "unfair", the Arbitrators did not abandon the realm of the law to go into *ex aequo et bono*. They merely intended to reinforce their legal reasons, recalled in the previous

[13] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/admissibility-of-appeal-against-interlocutory-decision-procedura/

[14] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/appeal-against-interlocutory-and-partial-awards-violation-of-pub/

paragraph, in which they had demonstrated why they regarded such a solution as incoherent. Moreover the Appellant, when quoting the pertinent part of the award (see at 3.2.1 above) omits the words establishing the connection between the two arguments put forward by the Arbitral tribunal (see award nr 345 b, p. 104: “In light of this argument…”).

3.1
This being so the Appellant unsuccessfully challenged the jurisdiction of the Arbitral tribunal.

4.
Furthermore the Appellant claims that the Arbitral tribunal would have breached its right to be heard and the requirement of treating the parties equally (Art. 190 (2) (d) PILA) and also disregarded the requirement of good faith governing the proceedings (Art. 190 (2) (e) PILA) when the Appellant was refused the possibility to express its view on the merits (*i.e.* on the issue, which had been stayed, of the absolute time limit of the claim in dispute) although the Appellant had specifically reserved the possibility to do so before filing its challenged and renewed its *ad hoc* request after the challenge was rejected by the State Court.

As submitted, this multifaceted argument is not admissible. It must be recalled that the Federal Tribunal reviews only the grievances raised and reasoned by the Appellant (Art. 77 (3) LTF). Yet the appeal at hand contains insufficient reasons in this respect. Indeed, in the award of November 20, 2011, the arbitral tribunal set forth under the caption “Measures of inquiry” the reasons for which it considered that it was not necessary to grant the Appellant’s request (nr 256 to 258 p.62 ff). Yet the latter does not address in the appeal the reasons developed by the Arbitrators in this respect and merely points out essentially what it could have argued to substantiate its defense that the limitation period was exceeded if it had had the possibility to express itself on the merits. Admittedly its reply contains a reference to nr 257 of the award under appeal and some embryonic criticism of the Arbitral tribunal’s position on this procedural issue in dispute (nr 42 to 44 p. 15 ff). However a reply does not purport to enable a party to invoke the means of recourse it did not introduce timely, namely before the non-extendable time limit to appeal expired (Art. 47 (1) LTF) as stated at Art. 100 (1) LTF (see judgment 4A_652/2011 of March 7, 2012 at 3.2) or to supplement afterwards some reasons which, albeit existent, were insufficient for the Federal Tribunal to consider the grievance invoked as admissible.

Under such conditions it is not possible to address the grievances relating to the conduct of the Arbitral tribunal after the judgment of the Federal Tribunal of May 16, 2011 was notified.

5.
5.1
The Appellant finally argues that the Arbitral tribunal, to use the Appellant’s very wording, “misrepresented the law as well as the goal and the scope of the contractual provision as to the absolute limitation period, leading to results that the legislature cannot have wanted and which hurt the feeling of justice and good faith (Art. 190 (2) (e) PILA) and the requirement of treating the parties equally (Art. 190 (2) (d) PILA)” (appeal p. 50). To substantiate the last argument the Appellant quotes three precedents concerning the interpretation of a municipal regulation concerning an extension plan (ATF 108 IA 74 at 4c), the interpretation of contracts in French law (judgment 4P.119/2006 of July 11, 2006 at 3.1.2) and in Swiss law (ATF 111 II 284 at 2 p. 287). It emphasizes the words “to distort” and “distortion” found there and referring to the second case quoted, defines distortion as “the disregard of the clear and precise meaning of a piece of writing” (appeal nr 136 p. 51). According to the Appellant this notion

would fall squarely within the grievances of breach of procedural public policy or the requirement to be treated equally, as the distortion is inconsistent with the feeling of justice and the aforesaid principle and also within the violation of substantive public policy, for distorting a contract is tantamount to betraying the trust of the parties and to disregarding the requirement of good faith. Applying these principles to the case at hand the Appellant argues that the Arbitral tribunal distorted both the law and the contract: the former by applying the ten years limitation period to the purchaser's claim for damages when it should have applied Art. 210 CO[15] (one year limitation period) in any event; the latter by unduly substituting the word "receipt" to the wording "loading of the equipment" and by drawing erroneous conclusions from the three warranty extensions the Appellant granted to the Respondent.

5.2
5.2.1 An award is contrary to material public policy when it violates some fundamental principles of material law to such an extent that it is no longer compatible with the determining legal order and system of values; among such principles are in particular fidelity to contract; compliance with the rules of good faith, the prohibition of abuse of rights, the prohibition of discriminatory or confiscatory measures, as well as the protection of incapables (ATF 132 III 389 at 2.2.1). As to the fidelity to contracts specifically, the process of interpretation in itself and the legal consequences logically derived therefrom are not governed by this principle so that they could not be attacked from the point of view of Art. 190 (2) (e) PILA. The Federal Tribunal has emphasized repeatedly that almost all disputes concerning alleged breaches of contract are outside the scope of protection of the rule *pacta sunt servanda* (judgment 4A_46/2011[16] of May 16, 2011 at 4.2.1).

The Appellant seeks to circumvent clearly established case law by creating a new concept – distortion – that it seeks to assimilate to the specific concept of public policy at Art. 190 (2) (e) PILA. Such attempt is doomed from the start. Distortion, as meant by the Appellant (see 5.1 second paragraph above), is at most tantamount to arbitrarily interpreting or applying the law or the contract and has therefore nothing to do with that concept. Even though the arbitral tribunal may have interpreted or applied the pertinent legal provisions in an untenable manner (here Art. 97, 201 and 210 CO) or the specific clauses of the contract, particularly by failing to rely on the rules of law governing the issue in dispute or by confusing the meanings of some distinct provisions in a contractual clause, it would have breached substantive public policy within the restrictive meaning given by case law.

5.2.2 As to procedural public policy (on this notion, see ATF 132 III 389 at 2.2.1), it is only a subsidiary guarantee (see 2.3 above). Consequently the Appellant cannot argue its violation with a view to submitting to the review of the Federal Tribunal the same arguments that it submitted in vain from the point of view of the alleged violation of substantive public policy.

Finally the Appellant does not show why its arguments in this respect would imply a violation of the requirement of treating the parties equally and fall within the purview of Art. 190 (2) (d) PILA. That part of the argument is accordingly inadmissible.

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

[16] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/no-breach-of-pre-arbitral-procedures-failure-to-deal-with-an-arg/

6.
Consequently the appeal must be rejected to the extent that the matter is capable of appeal. Hence the Appellant's submission that the Federal Tribunal should remove the members of the Arbitral tribunal becomes moot. The same applies to the request for a stay of enforcement contained in the appeal.

7.
The Appellant shall pay the costs of the federal proceedings (Art. 66 (1) LTF) and pay the costs of its opponent (Art. 68 (1) and (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 25'000 shall be borne by the Appellant.

3.
The Appellant shall pay to the Respondent an amount of CHF 30'000 for the federal proceedings.

4.
This judgment shall be notified to the representatives of the Parties and to the Chairman of the *ad hoc* Arbitral tribunal.

Lausanne, May 2nd, 2012.

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

The Presiding Judge:	The Clerk:
Klett (Mrs)	Carruzzo