4A_360/2011[1]

Judgment of January 31st, 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.

Appellant,

X._____,
Represented by Mr Philippe Bärtsch and Mrs Anne-Carole Cremades,

v.

Respondent,
Z._____ Inc.,
Represented by Mr Jean-Philippe Rochat,

Facts:

A.
On May 24, 2007 X._____ a company under the law of [name omitted] with headquarters at [name omitted] then known as V._____ and Z._____ Inc. (hereafter: Z._____), a company governed by the law of Delaware (United States of America) entered into a Supply and Joint Venture agreement (hereafter: the Contract). In doing so [name omitted] company entrusted the American company with the exclusive distribution of its products in the area defined in the Contract (United States of America, Canada and Mexico) and Z._____ undertook to acquire certain products only from X._____.

A first dispute relating to the exclusivity clause opposed the parties in July 2008 after the American company found that a supermarket in California was selling products manufactured by X._____ and imported into the United States of America by a competitor of Z._____. The following year, the discovery of animal material in the products resold by the aforesaid company to an important American producer (R._____) created a new conflict between the parties. X._____'s failure to take insurance for its products liability and some delays in deliveries alleged by Z._____, on top of a disagreement as to pricing, were new sources of disagreement between the parties.

[1] Translator's note: Quote as X._____ *v.* Z._____ Inc., 4A_360/2011. The original of the decision is in French. The text is available on the website of the Federal Tribunal www.bger.ch

Finally on May 20, 2009 Z._____ notified X._____ that it was terminating the contractual relationship.

B.
In a request of July 28, 2009 based on the arbitration clause inserted in the Contract Z._____ started arbitral proceedings against X._____ with a view to obtaining the payment of damages amounting to USD 1'813'122.57 according to its latest submissions. For its part, company [name omitted] filed a counterclaim to obtain the equivalent in euros of USD 6'142'946.96 on several grounds and in particular for unpaid invoices. The Court of Arbitration of the International Chamber of Commerce (ICC) appointed an arbitrator to decide the dispute. The seat of the arbitration was in Geneva.

In a final award of April 26, 2011 the arbitrator ordered X._____ to pay an amount of USD 1'118'379.21 to Z._____. As to Z._____, it was ordered to pay an amount of € 514'472.53 to X._____. The company [name omitted] was ordered to pay 80% of the arbitration costs, with the balance to be paid by the American company. All other submissions were rejected.

C.
On June 9, 2011 X._____ filed a Civil law appeal. Arguing that the arbitrator breached the requirement to treat the parties equally and its right to be heard, the Appellant submits that the Federal Tribunal should annul the final award. Moreover it sought an order that the names of the parties should be omitted from the judgment which will be published on the internet and in the official register as the case may be.

In his submissions of July 20, 2011 the arbitrator submitted his records and sought a rejection of the appeal. The Appellant expressed its position on these observations in an additional writing of August 24, 2011.

Z._____ (hereafter: the Respondent) filed its answer on October 3, 2011 and submitted that the appeal should be rejected entirely.

On October 20 and November 7, 2011 the Appellant and the Respondent filed a reply and a rejoinder respectively in which they maintained their previous submissions.

Reasons:

1.
According to Art. 54 (1) LTF[2] the Federal Tribunal issues its decision in an official language[3], as a rule in the language of the decision under appeal. When the decision was issued in another language (in this case English), the Federal Tribunal resorts to the official language chosen by the parties. In front of the arbitrator they used English whilst in their briefs to the Federal Tribunal both resorted to French. In accordance with its practice the Federal Tribunal will therefore issue its decision in French.

---

[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.

2.
In the field of international arbitration a Civil law appeal is allowed against the awards of arbitral tribunals pursuant to the requirements stated at Art. 190 to 192 PILA[4] (Art. 77 (1) LTF).

2.1
The seat of the arbitration was set in Geneva. At least one of the parties (in this case both) did not have its domicile in Switzerland at the decisive time. The provisions of chapter 12 PILA are accordingly applicable (Art. 176 (1) PILA).

2.2
The Appellant is directly affected by the award under appeal as the Arbitrator ordered it to pay a sum of money to the Respondent and upheld only a very small part of its counterclaim. Therefore it has an undeniable interest worthy of protection to seek the annulment of the award and therefore standing to appeal (Art. 76 (1) LTF).

