4A_238/2011[1]

Judgment of January 4, 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 Charles Joye and Mr Ralph Schlosser,

v.

Respondent,
Z._____ SA,
Represented by Mr Sébastien Besson and Mr Pierre-Yves Gunter,

Facts:

A.
A.a X._____ is a Tunisian businessman domiciled in Tunisia. Z._____ SA (hereafter: Z._____) a company under French law with headquarters at [name omitted] (France) is a subsidiary of the eponymous group headquarted in New-York (United States of America).

Active in Tunisia for a long time, Z._____ was not satisfied of the services given by the company entrusted with defending its interests there and decided at the end of the 1990s to elaborate a new concept for the development of its business in that country. In order to avoid paying high custom duties on products imported into Tunisia it chose to collaborate with a Tunisian company already making comparable products. X._____, who was in control of such a company, expressed an interest to become the local partner. Various agreements were then worked out between them for that purpose, taking into account the fact that Tunisian law forbade a foreign company from holding the majority of the capital of a distributor under Tunisian law. Specifically, a holding and services company named A._____ was constituted and held almost the entire capital of a distribution company named B._____. X._____ and his three sons on the one hand and Z._____ on the other hand held 49% of the shares each, the other 2% having been subscribed by a trustee of

[1] Translator's note: Quote as X._____ *v.* Z._____ SA, 4A_238/2011. The original of the decision is in French. The text is available on the website of the Federal Tribunal www.bger.ch

the French company. To formalize their collaboration X._____ and his three sons entered into four contracts with Z._____ on September 4, 2000, namely a Shareholders Agreement, to which the trustee too was a party, an Option Agreement and two Share Purchase Agreements (I and II). Pursuant to the Option Agreement Z._____ was granted the right to force X._____ and his three sons under certain conditions to assign to him or to a third company it would appoint, their entire shareholding in company A._____ against payment of a price calculated pursuant to a formula taking into consideration the profit made by company B._____. The contracts were governed by the law of the state of New York to the extent compatible with the laws of Tunisia.

The relations between the Parties deteriorated in August 2006 after B._____ terminated the contract it had concluded in 2000 with a company controlled by X._____ and his sons, pursuant to which the latter company was to manufacture products for delivery to B._____.

A.b On April 2, 2007 X._____ initiated arbitral proceedings against Z._____ on the basis of the Shareholders Agreement, arguing that the French company had instigated B._____ to breach the manufacturing agreement.

In an award of March 1st, 2010, an *ad hoc* arbitral tribunal rejected the Tunisian businessman's claim. On June 28, 2010 it issued a corrective award against which X._____ filed a Civil law appeal and the Federal Tribunal held in its judgment of March 21st, 2011 that the matter was not capable of appeal as the parties had validly opted out of any appeal against the decisions of the arbitral tribunal (case 4A_486/2010[2]).

A.c On June 6, 2007 Z._____ advised X._____ and his three sons of its exercise of the option right with a view to obtaining the assignment of all the shares of company A._____ which they held. This was rejected and the letters subsequently sent by Z._____ remained without answer.

B.
On August 4, 2008 Z._____ introduced a request for arbitration against X._____ and his three sons. A three members arbitral tribunal was constituted under the aegis of the International Chamber of Commerce (ICC) and its seat was set in Geneva.

After hearing the case the Arbitral tribunal issued a final award on March 9, 2011. Among other things it ordered the Respondents severally to assign within thirty days to the person(s) of Tunisian nationality appointed by the Claimant all the shares of A._____ which they hold individually or collectively, namely 24'500 shares representing 49% of the capital of the company. Still according to the Arbitral tribunal, at the time of transfer of the shares, Z._____ would pay a total amount of 245'000 Tunisian dinars (TND) to the Respondents, by way of TND 244'970 to X._____ and TND 10 for each his three sons. The Respondents were to pay the costs of the arbitration.

