4A_446/2013[1]

Judgment of February 5, 2014

First Civil Law Court

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

X._____ A.S.,
Represented by Mr. Christopher Bollen and Mr. Mathis Kern,
Appellant

v.

Z._____ S.A.,
Represented by Mr. Daniel Peregrina and Mr. Luca Beffa,
Respondent

Facts:

A.
The Turkish company, A._____ A.S. (hereafter: A._____) undertook the construction of a compressor station in Turkey, more precisely, at V._____ [name of place omitted] on the gas pipeline between [name omitted] and [name omitted] (hereafter: the V._____ Station). For this purpose, it called upon X._____ A.S. (hereafter: X._____ or the Appellant), another Turkish company active in the construction business. The project was to be finished by June 26, 2008. Once finished, the V._____ Station would be connected to the gas pipeline by the so-called process of hot tapping, which consists of creating a connection to a pipeline without interrupting the flow of the liquid going through it. To carry out this operation, X._____ involved a subcontractor specializing in this kind of work, the Belgian company Z._____ S.A. (hereafter: Z._____ or the Respondent). X._____ and Z._____ signed a

Translator's Note: Quote as X._____ A.S. *v.* Z._____ S.A. 4A_446/2013. The original decision is in French. The full text is available on the website of the Federal Tribunal, www.bger.ch.

contract on July 9, 2007, governed by Turkish law, concerning both the delivery of parts and the provision of services for the hot tapping to be carried out on the site of the V._____ Station (hereafter: the Contract). The total price of the work was set at USD 850'000 (USD 297'086 for the equipment and USD 552'914 for the services). The services should have begun on February 1, 2008, with a tolerance of plus or minus 15 days. The contract did not set a date for the termination of the work but nonetheless regulated their duration and the consequences of a possible delay. At the time the contract was concluded, Z._____ was working on the compressor station of W._____ near the eponymous Turkish town (hereafter: the W._____ Station). The equipment it intended to use for the work pursuant to the Contract was in that place, where it was active as a subcontractor of B._____ Company, which was the main contractor for the same principal as at the V._____ Station, namely A._____. Z._____ was supposed to finish the work at W._____ at the end of the month of July 2007, which would have left it with enough time to dismantle the equipment and take it to V._____ before the date anticipated for the beginning of its services (*i.e.*, February 1, 2008, plus the tolerance margin indicated above). However, B._____ became insolvent during the realization of the project, which caused the work to stop around the third week of July 2007, some ten days before their anticipated end and the equipment of Z._____ was blocked at W._____. The dismantling of the equipment only commenced on January 11, 2008. It should have taken 10 days but went well beyond due to meteorological conditions (temperate of -25 C during the day). Additionally, on February 8, 2008, the torsion shaft of a machine was twisted, which caused the dismantling work to stop until a spare part arrived from the United States. On March 5, 2008, X._____ advised A._____ of the situation and asked for an extension of 70 days of the time limit set to terminate the work at V._____. In support of this request, it invoked the extreme climactic conditions at W._____, the necessity to wait to receive the spare part ordered from the United States and some unforeseeable reasons. The principal did not agree to this request, holding that the circumstances invoked by X._____ did not constitute *force majeure*.

After receiving the spare torsion shaft and transporting its equipment to V._____, Z._____ started the tapping work on April 1, 2008, and ended on May 18, 2008.

During that time, pursuant to a lease contract of May 5, 2008, A._____ assigned to X._____ the use of a TM-760 machine because Z._____ had encountered some problems with its own machine of the same type. Z._____ indeed used the machine rented by X._____ during the first half of May 2008. The rental and transportation costs of the machine from W._____ to V._____ round trip and the costs related to a deposit of guarantee of USD 100'000 were borne by X._____.

On October 27, 2008, Z._____ sent two invoices of USD 300'000 and USD 252'914 to X._____, which did not pay them and did not comply when put on notice by a Turkish law firm on November 23, 2009.

A mediation attempted at Z._____'s request did not succeed.

B.

On November 16, 2011, Z._____ relied on the arbitration clause inserted in the contract to file a request for arbitration against X._____. In its final submissions, it sought an order that X._____ should pay the amount of USD 552'914 with interest and the rejection of all submissions of its opponent. In so doing, Z._____ was claiming the payment of the services it had provided pursuant to the contract.