Filed within 30 days after the notification of the final award (Art. 100 (1) LTF) the appeal meets the formal requirements of Art. 42 (1) LTF and the matter is accordingly capable of appeal.

2.3
The Appellant's submission that the names of the Parties should be omitted in this judgment has no specific bearing because according to Art. 27 (2) LTF and in view of the practice of the Court this judgment will be published in an anonymous format anyway.

3.
There is no dispute as to the circumstances relied upon in the appeal. Indeed, from his own admission, the Arbitrator, who apologizes for that, issued his award without taking into consideration the Post-Hearing Briefing of Respondent X._____ (hereafter: the Post-Hearing Memorandum) filed by the Appellant on December 22, 2010 and mentioned in Procedural order nr. 11 of December 24, 2010 which closed the proceedings. He explains the oversight by a succession of incidents connected with the introduction of new software by the secretariat of his firm at the end of 2010 and in the beginning of 2011. Actually the reasons of the inadvertence alleged are of no importance. For the purposes of this case it is sufficient to hold that it did take place.

The only issue in front of the Federal Tribunal is as to the consequences of that fact. The Parties disagree: the Appellant sees there a reason to annul the award entirely; the Respondent and the Arbitrator take the view that the violation alleged had no impact on the disposition of the dispute or that in any event it would merely justify partial annulment of the award.

The issue must be examined only on the basis of the grievances raised by the Appellant (Art. 77 (3) LTF).

4.

[4] 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.

Relying on Art. 190 (2) (d) PILA, the Appellant firstly argues that the Arbitrator violated the requirement of treating the parties equally to its detriment when he did not take into account its Post-Hearing Memorandum. According to the Appellant such inadvertence would require the annulment of the entire award event if the Memorandum at issue had contained no pertinent arguments as this is the consequence of the formal nature of the disregarded guarantee.

4.1
The aforesaid annulment ground seeks to ensure the respect of the mandatory procedural rule contained at Art. 182 (3) PILA (ATF 119 II 386 at 1b p. 388 and the case quoted). This provision requires the arbitral tribunal to abide by the rule of equal treatment of the parties whatever the chosen procedure may be.

Equal treatment of the parties requires the proceedings to be organized and conducted in such a way that each party has the same possibilities to present its arguments (judgement 4A_440/2010[5] of January 7, 2011 at 4.1). Pursuant to that principle the arbitral tribunal must treat the parties in the same manner at every step of the proceedings (ATF 133 III 139 at 6.1 p. 143 *in medio*). Yet the concept of "proceedings" must be explained more precisely. The commentators who examined the issue give a restrictive definition and limit the scope *ratione temporis* of the guarantee involved to the examination stage, hearing and arguments included as the case may be, to the exclusion of the deliberation phase of the arbitral tribunal (BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 2nd ed. 2010, nr 1020 ff; see also: JEAN-FRANÇOIS POUDRET, in POUDRET/LALIVE/REYMOND, Le droit de l'arbitrage interne et international en Suisse, 1989, n° 1 *ad* Art. 25 CA, p. 137; see also the examples quoted by KAUFMANN-KOHLER/RIGOZZI, Arbitrage international, 2nd ed. 2010, nr 486). Trying to assimilate the fact that an arbitral tribunal may inadvertently or for whatever reason not take into account a pertinent rule of law relied upon by a party or a decisive fact it advances to a violation of the requirement to treat the parties equally, would be tantamount to introducing through case law and under the cloak of Art. 190 (2) (d) PILA the grievance of arbitrariness (on that concept see ATF 136 III 552 at 4.2 p. 560) although the federal legislature specifically refused to introduce the possibility of annulment of an international arbitral award on that ground. It must accordingly be held that the requirement of equal treatment is not affected by the assessment of the evidence and by the application of the law contained in an award even though they may be untenable (judgement 4P.140/2004 of November 18, 2004 at 2.1 and 2.2.3; Andreas BUCHER, in Commentaire romand, Loi sur le droit international privé – Convention de Lugano, 2011, nr 51 ad Art. 182 PILA).