[2] Translator's note: Full English translation of the opinion on http://www.praetor.ch/arbitrage/valid-clause-waiving-the-appeal-to-the-federal-tribunal/

C.
On April 13, 2011, X._____ (hereafter: the Appellant) filed a Civil law appeal with the Federal Tribunal seeking the annulment of the March 9, 2011 award. In summary the Appellant argues that the Arbitrators wrongly accepted jurisdiction to decide certain arguments he had submitted to them and that they violated his right to be heard by refusing to appoint an accounting expert to determine the price of the shares in dispute and also by failing to take a position on some essential arguments he had presented, such as the lack of independence of the auditor of company B._____; finally, the Arbitrators would have violated public policy by setting the purchase price of the shares on the basis of accounts irregularly presented and by giving him an order the execution of which would be contrary to Tunisian law as to foreign holdings in the capital of a Tunisian company.

On July 15, 2011 the Presiding Judge invited the Appellant to pay an amount of CHF 6'000 by August 16, 2011 as security for the costs of Z._____ (hereafter: the Respondent). He did so timely.

In its answer of September 13, 2011 the Respondent submits that the matter is not capable of appeal or that it should be rejected. The Arbitral tribunal did not take a position on the appeal.

On October 10 and 28, 2011 the Appellant and the Respondent filed a reply and a rejoinder.

Reasons:

1.
According to Art. 54 (1) LTF[3] the Federal Tribunal issues its decision in an official language[4], as rule in the language of the decision under appeal. When the decision is in another language (here English) the Federal Tribunal resorts to the official language used by the parties. In front of the Arbitral tribunal they used English. In the brief submitted to the Federal Tribunal the Appellant used French. According to its practice, the Federal Tribunal will resort to the language of the appeal and consequently issue its judgment in French.

2.
For the matter to be capable of appeal it is necessary, among other requirements, that the parties would not have excluded the possibility to appeal within the meaning of Art. 190 PILA[5].

2.1
Art. 192 (1) PILA provides that when both parties have neither a domicile or an habitual residence or an establishment in Switzerland they may in a specific statement in the arbitration agreement or in a subsequent written agreement, rule out any appeal against the awards of the arbitral tribunal; they may also opt out of the appeal only for one or the other of the grounds listed at Art. 190 (2) PILA.

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

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

[5] 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.

Federal case law progressively developed the principles arising from that provision. In substance, case law is very restrictive in admitting the agreements excluding appeals and it holds that indirect renunciation is insufficient. As to direct renunciation, it does not necessarily have to include a reference to Art. 190 PILA and/or to Art. 192 PILA. It is sufficient for the specific statement of the parties to express clearly their common intent to opt out of any appeal. Knowing whether this is the case or not is a matter of interpretation (ATF 134 III 260 at 3.1 and the cases quoted).

2.2

2.2.1 In the case at hand the Appellant and his three sons were domiciled in Tunisia and the Respondent had it headquarters in France at the time the Option Agreement and the Share Purchase Agreements were concluded on September 4, 2010. The Option Agreement included an arbitration clause containing in particular the following wording:

"*Neither Z._____ nor the Grantors [i.e. the Appellant and his three sons] shall be entitled to commence or maintain any action in a court of law upon any matter in dispute arising from or concerning this Agreement or a breach thereof except for the enforcement of any award rendered pursuant to arbitration under this Agreement. The decision of the arbitration shall be final and binding and neither party shall have any right to appeal such decision to any court of law*[6]" (emphasis supplied by the Federal Tribunal).

Without being contradicted by the Appellant, the Respondent translates the pertinent passage of the arbitration clause as follows:

[French translation omitted]

The opting out clauses inserted in the arbitration clauses contained in two Share Purchase Agreements are identical to the clause quoted above, except that "Grantors" was substituted with "Vendors".

2.2.2 The Shareholders Agreement also signed on September 4, 2000 contains an arbitration clause providing an opting out of appeals with the same wording as those used in the three other contracts entered into on the same day, except that the word "party" was used instead of "Z._____ nor the Grantors (respectively the Vendors)". The First Civil law Court analysed this opting out clause at 2.2 of its aforesaid judgment of March 21st, 2011 (case 4A_486/2010; see A.b above), and stated the following:

"*Considered in the light of the principles of case law recalled above, the aforesaid clause certainly constitutes valid renunciation to the appeal. It expresses doubtlessly the common will of the parties to renounce any right of appeal against any decision of the Arbitral tribunal in front of any state court whatsoever. This intent to rule out any appeal against such a decision, clearly expressed in the emphasized sentence of the arbitral clause is reinforced and indirectly confirmed by the preceding sentence; it appears indeed that the state courts could not be seized by any party except to obtain the enforcement of an award issued by the Arbitral tribunal. Moreover the renunciation at hand*

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

closely resembles that which was dealt with in the judgment published at ATF 131 III 173 at 4.2.3.2. Reference may accordingly be made mutatis mutandis to the reasons contained in that decision whilst pointing out that in this case as in the one which gave rise to the precedent quoted, the word "appeal" must manifestly be understood in its general meaning."