For its part, X._____, in its final submissions, sought a rejection of the request and counterclaimed for a total amount of USD 587'052.34. Moreover, it requested set off of the reciprocal claims of the parties if needed.

Sitting in Geneva, the Sole Arbitrator appointed by the Arbitration Court of the International Chamber of Commerce (ICC) issued his final award on July 16, 2013. He upheld the claim of Z._____, rejected the counterclaims of X._____ entirely and ordered the latter to pay all costs of the arbitral proceedings and of the other party, all other requests and submissions being rejected. In substance, the Arbitrator set forth at length the respective positions of the parties and held that Z._____ had provided the services foreseen by the contract, that they had no deficiencies within the meaning of Art. 360(2) of the Turkish Code of Obligation (hereafter: TCO) and that even in the contrary hypothesis, X._____ was not entitled to claim a reduction of the price of the work because it failed to notify Z._____ of the deficiencies in a timely manner. As to the counterclaim, he first rejected it because it was based in Art. 9 of the contract, which provided a penalty for late performance. The Arbitrator then rejected the various claims raised by X._____ in connection with the costs paid for renting the TM-760 machine made available by A._____. Analyzing the pertinent facts, he drew the legal conclusion that the lease contract was a *res inter alios acta* for Z._____. Moreover, the various legal grounds invoked by X._____ in support of its claims in this respect were all rejected by the Arbitrator: representation (Art. 32 TCO) because Z._____ had not authorized X._____ to act in its name towards A._____; the contract because the provision invoked (Art. 13, §2) did not apply to the claims at hand; breach of contract (Art. 96 TCO) because X._____ had not proved it; unjust enrichment (Art. 61 TCO), finally, because a possible claim on this ground was already time barred in 2008. Based on Art. 159(2) TCO, the Arbitrator also excluded the costs and penalties that Z._____ being late in fulfilling its contractual obligations had allegedly caused to X._____ because the Belgian company could not be held at fault. Finally, he rejected the Turkish Company's claim after finding that, contrary to its statements, it had not seen its reputation damaged *vis-à-vis* third parties and particularly in respect of A._____, which had kept working with it after the V._____ Station was built.

C.

On September 16, 2013, X._____ filed a civil law appeal to the Federal Tribunal with a view to the annulment of the July 16, 2013, award. It principally criticizes the Sole Arbitrator for disregarding its right to be heard on several counts (Art. 190(2)(d) PILA[2]). It also argues that he decided *infra petita* in violation of Art. 190(2)(c) PILA. Finally, in an alternate argument, it submits that the Arbitrator breached procedural

[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.

public policy (Art. 190(2)(e) PILA) by failing to apply the law *ex officio* without regard to the principle of *iura novit curia*.

In its answer of November 21, 2013, Z._____ submitted that the appeal should be rejected.

The Arbitrator did not express his view as to the appeal.

The Appellant did not file a reply within the time limit set for this purpose.

Reasons:

1.
According to Art. 54(1) LTF,[3] the Federal Tribunal issues its decision in an official language,[4] as a rule in the language of the decision under appeal. When the decision was issued in another language (here English) the Federal Tribunal resorts to the official language chosen by the parties on appeal. In the arbitration they used English but in the briefs submitted to the Federal Tribunal they both used French. In accordance with its practice, the Federal Tribunal will consequently issue its judgment in French.

2.
In the field of international arbitration, a civil law appeal is admissible against the decisions of arbitral tribunals pursuant to the requirements set at Art. 190 to 192 PILA (Art. 77(1)(a) LTF). Whether as to the object of the appeal, the standing to appeal, the time limit to appeal, the Appellant's submissions or the grounds for appeal invoked, none of these admissibility requirements raises any problem in this case. There is, therefore, no reason not to address the appeal.

3.
The Appellant argues a violation of its right to be heard in the main argument in its brief.

As it is guaranteed by Art. 182(3) and 190(2)(d) PILA, the right to be heard does not have, in principle, different content from that which is recognized in constitutional law (ATF 127 III 576 at 2c; 119 II 386 at 1b; 117 II 346 at 1a p. 347). Thus, it was held that in international arbitration each party had the right to state its views on the essential facts for judgment, to submit its legal arguments, to introduce evidence on pertinent facts, and to attend the hearings of the arbitral tribunal (ATF 127 III 576 at 2c; 116 II 639 at 4c p. 643).