4.2
In this case, far from denying the Appellant some procedural mean it would have granted to the Respondent, the Arbitrator scrupulously complied with the requirement of equality of arms throughout the case. In particular he allowed the Appellant to develop its arguments in a post-hearing memorandum which was part of the record of the arbitration. Admittedly he inadvertently did not take that brief into account when he studied the case before issuing the award under appeal. However, for the reasons stated above, the Appellant may not argue a breach of the requirement that the parties must be treated equally in this respect. Its first grievance is therefore groundless.

---

[5] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/claim-of-award-ultra-petita-rejected-claim-of-violation-of-publi/

5.
Secondly, again relying on Art. 190 (2) (d) PILA and stating the same circumstance, the Appellant argues that the Arbitrator violated its right to be heard.

5.1
The right to be heard in contradictory proceedings within the meaning of Art. 190 (2) (d) PILA certainly does not require an international arbitral award to be reasoned (ATF 134 III 186 at 6.1 and references). However it imposes upon the arbitrators a minimal duty to review and deal with the pertinent issues (ATF 133 III 235 at 5.2 p. 248 and the cases quoted). This duty is breached when inadvertently or by misunderstanding, the arbitral tribunal does not take into account some statements, arguments, evidence and offers of evidence submitted by one of the parties and important to the decision to be issued. If the award totally overlooks some elements which appear important to the disposition of the dispute, it behooves the arbitrators or the respondent to justify such omission in their observations as to the appeal. They have to demonstrate that contrary to the appellant's arguments the items overlooked were not pertinent to decide the case at hand or, if they were, that they were implicitly rejected by the arbitral tribunal. However the arbitrators have no obligation to discuss all arguments invoked by the parties so that they cannot be found in breach of the right to be heard in contradictory proceedings if they did not reject, albeit implicitly, an argument that was objectively devoid of any pertinence (ATF 133 III 235 at 5.2 and the cases quoted).

Moreover the Federal Tribunal held that it does not behoove this Court to decide whether or not the arbitrators should have upheld the argument they overlooked had they dealt with it. Indeed this would be tantamount to disregarding the formal nature of the right to be heard and the requirement that should it be breached, the decision under appeal must be annulled irrespective of the appellant's chance to obtain a different result (judgment 4A_46/2011[6] of May 16, 2011 at 4.3.2 *in fine* and the precedents quoted).

5.2
The Appellant argues that the Arbitrator failed to deal with three pertinent arguments it had raised in its Post-Hearing Memorandum. Each of these arguments must be reviewed in the light of the aforesaid case law and the explanations given by the writer of the award and by the Respondent.

5.2.1 The first argument is as to the insurance which the Appellant should have concluded pursuant to Art. 11.7 of the Contract in order to cover its product liability (product liability insurance)[7].

5.2.1.1 In the arbitral proceedings the Respondent argued that the Appellant had not obtained such insurance during the time of the Contract. On that account it sought equitable compensation[8], which it estimated at some € 45'000. That amount corresponds to the insurance premium saved by the Appellant during the contractual relationship. In its Post-Hearing Memorandum the Respondent argued that the Appellant had taken the premium into account to set the price of the products it sold to the Respondent.

---

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

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

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

To dispute that point of the claim the Appellant put two arguments forward in its Post-Hearing Memorandum. Firstly it argued that the failure to obtain insurance coverage was not attributable to the Appellant because it had been caused by illicit acts by an insurance broker of which it had been the victim. Secondly the Appellant argued that the lack of insurance coverage had caused no damage to the Respondent because in any event that insurance would not have covered its liability towards its contractual counterpart but merely that which it may have incurred towards final consumers suffering damage as a consequence of a product defect.

In the award the Arbitrator referred to Art. 7.4.1 of the Unidroit Principles, which states the general rule that the breach of an obligation without valid reason entitles the other party to damages. He then examined whether or not the Appellant had been the victim of fraud, as it claimed in its first argument or if to the contrary it had not been the author of the fraud itself, as the Respondent claimed. Pursuant to his analysis he reached the conclusion that the latter was plausible but that in any event it was sufficient for him to hold that the Appellant had not been able to provide a valid excuse for the breach of its contractual obligation to maintain valid insurance coverage. Recalling that he could decide the claim in dispute *ex aequo et bono* the Arbitrator then referred to the developments contained in the Respondent's Post-Hearing Memorandum as to the quantum of the claim. Then he found that the Appellant did not challenge the amount of € 45'000 sought by the Respondent (*"Respondent did not dispute the quantum of the claim*"[9]), so that its payment should be ordered as fair compensation.