2.2.3 The opting out clause submitted to the review of the Federal Tribunal cannot be interpreted differently from the one in the case decided less than a year ago. However, contrary to what the Respondent claims in its rejoinder (n. 3), it is not *res judicata* which prevents the adoption of a different solution as what is involved here is an opting out of appeals contained in another contract. Yet the identity of the wording used by the same parties in the four related contracts into the same day requires the same interpretation for all opting out clauses which the Parties entered into on September 4, 2000. The Respondent's objections to this, which will be reviewed hereafter, do not change the situation.

2.2.4
2.2.4.1 According to the Appellant, taking into account "the legal culture familiar to the parties" would show that they could only have meant a narrow meaning of the term "appeal" in the opting out clause, namely that by using this word they intended only the ordinary appeals, with full judicial review and not limited to annulment (see ATF 131 III 173 at 4.2.3.2 p. 180). Indeed the law of the state of New York as *lex causae* as well as Tunisian and French law, as laws of the countries were the Parties have their domicile and their seat respectively, would attribute such a meaning to the wording at hand. Thus the Parties, when they renounced any "right of appeal" against a possible future award, would only have intended to renounce an appeal in the strict meaning of the term, to the exclusion of any extraordinary recourse. Indeed the use of the singular ("right of appeal" instead of "rights of appeal") would not be anodyne in this respect because it could confirm that the Parties did mean a specific legal recourse and not all those available.

2.2.4.2 It must be underlined immediately that the Appellant's last remark is inconsistent with the very text of the clause in dispute, in which the word "appeal" is used not as a substantive (with the preposition "of" which is not there) but as a transitive verb (after the preposition "to"; "right to appeal such decision"). This being so, if the verb is considered not in itself but by replacing it in its context, there is no reason to conclude that the Parties would have used it on purpose to exclude only an appeal *strico sensu*. Quite to the contrary, it appears that they used it with a view to excluding the possibility for each of them to challenge the award (see 2.2.2 above).

Furthermore the Appellant's line of argument is at the very least debatable and moreover hardly consistent with the principle of economy of proceedings when in the various legal orders which could be considered he seeks an alternative connexion *in favorem invaliditatis* as to the interpretation of the opting out agreement. Actually and depending on the circumstances, this would require a delicate analysis of the nature of the legal recourses established by the laws of several states – in particular when the parties are not resident of the same country and chose to apply the legislation of a third country to their contract – and this analysis, merely aimed at determining whether the matter is capable of appeal to the Federal Tribunal or not, will often be disproportionate compared to the interests involved. Accordingly, when it comes to the law applicable to the interpretation of the opting out agreement – an issue relating to the substantive validity of that agreement – one may reasonably

wonder whether it is justified to determine it by applying the provision governing the arbitration agreement in this respect, namely Art. 178 (2) PILA as some commentators recommend (see BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 2nd ed. 2010, n. 1671) or if it would not be better to simply apply Swiss law as two writers suggest on the basis of the principle of proximity, as the renunciation relates to the intervention of Swiss courts and results in lack of jurisdiction of the Federal Tribunal (KAUFMANN-KOHLER/RIGOZZI, Arbitrage international – Droit et pratique à la lumière de la LDIP, 2nd ed. 2010, n. 761a p. 474). As to stating a general principle according to which the English word "appeal" would sufficiently (or insufficiently) reflect the intent of the parties to opt out of the appeal available in Switzerland against an international arbitral award, as suggested by one author (Sébastien BESSON, in Revue de l'arbitrage, 2005, p. 1082), this would indeed have the double advantage of simplicity and foreseeability; however it is doubtful that such a legal fiction would be consistent with the general rules of interpretation of the statements of intent in contract law and in terms of the certainty of the law and it would in any event be hardly possible to include the opting out agreements entered into before its possible creation by case law. However the issue needs not be decided finally in this case because, similar to Swiss law, none of the foreign laws relied upon here would uphold the Appellant's thesis as will be demonstrated hereafter.