In Switzerland, the right to be heard relates mainly to factual findings. The right of the parties to be asked for their views on legal issues is recognized only restrictively. As a rule, according to the adage *iura novit cuira*, state courts or arbitral tribunals may freely assess the legal bearing of the facts and decide on the

[3] Translator's Note: LTF is the French abbreviation of 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.

basis of other rules of law than those invoked by the parties. Consequently, to the extent that the arbitration agreement does not limit the mission of the arbitral tribunal to the legal arguments raised by the parties, they do not have to be heard specifically as to the scope to be given to the rules of law. As an exception, they must be asked for their views when the judge or the arbitral tribunal considers basing the decision on a norm or a legal consideration that was not mentioned during the proceedings and the pertinence of which the parties could not have foreseen (ATF 130 III 35 at 5 and references). However, knowing what is unforeseeable is a matter of appreciation. Thus, the Federal Tribunal is restrictive in applying the aforesaid rule for this reason and because the specificities of this type of procedure must be taken into account to avoid the argument of surprise being used with a view to obtaining substantive review of the award by the Federal Tribunal (judgment 4A_254/2010[5] of August 3, 2010, and the precedents quoted).

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[6] at 6.1 and references). However, it imposes upon the arbitrators a minimal duty to address and handle the pertinent issues (ATF 133 III 235 at 5.2 p. 248 and the cases quoted). This duty is breached when, inadvertently or due to a misunderstanding, the arbitral tribunal does not take into account some assertions, arguments, evidence, and offers of evidence submitted by one of the parties and important to the decision to be issued. If the award is totally silent as to some items apparently important to resolve the dispute, it falls to the arbitrators or the Respondent to justify the omission in their observations as to the appeal. They must demonstrate that, contrary to the Appellant's assertions, the elements omitted were not pertinent to decide the case at hand or, if they were, that they were refuted implicitly by the arbitral tribunal. However, the arbitrators do not have the obligation to discuss all the arguments invoked by the parties so they cannot be found in breach of the right to be heard in contradictory proceedings for not refuting, albeit implicitly, an argument objectively devoid of any pertinence (ATF 133 III 235 at 5.2 and the cases quoted). The Appellant's various criticisms as to the violation of its right to be heard will be considered in the light of these principles of case law.

4.
The Appellant's first argument concerns "the violation of its duties by the Respondent after the stoppage of the work at W._____" (appeal n. 35 to 74).

4.1. The Arbitrator held that the delay in providing the services as per the contract was not due to the Respondent's fault but an unfortunate set of circumstances (award n. 386 to 392; see A., 2nd §, above). To reach this conclusion, he rejected the Claimant's contention that the Respondent could have obtained its equipment earlier (sentence n. 387).

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[5] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/claim-of-violation-of-due-process-denied-no-unforeseen-legal-arg

[6] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/right-to-be-heard-equality-between-the-parties

According to the Appellant, the Arbitrator limited his reasons to this assertion only and failed to take into account the following four items it had properly submitted.

4.1.1. First, the Respondent did not ask – or did not ask in a timely manner – for A._____'s authorization to retake possession of its equipment on the W._____ site so that it could meet its contractual commitments (appeal n. 40 to 52).

According to the Appellant, the testimony of R._____ – in charge of the Respondent's operations on location – showed that the latter had deliberately delayed requesting the release of its equipment because it could draw considerable income – USD 2'800 per day – from extending its tenure on the site of W._____ and it had waited until the end of November or even December 2007, i.e. four or five months after the work stopped at W._____, before starting serious negotiations with A._____ with a view to accessing the site and dismantling the equipment.

Hence, by failing to take these assertions into consideration and the testimony in support, which were recalled at § 5 – 8 of the Appellant's Post-Hearing Brief of February 8, 2013, the Arbitrator failed to address the decisive issues as to the existence (or lack thereof) of a request by the Respondent to obtain the release of its equipment and, as the case may be, whether or not such a request was late.