5.2.1.2 There is not the slightest allusion in the award under appeal to the Appellant's second argument in support of its submission that the claim should be rejected. In his observations on the appeal the Arbitrator justifies his silence on this issue by the fact that he had the power to decide *ex aequo et bono*. He points out that the Appellant did not demonstrate according to which criteria the fair compensation due to the Respondent should have been computed and adds that he relied on the expenses that the subscription of a valid insurance would have caused and concludes by emphasizing that he would not have decided the issue in dispute differently if he had been aware of the Appellant's Post-Hearing Memorandum. As to the Respondent it argues in its answer that it did not seek the payment of damages but fair compensation taking into account the insurance premium saved by the Appellant and reflected on the selling prices. According to the Respondent the Arbitrator, although he did not have to do so, had nonetheless examined the issue as to the existence of damage and accordingly rejected the argument implicitly that the Respondent would have suffered no harm. Moreover the issue in dispute would have been discussed at the hearing.

It is undisputed that the Appellant's second defence was totally ignored by the Arbitrator. Arguing, as the Respondent does, that he would have implicitly rejected it is not reasonable. Indeed when he relied on the Respondent's explanations to compute the quantum of the claim connected to the absence of insurance coverage, the Arbitrator did not at all respond, even implicitly, to this argument, which related to the very principle of compensation. Reading the topical passages of the award (n. 106, 113 and 114) as well as the explanations subsequently given by the Arbitrator still does not make it possible to understand how the Arbitrator interpreted the faculty he was granted to decide the matter *ex aequo et bono*. In particular it does not appear that he would have understood it as an authorization to grant the claim in dispute irrespective of the existence of any damage, similarly to punitive damages. Such is moreover the implicit conclusion that can be drawn from his reference to the pertinent rules of Unidroit, which state at Art. 7.4.2 (1) of the 2004 version the requirement of damage and of a causal link between

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

the breach of the obligation and the damage. Considered from that point of view the Appellant's argument seeking to demonstrate that the contractual breach it was blamed for did not cause any harm to the Respondent does not at all appear devoid of any pertinence from the outset. Deciding whether it is founded or not and in particular if it could be rejected in view of the Respondent's argument that the insurance premium was reflected in the selling price of the Appellant's products is another issue, which relates to the merits and that it does not behoove the Federal Tribunal to decide (see aforesaid judgment 4A_46/2011, *ibid*). Finally, contrary to what the Respondent argues without further explanations, the passage in the minutes attached to its answer does not show that the Appellant's second argument would have been the object of debate at the November 10, 2010 hearing. And even if that had been the case the Appellant would still be entitled to present the aforesaid argument in its Post-Hearing Memorandum in order to develop it on the basis of the statements made at the hearing as to the issue in dispute.

The Appellant is accordingly right to argue that its right to be heard was violated in connection with the claim in dispute. Its grievance is therefore founded.

5.2.2 The second argument relates to the guarantee obligation which the Respondent claimed against the Appellant as to the defects of the products it had resold to R._____ (see above A., 2nd paragraph). On that count the Respondent was awarded a total of USD 1'056'779.21 including an amount of USD 273'588 it paid to R._____ pursuant to a settlement entered into an April 9, 2009.

5.2.2.1 In this respect the Appellant argues that in its Post-Hearing Memorandum it had stated that the claim based on the guarantee obligation was outside the statute of limitations as a consequence of the Respondent's lack of diligence in the implementation of that obligation, particularly in the negotiation of the settlement with R._____. According to the Appellant the Arbitrator would have failed to deal with the issue of the statute of limitations as the award contains "no reference, be it by an allusion, to the statute of limitations" (appeal n. 77). The Appellant emphasizes that the pertinence of the argument based on the statute of limitations is undeniable because it can lead to the guarantee claim being rejected. The Appellant refers in this respect to case 4A_46/2011 already quoted[10] in which the Federal Tribunal annulled an award because the arbitrators failed to examine a party's argument based on an absolute statute of limitations of 22 months (see 4.3.2). According to the Appellant this would be the very failure of the arbitrator in this case.