The Appellant submitted some excerpts of laws and a copy of a judicial decision with a view to demonstrating that the laws of civil procedure in Tunisia, France and New York all provide for an appeal within the strict meaning of the word as opposed to extraordinary recourses. However such a demonstration is tantamount to unduly broadening the issue, which is not to ask if each of these legal orders provides for an ordinary appeal, within the traditional meaning of the term, against the decisions issued in a civil case but only if it does so with regard to awards issued in the framework of an international arbitration. It is indeed only in the latter hypothesis that a renunciation to appeal such an award would have that meaning and not if, notwithstanding the existence of an ordinary appeal, the parties in an international arbitration would anyway be unable to challenge the award by that legal recourse. Such is moreover the basis of criticism made against the decision published at ATF 131 III 173 by certain commentators. They point out that one of the parties – in that case the Appellant – was an English company and that English law provides for an appeal on point of law, which can be opted out of, next to other mandatory legal recourses which provide for grievances comparable to those at Art. 190 (2) PILA; they deduct from that the possibility that by ruling out "any rights of appeal", the parties may have really intended to renounce only the appeal on point of law (François PERRET, in Bulletin de l'Association Suisse de l'Arbitrage [ASA], 2005, p. 522; BESSON, op. Cit., p. 1080 ff; POUDRET/BESSON, Comparative Law of International Arbitration, 2nd ed. 2007, n. 839 p. 782).

The 1925 federal American law on arbitration (United States Arbitration Act [9 U.S.C.]), generally referred to as the Federal Arbitration Act (FAA) was conceived with a view to excluding from annulment an award contrary to the law or the facts (REDFERN/HUNTER/SMITH, Droit et pratique de l'arbitrage commercial international, 2nd ed. 1994, p. 354 *i. f.*); hence it does not provide for an appeal against arbitral awards, whether national or international, and makes it possible to challenge them only on procedural grounds (see Section 10 of FAA; Thomas E. CARBONNEAU, International Arbitration . The United States, in Internationale Schiedsgerichtsbarkeit, 1997, Peter Gottwald [ed.], p. 875 ff, spec. 877 and 883). The judgment issued by the Court of appeal of the state of New York on May 14, 1970 (26 N.Y.2d 493 [1970], n. 514), a copy of which was placed into the record by the Appellant, states nothing else. In France, since 1981, an international arbitral award may only be the object of an annulment proceeding as stated by Art. 1504 of the New Code of Civil Procedure (NCPC) to the exclusion of an appeal strictly speaking (FOUCHARD/GAILLARD/GOLDMAN, Traité de l'arbitrage commercial

international, 1996 n. 1596 and 1597; see ATF 135 III 136 at 2 p. 138); the annulment proceedings are open on the grounds limitatively spelled out by Art. 1502 NCPC, which sanction the gravest irregularities and do not intend to submit the arbitrators' decision on the merits to a new determination by the state court (FOUCHARD/GAILLARD/GOLDMAN, op. cit., n. 1603). The situation is not different in Tunisian law. Indeed the Arbitration Code promulgated by law nr 93-42 of April 26, 1993 provides at its Art. 78 (1) devoted to international arbitration (see Art. 47 (1) of the same Code) that the arbitral award is subject only to annulment proceedings and it states limitatively at its Art. 78 (2) the grounds which could lead to the annulment of the international arbitral award. Finally, in Switzerland, the Civil law appeal against such an award is allowed pursuant to Art. 77 (1) (a) LTF only for one of the grounds contained in the exhaustive list of Art. 190 (2) PILA; this has nothing to do with an ordinary appeal either.

This brief review of comparative law shows that none of the laws invoked by the Appellant provides for an ordinary appeal against an international arbitral award. Thus when he signed the option agreement containing the arbitration agreement in which the opting out clause in dispute was included, the Appellant could renounce only the legal recourse he had against a possible future award, namely the Civil law appeal as stated by the last two aforesaid provisions.