4.1.2. Secondly, and in connection with the facts underlying the first part of its argument, the Appellant asserts that it is not legally admissible under Turkish law for a contractor to deliberately leave its equipment with the principal with a view to receiving a comfortable rent while invoking the "blockage" of the same equipment to justify late performance of its obligations (appeal n. 53 to 55). The Arbitrator did not examine this argument even though it was invoked at § 7 of the aforesaid post-hearing brief.

4.1.3. Thirdly, the Appellant argues that it was not impossible for the Respondent to have the necessary equipment delivered from somewhere other than W._____ (appeal n. 56 to 60). It claims to have raised this issue by arguing in its post-hearing brief not only that the Respondent should have found a solution to the problem caused by the temporary immobilization of its equipment but also that the problem was none of its concern. In a brief of January 20, 2012, it explained, moreover, that in Turkish law only objective impossibility to deliver the contractual commitment would have allowed the Respondent to escape liability. Yet, the award under appeal was silent on all these issues.

4.1.4. Finally, the Appellant claims to have argued in the arbitration that the Respondent did not take the steps that could be expected from a prudent trader to ensure that it would be able to meet its contractual obligations, thus violating the duties imposed by Turkish law (appeal n. 61 to 66). Yet the Arbitrator did not examine whether or not the Respondent had taken advantage of any steps in order to avoid any delay of the six months between the time when the works at W._____ were to be finished (the end of July 2007) and the agreed-upon beginning of work at V._____ (February 1, 2008).

In substance, the Appellant claims to have been put in the same situation as if it had not been able to present its arguments. In its view, they were essential to decide the dispute because, had they been taken into account, this would necessarily have lead the Arbitrator to hold the delay in providing the contractual services against the Respondent and consequently, to award to the Appellant the damages it was seeking in this respect (appeal n. 67 to 70).

4.2. Examined in the light of the answers given by the Respondent in its answer to the appeal (p. 3 to 16), the arguments thus advanced by the Appellant call for the following remarks.

4.2.1. Generally speaking, the issue as to who was liable for the delay in starting the hot tapping work on the V._____ site and, more precisely, whether or not the Respondent could be blamed for being late in dismantling its equipment on the W._____ site, did not escape the Arbitrator at all. He ruled out holding it against the Respondent (award n. 382) and explained with reference to testimony and two exhibits that he could not uphold the Appellant's view, according to which the Respondent could have regained possession of the equipment earlier than it did (award n. 387). Moreover, he found in his preliminary factual findings in this respect that all parties concerned had met several times to discuss the situation and the necessity to dismantle the equipment to transport it to V._____ (award n. 102).

There is no doubt that the Arbitrator did not explicitly reject the Appellant's argument that the Respondent preferred receiving rent of USD 2'800 per day from A._____ as long as it could not regain possession of its equipment rather than demand its immediate release. However, it can be admitted that he did so implicitly and *a contrario* by refusing to hold the Respondent liable for the late dismantling for its equipment. Be this as it may, it must be pointed out to the Respondent that the argument would fail anyway. First, it was invoked rather sparsely and in a sibylline manner in its post-hearing brief (§ 5-8). Moreover, it broadens the testimony supposedly supporting the argument by submitting a truncated version for the purpose of its demonstration. Indeed, the witness (R._____) never stated that the Respondent had claimed the aforesaid rent from A._____ but merely pointed out that it had written a letter to that company on August 6, 2007, to draw its attention to the problems that the enforced immobilization of its equipment on the W._____ site would cause.

Actually, under the cloak of an argument that its right to be heard was violated, the Appellant seeks to question the Arbitrator's conclusion based on his assessment of the pertinent evidence as to the liability for the delay in the dismantling of the equipment at W._____ and, more generally, as to the failure to comply with the contractual time limit within which the hot tapping work should have started at the V._____ Station. Such an attempt is doomed because it disregards the prohibition on criticism of the assessment of the evidence, which prevails in federal appeal proceedings against an international arbitral award.

4.2.2. The aforesaid reasons deprive the reasoning of any basis on which the second part of the argument mentioned at 4.1.2 above is based, as it relies on the unproven assertion that the Respondent intentionally left its equipment with A._____ in order to cash-in on a comfortable rent.