5.2.2.2 The argument is devoid of any merit.

Extinctive or liberating prescription is a legal institution which makes it possible to paralyse a claim as a consequence of the time elapsed (Pascal PICHONNAZ, *in* Commentaire romand, Code des obligations I, 2003, n° 1 *ad* Art. 127 CO). In this case the Appellant does refer to the "limitation period" (appeal *ibid.*) and the case it quotes certainly refers to that legal institution. However the Appellant gives no explanation as to when the statute of limitation would have run out as to the claim in dispute; neither does it explain where and when it would have raised that defence in the arbitral proceedings. As it appears from reading its briefs, the Appellant is actually seeking under the cloak of the statute of limitations to demonstrate that the claim would be absolutely time barred (on this concept, see PICHONNAZ, *op. cit.*, n° 7 *ad* Art. 127 CO) because the Respondent would have failed to abide by the

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

requirements of the contract and/or by the rules of law applicable. In other words what is at hand is the right to claim being forfeited according to the Respondent's implicit defence in its argument.

As the detailed explanations given by the Respondent show (answer p. 10 to 14, with several references to the topical passages of the Appellant's briefs and to the award under appeal) – explanations persuasive to this Court – the Arbitrator not only did not ignore the Respondent's argument that the guarantee rights had been forfeited but, quite to the contrary, he dealt with the issue in details with reference to the Respondent's duty to inform and collaborate in the implementation of the guarantee. In this regard the Appellant's attempt to present the issue in a new light by relying on the statute of limitations rather than on the rights being forfeited and by reference to American law – which it had argued was inapplicable – is devoid of any merits from the outset.

Accordingly the Appellant is wrong to claim a violation of its right to be heard in this respect.

5.2.3 The third argument relates to a claim for USD 61'000 that the Respondent had successfully raised to obtain compensation for the damage it underwent as a consequence of the Appellant being late to dispatch its products.

5.2.3.1 To dispute that claim the Appellant had explained that it had withheld some of the shipments because the Respondent was late in paying the products purchased and repeatedly went above the credit line of € 450'000, subsequently raised to € 650'000, that it had been granted.

In the award the Arbitrator points out that the Respondent denies being late in paying the products sold. He upheld that version of the facts on the basis of a witness statement submitted by that Party, a Mr A._____, accordingly to whom the payments were made timely, whilst the computations and tables produced by the Appellant to substantiate the opposite opinion were not accurate. The Arbitrator then adds the following remark: "*Respondent waived a filing of Post-hearing Briefs and did not comment on in its Post-hearing Brief*"[11] (nr. 250). Finally he explains why the Appellant's Exhibit R7 does not carry sufficient evidentiary weight as to the alleged payment delays.

5.2.3.2 The Appellant points out that in its Post-Hearing Memorandum it referred to the statements of four witnesses – Mr B._____, C._____, D._____ and E._____ – to demonstrate that the Respondent was late to pay, which entitled the Appellant to postpone the shipment of the goods ordered. The Appellant argues that the Arbitrator held that late payment by the Respondent and an overdraft of its credit line had not been proved by the Appellant because the latter would have renounced the filing of a Post-Hearing Memorandum and therefore did not express a view on the issue. The Appellant submits that the Arbitrator disregarded its right to be heard when he failed to deal with the arguments and pertinent evidence contained in the aforesaid Post-Hearing Memorandum.

Such conclusion is accurate. It is indeed clear from the aforesaid passage of the award (see 5.3.1 *in fine*) that the Arbitrator relied on the statement of one of the Respondent's witnesses as to the decisive issue of delays in payment of the products by wrongly holding that the opposing Party had chosen not to state its position in this respect.

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

Contrary to what the Respondent claims, the Appellant's argument does not attack the assessment of the evidence that the Arbitrator would have performed, something it would not be entitled to do in the framework of an appeal against an international arbitral award. The Appellant rather bases its argument on the total lack of consideration of four witness statements which could have *a priori* modified the Arbitrator's analysis as to the alleged delays claimed by the Respondent in the payment of products delivered to the Appellant, as a consequence of an oversight as to the existence of its Post-Hearing Memorandum.