2.2.5 The Appellant disputes moreover that the sentence before the renunciation to appeal strictly speaking would reinforce his intent to exclude any appeal against a possible future award, contrary to what was held in case 4A_486/2010, quoted above (see 2.2.2 above). According to him that sentence would merely express the essence of an arbitration agreement, namely the undertaking of the parties to refrain from seizing a state court of a dispute relating to the contract (reply nr. 5).

The Appellant's remark may not be groundless. It is indeed possible that the sentence at issue could have intended only to prevent the introduction or the continuation of a case in a state court for the disputes arising from the Option Agreement. However this is merely a redundant argument, which changes nothing to the fact that, to quote the wording used at 2.2 of the aforesaid judgement, the intent to exclude any appeal "clearly appeared from the emphasised words in the arbitration clause", *i.e* from the opting out agreement thus emphasised. Thus the Appellant's objection does not contradict the conclusions drawn directly from the very text of the aforesaid agreement.

2.2.6 The requirements of Art. 192 (1) PILA are thus met in this case so that the matter is not subject to appeal in front of the Federal Tribunal pursuant to that provision.

To conclude on this issue it will pointed out that – a noticeable fact – Tunisia – a country of which the Appellant is a citizen and where he has his domicile – chose the Swiss optional approach as to the renunciation of appeal against an international arbitral award (Jan Carlos LANDROVE, Les limites de l'ordre public posées à la liberté contractuelle – Un exemple tiré du droit international privé Suisse, in Le "droit décloisonné", interférences et interdépendences entre droit privé et droit public, 2009, Dunand/Mahon [ed], p. 343 ff, 347 footnote 15). Article 78 (6) of the Arbitration Code indeed provides that the parties that have no domicile or principal residence or an establishment in Tunisia may expressly agree to exclude any recourse, total or partial, against any decision of the arbitral tribunal. There is therefore even less of a reason to disregard the exclusion clause that the party involved comes from a country where the possibility to renounce any recourse against an international arbitral award was codified in the same way as in Switzerland.

3.
In an alternative argument, the Appellant claims that Art. 192 PILA is not consistent with the November 4, 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter: EHRC) so that the Federal Tribunal should in any event refuse to apply that legal provision and hold the matter capable of appeal. According to him the exclusion in advance of any appeal against an international arbitral award would be inconsistent with the right to a fair trial guaranteed by Art. 6 (1) EHRC, at least when the renunciation to appeal entails the deprivation of legal recourses as essential as those relating to the violation of the right to be heard or public policy.

3.1
The Respondent submits that the Federal Tribunal should not review the issue raised by the Appellant. It presents three reasons in support, which call for the following comments.

3.1.1 According to the Appellant Art. 191 (*recte:* 190*)* Cst.[7] would prevent the Federal Tribunal from reviewing the compatibility of Art. 192 PILA with Art. 6 (1) EHRC. It is not so.

The commentators invoked by the Respondent (BERGER/KELLERHALS, op. cit., nr. 1665) do not help it as they merely deny to the Supreme Court of the land the right to review the constitutionality of Art. 192 PILA (in the same direction see Valentine GETAZ KUNZ, Rechtsmittelverzicht in der internationalen Schiedsgerichtsbarkeit der Schweiz, 1993, p. 142 *i.l.*); however they do not address the issue of an examination of the conformity of that legal provision with international law. The precedent to which Respondent refers at § 8 of its rejoinder (judgment 4P.198/2005 of October 31st, 2005 at 2.2 *i.f.*) does not do it either whilst denying to the Federal Tribunal the power to correct the aforesaid provision *contra legem* even though it might be contrary to public policy (see Sébastien BESSON, Arbitration and Human Rights in Bulletin ASA 2006 p. 395 ff, nr 35 *i.f.*).