4.2.3. As the Respondent rightly remarks, the Appellant's assertion – which is the third part of the argument under consideration – that "it was not objectively impossible to obtain the necessary equipment elsewhere than at V._____" was not contained in the very broad criticism, at § 6 of the Appellant's post-hearing brief, of the Respondent that it had not found a solution to its alleged problem during the aforesaid six month period instead of claiming more money from A._____. Neither was it contained in the assertion by which the Appellant stated that the difficulties encountered by the Respondent were none of its concern and irrelevant to the case at hand (same brief, § 1, 2 and 8). Therefore, the Appellant cannot criticize the Arbitrator for failing to specifically review an argument it had not submitted. Moreover, as to the "applicable legal rules," the Appellant refers to several arguments it submitted to the Arbitrator in a brief of January 20, 2012, (Exhibit n. 5), with legal writing in support, to demonstrate that in Turkish law only objective impossibility to perform the contractual obligation – a requirement not met in this case in its view – would have allowed the Respondent to escape liability. However, the award would be moot on this issue (appeal n. 59). The pertinence of the latter assertion is more than doubtful. Indeed, the Arbitrator held that the origin of the Respondent's temporary impossibility to furnish its services was not due to a fault of the interested party but to an unfortunate set of circumstances. Hence, he implicitly found in favor of objective impossibility for this party to perform its contractual obligation and thus address the issue raised by the Appellant. Be this as it may, the general criticism of the Appellant in the topical part of its brief – criticism supported by a reference to some numbered paragraphs of a brief containing no numbers – is not admissible.

4.2.4. The latter remark also applies to the Appellant's reference to the same brief in connection with the fourth part of its argument where it claims that the Respondent did not take the measures that could be expected from a prudent trader to ensure that it would be able to perform its obligations.

Moreover, the demonstration attempted here by the Appellant is a mere repetition as compared to the three arguments already reviewed. Furthermore, it too relies on the erroneous assumption drawn from the testimony of R._____ as to the reasons for the delay with which the Respondent would have sought the restitution of its equipment blocked at W._____.

4.3. The first argument raised by the Appellant is consequently unfounded in its four parts.

5.
5.1. Still from the point of view of the violation of its right to be heard, the Appellant argues in support of a second grievance entitled "The invocation of *force majeure* by the Respondent in connection with its late performance of services" (appeal n. 75-93) that in the arbitration, it made a counterclaim stating its right to a penalty for late performance based on Art. 9 of the contract, particularly in connection with the late start of the agreed-upon services. It adds that the Arbitrator rejected the argument because it had accepted the postponed commencement of the services without reservation. Challenging the accuracy of this conclusion,

the Appellant argues that the Arbitrator inadvertently neglected to address the issue of the applicability of Art. 16 of the contract, which it had raised. He failed to see that, pursuant to this clause, the Appellant's right to claim a penalty for late performance on the basis of Art. 9 of the contract was automatically reserved should A._____ fail to accept the existence of *force majeure* invoked by the Respondent. Yet, the facts of the case, and in particular the letters exchanged between the different players as to the delay in the performance of the services, would demonstrate – contrary to what the Arbitrator held, despite the concurring statements of the parties, as another arbitrator had done in the case published at ATF 121 III 331 – that the Respondent had indeed invoked circumstances similar to *force majeure* as contemplated by Art. 16 of the contract with which A._____ disagreed. Thus, in its view, it could not be claimed that the Appellant accepted without reservation the late delivery of the Respondent's services because a reservation of its claims based on Art. 9 of the contract resulted from the very application of Art. 16 of the aforesaid contract.

Consequently, the Arbitrator violated the Appellant's right to be heard by failing to take into consideration the legally pertinent argument it had submitted in this respect.

5.2. The grievance thus summarized is unfounded in several respects.

First, it is not true – from a formal point of view at least – that the Arbitrator did not deal with the issue of the applicability of Art. 16 of the contract. Indeed, he addressed it expressly at n. 321 of his award by rejecting the Appellant's defense based on the text of this clause, an excerpt of which he quoted. The issue of the penalty for late performance within the meaning of Art. 9 of the contract – referred to in that paragraph – and the Appellant's argument, based on Art. 16 of the contract, were reviewed by the Arbitrator only in connection with the late delivery of the parts and not with the late commencement of services because he addressed the claim in dispute separately and successively, depending on the two different parts of the Respondent's contractual performance.