Moreover, no matter what the Arbitrator and the Respondent say, it is impossible to conclude that the Arbitrator took into consideration all evidence, including that of the four aforementioned individuals, in order to reach an opinion as to the issue in dispute simply because he quoted the names of all witnesses in his description of the arbitration proceedings (award nr. 31, 32 and 39).

It is equally artificial to attempt to demonstrate that the evidentiary value of the Appellant's four witnesses was implicitly rejected on the basis of what the Arbitrator stated as to Exhibit R7 since these witnesses were precisely supposed to provide explanations as to the Exhibit.

Finally, considering the formal nature of the right to be heard, it is of no importance what result the Arbitrator would have reached had he taken into account the witness statements mentioned in the Post-Hearing Memorandum that he overlooked. It does not behoove the Federal Tribunal itself to assess the evidentiary value of these statements.

Accordingly the Appellant is right to argue that it was not heard properly as to the issue of the Respondent's alleged late payments.

5.3
The consequence is that the appeal must be granted with a view to Art. 190 (2) (d) PILA to the extent that it relates to the issue of the product liability insurance (above at 5.2.1) and as to the issue of the Respondent's alleged delay in paying its debts towards the Appellant (here above 5.2.3) but that it must be rejected to the extent that it relates to the guarantee obligation arising from the resale of the defective products to R._____ (5.2.2 above).

6.
According to the Appellant the award under appeal must be annulled entirely.

6.1
Case law and legal writing recognize the possibility of partial annulment, irrespective of the fact that an appeal against an international arbitral award may only seek its annulment (see Art. 77 (2) LTF ruling out the applicability of Art. 107 (2) LTF) when the issue appealed is independent of the others (judgement 4P.129/2002 of Novembre 2002 at 10; judgement 4P.114/2001 of December 19, 2001 at 1c; Sébastien BESSON, Le recours contre la sentence arbitrale internationale selon la nouvelle LTF (aspects procéduraux), in Bulletin de l'Association suisse de l'arbitrage [ASA], 2007, p. 2 ff, nr. 49; Jean-François POUDRET, Les recours au Tribunal fédéral suisse en matière d'arbitrage international (Commentaire de l'art. 77 LTF), *in* Bulletin ASA 2007 p. 669 ff, 685 ch. 4.9; KAUFMANN-KOHLER/RIGOZZI, *op. cit.*, p. 484 footnote 565).

6.2
In this case the procedural requirement enabling the Court to depart from a full annulment of the award is not met. Indeed, items 1 and 2 of the award refer to global amounts, without any distinction between the various heads of claim involved. These amounts are moreover in various currencies (US dollars and euros) and furthermore result from setoff between the claims of both Parties.

Consequently the award must be annulled entirely. However it goes without saying that notwithstanding the annulment it is only the claims in respect of which the appeal has been granted which will need to be decided again in the new award.

7.
It remains to issue a decision on the costs of the federal proceedings. They must be shared because none of the parties prevails entirely (Art. 66 (1) LTF, Art. 68 (1) and (2) LTF). The Federal Tribunal shall do so by taking into account the amount of the claims in dispute which were granted (USD 124'307.50, namely USD 61'600 + the counter-value in USD of € 45'000 converted pursuant to the rate at § 289 *in fine* of the award) and that which was rejected (USD 1'056'779.21). Consequently the Appellant prevailed on a claim representing about one tenth of the total amount of the claims in dispute. However it must be taken into account that it had to act in order to enforce a procedural guarantee – its right to be heard – the importance of which cannot be measured merely on the basis of the financial impact of the award under appeal. Therefore it appears fair to have the Respondent pay one fifth of the costs and to reduce in the same proportion the compensation award to the other Party.

Therefore the Federal Tribunal pronounces:

1.
The appeal is partially granted and the award under appeal is annulled.

2.
4/5 of the costs of the federal proceedings, set at CHF 8'000, shall be paid by the Appellant and 1/5 by the Respondent.

3.
The Appellant shall pay to the Respondent an amount of CHF 4'800 as reduced compensation for the federal proceedings.

4.
This judgment shall be notified to the representatives of the Parties and to the ICC sole Arbitrator.

Lausanne, January 31st, 2012.

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

The Presiding Judge: The Clerk:

Klett (Mrs) Carruzzo