According to Art. 190 Cst. the Federal Tribunal and other authorities are bound to apply federal laws and international law. This constitutional provision does not solve the conflict between a federal law and international law (AUBERT/MAHON, Petit commentaire de la Constituion fédérale de la Confédération Suisse, 2003, nr 9*ad* Art. 190). Similarly Art. 5 (4) Cst., which requires the federal state and the cantons to abide by international law is too broadly phrased to deduct from it the unconditional primacy of international law (ATF 133 V 367 at 11.1.2 p. 387 and the writers quoted). Case law of the Federal Tribunal has attempted to define priorities between these two sources of law of different levels (on the evolution of case law, see AUER/MALINVERNI/HOTTELIER, Droit constitutionnel Suisse, vol. I, 2nd ed. 2006, nr 1874 ff). As to the issue presently under review, case law recognises that the Federal Tribunal must set aside the application of a federal law which violates a fundamental right guaranteed by an international treaty such as the EHRC (ATF 136 II 120 at 3.5.3 p. 131; 133 V 367 at 11.1.1; 125 II 417 at 4d). Pursuant to that principle of case law the Federal Tribunal repeatedly ignored voluntarily some rules of Swiss law forbidding the Court to entertain an appeal when it related to civil rights within the meaning of Art. 6 (1) EHRC and judicial review was necessary under the requirements of treaty law (ATF 133 II 450 at 2.2 p. 455; 132 I 229 at 6.1 and 6.5; 125 II 417at 4c-e). Similarly the Court should address the appeal notwithstanding Art. 192 (1) PILA if it reached the conclusion that the provision is not consistent with Art. 6 (1) EHRC.

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

3.1.2 The Respondent moreover relies on case law according to which a direct violation of the EHRC may not be invoked directly in an appeal against an international arbitral award as such a violation is not included among the grievances limitatively spelled out at Art. 190 (2) PILA (judgments 4A_404/2010[8] of April 19, 2011 at 3.5.3; 4A_43/2010[9] of January 29, 2010 at 3.6.1; 4A_320/2009[10] of June 2, 2010 at 1.5.3; 4A_612/2009[11] of February 10, 2010 at 2.4.1; 4P.105/2005 of August 4, 2006 at 7.3). It also argues in this context that the Appellant in any event did not satisfy the requirement for reasons at Art. 77 (3) LTF.

It is true that according to the aforesaid case law an appellant cannot claim directly that the arbitrators violated the EHRC even though its principles may be useful, as the case may be, to make effective the guarantees on which he relies on the basis of Art. 190 (2) PILA (cases quoted, *ibid*). However the issue at hand is different: it is not whether the Arbitrators disregarded one or the other of these guarantees, interpreted in the light of Art. 6 (1) EHRC if necessary, but rather to determine whether Art. 192 PILA, which allows the parties to opt out in advance of any appeal against an arbitral award (or to exclude one or the other of the grounds for appeals), is consistent with Art. 6 (1) EHRC (normative control in a specific case).

Moreover the Appellant states clearly at § 13 of his brief on what ground he considers that Art. 192 PILA is not compatible with Art. 6 (1) EHRC (see above at 3). Therefore his appeal is sufficiently reasoned in this respect.

3.1.3 Lastly the Respondent argues that the Federal Tribunal already decided the issue in dispute several times and admitted the validity of an opting out agreement as to Art. 6 (1) EHRC. It is wrong. In the only case it relies upon (case 4A_486/2010, aforesaid case 4A_486/2010), the Appellant, who was the same as in this case, had not raised the issue of the conformity of Art. 192 PILA with international law. In a previous case, a grievance had been raised in this respect but not sufficiently for the argument to be addressed (ATF 134 III 260 at 3.2.3). Finally, the issue had been previously considered only in the case published at ATF 133 III 235 at 4.3.2.2 p. 244 *i.f.* and the renunciation to appeal had been held in principle inopposable to a sportsman and "also questionable with regard to Art. 6 (1) EHRC". Absent an error, these are the only two cases openly dealing with the issue in dispute, which therefore remains open. However it is true that the Federal Tribunal always implemented Art. 192 PILA when the requirements of that provision were met and that by doing so it implicitly suggested that it considered the legal provision consistent with Art. 6 (1) EHRC.

The time has come to give the issue a specific answer.