However, under n. 339 of his award, the Arbitrator, who expressed serious reservations as to the very applicability of Art. 9 of the contract to the late delivery of services (award n. 330 to 338), stated that in any event, the Appellant was time barred from invoking the latter circumstances *for reasons similar to those set forth above with respect to the late delivery of the goods*.[7] Yet, if one considers the logical construction of the Arbitrator's reasoning, there is no doubt that n. 321 of the award under appeal was included in the reference at n. 339. Thus, deciding whether the Arbitrator should have held that the requirements of Art. 16 of the contract were met in the case as to the late provision of services is an issue concerning the application of the law to the facts of the case which consequently is outside the judicial review of this court (see Art. 190(2) PILA *a contrario*) and so is the issue as to whether or not the award under appeal is sufficiently reasoned in this respect (see 3, § before last, above).

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

Finally, no matter what the Appellant says, it is not obvious that the parties agreed that the Respondent indeed invoked *force majeure* to justify the late beginning of its services at the V._____ Station (appeal n. 83). Not without some reason, the Respondent, while questioning its opponent's good faith, points out that the Appellant had argued the opposite in the arbitral proceedings by claiming that the delay was due to a fault of the Belgian company (answer p. 18 with references to § 144, 147 and 156 of the award). The evidence mentioned in the appeal (n. 87) is merely some messages exchanged by the Respondent and its representative in Turkey with A._____ and not with the Appellant. It must be observed here in connection with this remark that pursuant to Art. 16 of the contract, according to the French translation submitted by the Appellant (appeal p. 6, footnote 3), the party wishing to invoke circumstances constituting *force majeure* in its view should "notify without delay the beginning and the end of the aforesaid circumstances in writing to the other party" and not to a third party such as the principal (in this case, A._____).

Moreover, the Arbitrator applied Art. 158(2) TCO – the equivalent in Turkish law of Art. 160(2) of the Swiss Code of Obligations (CO) – which sets forth the conditions under which a party is entitled to ask for both performance of the contract and the contractual penalty. He also found that the requirements were not met in the case at hand because the Appellant had accepted without reservation the late performance of the services. According to him, the emails exchanged between the parties after the work entrusted to the Respondent was finished showed that the Appellant never challenged the invoice but made various requests to be allowed to pay it in installments (n. 340 to 342). Yet, the Appellant does not challenge this reasoning, which appears to be self-supporting, and in any event it does not attempt to demonstrate why the application of Art. 16 of the contract would render any reference to Art. 150(2) TCO groundless.

Finally, the Arbitrator followed the Respondent's reasoning and found that it would be contrary to good faith (*venire contra factum proprium*) that the Appellant, which had never claimed for late penalties due to the late beginning of the services, could wait until the filing of its counterclaim to raise a claim it had initially considered groundless or that it had renounced (award n. 343). This general application of the principle of good faith is not challenged by the Appellant.

6.

6.1. It was pointed out in the summary of the facts of the case that, while the hot tapping work was being performed, the Appellant obtained from A._____ the use of a TM-760 machine it had made available to the Respondent, which had encountered some problems with its own machine of the same type; this caused a number of expenses (see A, 2nd § before last, above).

In the arbitral proceedings, the Appellant made a counterclaim for payment of a total of USD 587'052.34 by the Respondent with set-off against the acknowledged part of the Respondent's claim (USD 276'914), the balance being awarded to it. In doing so, it claimed compensation in addition to moral damages of USD 100'000 and a penalty for late performance of USD 85'000 based on Art. 9 of the contract, compensation for its substantive damage set at USD 402'052.34 and comprising of three items, including a claim of USD 77'326.28 for the entire costs concerning the rental of the TM-760 machine (award n. 169, 175 and 177). In

support of the former claim, it invoked various possible legal grounds and in particular, unjust enrichment (award n. 162 to 170 and references).

At this stage in the proceedings, the only issue is the rejection of the former claim to the extent it is based on the latter reason. Reviewing the claim in this respect, the Arbitrator rejected it because the Appellant had merely quoted the wording of Art. 61 TCO without any explanation of the requirements of Turkish law to apply this provision concerning unjust enrichment and without explaining why the conditions were met *en casu* (award n. 374). Referring then to Art. 66 TCO, he found that, in any event, the claim in dispute was time barred because the Appellant waited for more than a year between the time it paid the rent of the aforesaid machine in the summer of 2007 and the time when it sought reimbursement from the Respondent for unjust enrichment in 2012 (award n. 375 and 376).