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[8] Translator's note: Full English translation of the opinion on http://www.praetor.ch/arbitrage/arbitral-clause-as-contract-in-favor-of-a-third-party-binding/

[9] Translator's note: Full English translation of the opinion on http://www.praetor.ch/arbitrage/judicial-review-of-international-arbitral-awards-limited-by-art-/

[10] Translator's note: Full English translation of the opinion on http://www.praetor.ch/arbitrage/facts-not-reviewed-by-federal-tribunal-claims-of-violation-of-du/

[11] Translator's note: Full English translation of the opinion on http://www.praetor.ch/arbitrage/limited-judicial-review-of-awards-independence-of-cas-reaffirmed/

3.2

Art. 6 (1) EHRC gives everyone the right to a fair and public hearing of his case by an independent and impartial court established by law, which will decide within a reasonable time among other things the disputes as to his civil rights and obligations.

According to the European Court of Human Rights the provision quoted does not bar the creation of arbitral tribunals to adjudicate certain pecuniary disputes between individuals, as long as the renunciation of the parties to their right to a state court in favour of arbitration is free, licit and unequivocal (judgement of October 28, 2010 in the case of Suda v. Czech Republic [request nr 1643/06], § 48-55 and the cases quoted). This point is not in dispute.

The issue at hand is whether or not it is possible to renounce a recourse against a future arbitral award without violating Art. 6 (1) EHRC. The question must be answered in the affirmative. The renunciation to appeal does indeed entail the impossibility for the losing party to obtain a finding by the Federal Tribunal that the award under appeal was issued in breach of the fundamental procedural guarantees contained in the treaty provision. However neither the letter nor the spirit of the provision prevent a person from renouncing such guarantees of his own volition as long as such renunciation is not equivocal and does not conflict with any important public interest (judgment of the European Court of Human Rights of May 28, 1997 in the case of Pauger v. Austria [request nr 16717/90], § 58 and cases quoted; FROWEIN/PEUKERT, EMRK_Kommentar, 3rd ed. 2009, nr 3 *ad* Art. 6 EHRC and the precedents quoted at page 145, footnote 7). Art. 192 (1) PILA meets these requirements as it requests an express renunciation, which must also be the object of an agreement between the parties, which excludes any unilateral renunciation. Moreover a renunciation which a party would make not of its own free will but by vitiated consent could be invalidated on that ground (judgment 4A_514/2010[12] of March 1st, 2011 at 4.2). Furthermore as arbitration is a contractual method of resolving disputes by recourse to private judges – the arbitrators – that the parties may choose, one does not see *a priori* which important public interest a renunciation to the appeal in advance could possibly harm in the ordinary course of life in such a procedural context.

One must therefore conclude that Art. 192 (1) PILA is consistent with Art. 6 (1) EHRC. There is accordingly no reason to deprive the parties able to bear the consequences of a renunciation to appeal from the possibility offered by this provision – which embodies procedurally the principle of party autonomy – to escape any state intervention which could harm the confidentiality of arbitration or to prevent the swift obtention of an enforceable decision putting an end to the dispute (Andreas BUCHER, in Commentaire romand, Loi sur le droit international privé, Convention de Lugano, 2011, nr 19 *ad* Art. 192 LDIP).

Hence the Appellant validly renounced appealing the March 9, 2011 award to the Federal Tribunal.

This being so, the matter is not capable of appeal.

[12] Translator's note: Full English translation of the opinion on http://www.praetor.ch/arbitrage/valid-waiver-of-appeal-clear-renunciation-to-all-setting-aside-p/

4.
The Appellant loses and shall pay the costs of the federal proceedings (Art. 66 (1) LTF) and compensation to the Respondent (Art. 68 (1) and (2) LTF); these will be taken from the security for costs he deposited with the Office of the Court.

Therefore the Federal Tribunal pronounces:

1.
The matter is not capable of appeal.

2.
The judicial costs, set at CHF 5'000, shall be borne by the Appellant.

3.
The Appellant shall pay to the Respondent an amount of CHF 6'000 for the federal judicial proceedings; that amount shall be taken from the security for costs deposited with the Office of the Federal Tribunal.

4.
This judgement shall be communicated to the representatives of the Parties and to the Chairman of the ICC Arbitral tribunal.

Lausanne January 4, 2012.

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

The Presiding Judge: The Clerk:

Klett (Mrs) Caruzzo