6.2. In a third and last group of arguments, the Appellant criticizes that part of the award on three grounds which must be reviewed in sequence.

6.2.1. As to the violation of its right to be heard, the Appellant first argues that the Arbitrator failed to take into account its explanations at n. 63 of its post-hearing brief as to Art. 61 TCO and in particular the one stating, with legal writing in support, that unjust enrichment could also consist of avoiding the reduction of one's assets by taking advantage of the other party's performance (appeal n. 97 to 100). Moreover, it emphasizes that in the previous paragraph of the same brief (n. 62), it had reproduced the text of the pertinent provision (Art. 356(3) TCO) and an excerpt of a legal treaty, recalling that in principle it falls upon the contractor to furnish the equipment and tools necessary for the work at his own cost.

Despite its claim, the Appellant's criticism of the Arbitrator is unfounded. Indeed, if he did not address the claim based on unjust enrichment, it is because he found that the counterclaimant failed to sufficiently explain the factual and legal basis of the claim, in other words, it had failed the duty that the German language describes as *Substanzierungspflicht.*[8] The two aforesaid paragraphs of the post-hearing brief (§ 62 and 63) support this view. Indeed, the two paragraphs in question, covering nearly a page and a half, contain nothing more than a citation of the text of Art. 61 and Art. 356 TCO with a brief excerpt for each of them of an opinion from a professor of Turkish law (…). One would look in vain for any subsumption. Therefore, it cannot be argued that the Arbitrator omitted some legal or factual arguments that had been validly submitted to him or that he disregarded his minimal duty to address the pertinent issues.

6.2.2. Admittedly, the introduction of n. 375 of his award ("irrespective of whether this provision [Art. 61 TCO] is applicable or not…"[9]) could suggest that the Arbitrator did not have a final opinion as to this issue. This might explain why he thought he should also address the issue of the claim in dispute being time barred (award n. 376). If this were the case, the claim being time barred would not be an alternative reason

[8] Translator's Note: The duty to substantiate one's claim.
[9] Translator's Note: In English in the original text.

compared to the previous one, but it would be the only one justifying rejecting the claim based on unjust enrichment. It is therefore necessary to review the criticism made in this respect.

A preliminary clarification is needed here as to the pertinent facts. It must be pointed out with the Appellant (appeal n. 103) that the Arbitrator made a mistake as to a date. The mistake concerns the time from which the statute of limitations started. According to the Arbitrator, it would be the summer of 2007 so that the time limit of one year would have expired in the following summer (award n. 376), yet that is excluded because the same Arbitrator previously found that the lease contract between A._____ and the Appellant was concluded on May 5, 2008, and that the Respondent used the TM-760 machine during the first half of the same month (award n. 113). Be this as it may, the Arbitrator's inadvertence has no consequence because even if moved forward correctly to the summer of 2009, the time limit still expired long before the Claimant raised its claim for unjust enrichment for the first time, namely in its counterclaim of June 29, 2012.

6.2.2.1. In a first part of this final argument, the Appellant claims that the Arbitrator violated its right to be heard by failing to deal with an essential legal issue it had validly invoked, namely the application of Art. 118(3) TCO. In its view, this provision, like Art. 120(3) CO[10] states that set-off of a time barred claim may be raised if the claim was not time barred at the time it could have been set off. Yet, in this case, the claim for unjust enrichment arose in May 2008 and was not time barred when it could be set off against the Respondent's claim for payment of the price of the work, contained in two invoices dated October 27, 2008. Consequently, according to the Appellant, the Arbitrator denied it due process by failing to analyze the issue of prescription from the point of view of Art. 118(3) TCO. Moreover, by applying Art. 66 TCO in isolation without inviting the Appellant to state its views as to the applicability of the aforesaid provision, he took the party by surprise and based his award on reasons that it could not have anticipated (appeal n. 104 to 108).

This double criticism cannot be upheld. On the one hand, as the Respondent rightly points out, the Appellant never submitted to the Arbitrator the argument based on Art. 118(3) TCO which it today claims as an "essential legal issue." And, contrary to what it claims at n. 106 of its appeal, the mere fact of specifically invoking mutual set-off of the parties' reciprocal claims *pendente lite* was not at all equivalent to submitting the specific argument. Thus, it cannot criticize the Arbitrator after the fact for not addressing the issue. On the other hand, the Appellant wrongly claims surprise. Indeed, the Respondent specifically argued that the claim based on unjust enrichment was time barred when referring to Art. 66 TCO in its post-hearing brief of February 8, 2013, (p. 105 and 106; see award n. 242). Upon receipt of this brief, the Appellant should logically have asked itself how it could set aside the defense that the claim was time barred, which would have lead it to consider raising the objection based on Art. 118(3) TCO. Then, it could have spontaneously raised an argument based on this provision or asked the Arbitrator to authorize it to do so because the case was coming close to its end. However, it could not remain without reaction and retain the possibility to raise

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

the argument later should the Arbitrator consider that its counterclaim was time barred (judgment 4A_150/2012[11] of July 12, 2012, at 4.2).

6.2.2.2. Moreover, in the second part of the argument, the Appellant claims that the Arbitrator "substantially decided *infra petita*", thus violating Art. 190(2)(c) PILA, "by not addressing this aspect of the counterclaim" (appeal n. 109).

The argument is doomed. Indeed, it flies in the face of solidly established case law concerning the provision quoted, according to which, a grievance based on Art. 190(2)(c) PILA does not authorize an argument that the arbitral tribunal failed to decide an issue important to the resolution of the dispute (ATF 128 III 234 at 4a p. 242 and references).

6.2.2.3. Finally and overabundantly, the Appellant argues that the Arbitrator violated the adage *iura novit curia* and, consequently, procedural public policy by failing to apply Art. 118(3) TCO (appeal n. 110).

The reasoning in support of the Appellant's last grievance is questionable as it is limited to this excessive remark. Moreover, the criticism is groundless. There is no need to review the issue as to whether the aforesaid adage is part of procedural public policy within the meaning of Art. 190(2)(e) PILA and related case law (ATF 132 III 389 at 2.2.1) in the acceptance given by the Appellant in this case. Some legal writers appear to disagree on the basis of precedents which, however, do not really address the issue from a theoretical point of view (see for instance: Berger/Kellerhals, *International and Domestic Arbitration in Switzerland*, 2nd ed. 2010, n. 1611, p. 466, who quote the judgments 4P.242/2004 of April 27, 2005, at 7.3 and 4P.119/1998 of November 13, 1998, at 1b/bb). As to the writers mentioned in the appeal (Kaufmann-Kohler/Rigozzi, *Arbitrage international, Droit et pratique à la lumière de la LDIP*, 2nd ed. 2010, n. 843), who appear to hold the opposite view, they nonetheless emphasize that the *iura novit curia* is not violated when the arbitral tribunal refers to Art. 16 PILA, to put the burden on the parties to prove the content of applicable law (*ibid*., with a reference to the first case quoted). Along the same lines, another writer relies on the second case quoted and excludes a violation of public policy if the arbitral tribunal does not look for an applicable rule of foreign law when none of the parties invoked it (Bernard Corboz, in *Commentaire de la LTF*, 2009, n. 173 ad Art. 77 LTF).

The situation invoked by the latter writer is precisely that of the case at hand. The Arbitrator did not consider the application of Art. 118(3) TCO because the provision had not been invoked. He cannot be criticized for this on the basis of Art. 190(2)(e) PILA – to the extent that the provision applies at all – also because at paragraph 10 of the Terms of Reference of May 4, 2012, it was agreed that as to applicable Turkish law, "*the parties shall prove the content of the applicable law*."[12]

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[11] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/federal-tribunal-reiterates-principle-pacta-sunt-servanda-violated-only-when-arbitral-tribunal

[12] Translator's Note: In English in the original text.

7.
The Appellant loses and it shall pay the costs of the federal proceedings (Art. 66(1) LTF) and compensate its opponent (Art. 68(1) and (2) LTF).

Therefore the Federal Tribunal pronounces:

1.
The appeal is rejected.

2.
The judicial costs set at CHF 7'000 shall be borne by the Appellant.

3.
The Appellant shall pay to the Respondent an amount of CHF 8'000 for the federal judicial proceedings.

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

Lausanne, February 5, 2014

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

Presiding Judge:	Clerk:
Klett (Mrs.)	Carruzzo