A.
On September 3, 2008, Y. ______ (hereafter Y. ______), a Turkish company and X. ______ SA (hereafter X. ______), a Romanian company, entered into a contract concerning in particular the sale, by the first to the second, of a certain quantity of metal bars. In an addendum of September 11, 2008, the price of the merchandise was revised downward at the request of X._______.

A clause in the contract imposed an obligation on X._______ to pay the purchase price through an irrevocable letter of credit which was to be opened by September 10, 2008, at the latest. This deadline was not met, and Y._______ extended it firstly to September 29, 2008, and a second time to October 15, 2008, while threatening its contractual partner with legal proceedings in the event that it did not perform.

1 Translator’s note: Quote as X._______ SA v. Y._______, 4A_488/2009. The original of the decision is in French. The text is available on the website of the Federal Tribunal www.bger.ch.
On November 4 and 19, 2008, X. _______ proposed to Y. _______ that they conclude a new contract. This proposal remained unanswered.

By letter of December 16, 2008, Y. _______ terminated the contract and manifested the intent to claim damages from Y. _______. An attempt to settle the dispute amicably, failed.

B.

On December 30, 2008, Y. _______ relied on the arbitration clause included in the sales contract, filed a request for the arbitration with the Geneva Chamber of Commerce and Industry (“CCIG”), this city having been designated as the seat of arbitration. The CCIG appointed A. _______, an attorney, as sole arbitrator on March 5, 2009.

Y. _______ claimed payment of an amount to be determined, but at least USD 396425.--, with interest.

X. _______ submitted that the request should be entirely rejected.

In an award of August 27, 2009, the sole arbitrator granted the request with costs.

C.

In a Civil law appeal, X. _______ submits that the award should be annulled.

The Respondent seeks the rejection of the appeal. The sole arbitrator did the same.

Reasons:

1. According to Art. 54 (1) LTF\(^2\), the Federal Tribunal issues its decision in one of the official languages\(^3\), as a rule in the language of the decision under appeal. When the decision was issued in another language (here English), the Federal Tribunal uses the official language chosen by the parties. In front of the Arbitral Tribunal, they opted for English, whilst in the Federal proceedings they used French. According to its practice the Federal Tribunal will adopt the language of appeal and issue its decision in French.

2. 

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\(^3\) Translator's note: The official languages of Switzerland are German, French and Italian.
In the field of international arbitration, a Civil law appeal is allowed against the decisions of arbitral tribunals under the conditions set forth at Art. 190 to 192 PILA\(^4\) (Art. 77 (1) LTF). As far as the object of appeal, the standing to appeal, the time limit for appeal, the submissions made by the Appellant or even the grounds raised in the brief are concerned, they do not pose any problems concerning the pre-condition for allowing the appeal. There is therefore no reason not to entertain this appeal.

3. In a grievance, based on Art. 190 (2) (e) PILA the Appellant claims that the sole arbitrator made an award which is inconsistent with public policy. More precisely, it claims that the principles of *pacta sunt servanda* and the rules of good faith have been violated.

3.1 A material examination of an international arbitral award by the Federal Tribunal is limited to the question of inconsistency of the award with public policy (*ATF 121* III 331 at 3a).

An award is inconsistent with public policy if it disregards the essential and broadly recognized values which, according to Swiss concepts, should be the basis of any legal order (*ATF 132* III 389 at 2.2.3). An award is contrary to material public policy when it violates some fundamental rules of material law to the point of no longer being consistent with the determining legal order and system of values; among such principles are contractual trust and respecting the rules of good faith. For it to be contrary to material public policy, a narrower concept than arbitrariness, it is not enough for the law to have clearly been violated (*Decision 4P_71/2002* of October 22, 2002 at 3.2 and cases quoted).

The principle of *pacta sunt servanda* in the restrictive meaning it has according to case law based on Art. 190 (2) (e) PILA is violated only if the arbitral tribunal refuses to apply a contractual clause whilst admitting that it binds the parties or, conversely, if it imposes on them to comply with a clause which it considers as not binding. In other words, the arbitral tribunal must have applied or refused to apply a contractual provision in a way that contradicts its own interpretation as to the existence or the contents of the legal instrument in dispute. However, the process of interpretation itself and the legal consequences logically

\(^4\) 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.
derived from it are not governed by the principle of contractual trust and they are not capable of appeal for violation of public policy. The Federal Tribunal has repeatedly emphasized that almost the entire realm of contractual breaches is excluded from the area protected by the principle of *pacta sunt servanda* (Decision 4A_370/2007 of February 21, 2008 at 5.5).

The rules of good faith must be understood in the light of case law relating to Art. 2 CC\(^5\) (Decision 4A_600/2008 of February 20, 2009 at 4.1).

3.2

3.2.1 In interpreting Art. 9.6 of the sales contract as amended by the parties, the sole arbitrator came to the conclusion that the deletion of the second sentence of this clause could not be regarded as expressing the common intent of the contracting parties to exclude the liability of the Appellant in the case of failure to finance the purchase price by a third party (award, n. 57 to 64). Subsidiarily, he held that, on the opposite assumption, the conventional exclusion of liability of the Appellant would be null by virtue of the applicable material law (award n. 65 to 67).

The Appellant merely challenges the manner in which the arbitrator interpreted the clause in dispute. According to the Appellant, the result of this interpretation would contradict the intent of the parties. This would consequently lead to a violation of the principle of *pacta sunt servanda*.

Such an argument has nothing to do with the aforesaid principle, within the meaning that it is given in federal case law. The Appellant’s onerous challenge of the interpretation of the clause as made by the sole arbitrator is inadmissible. He issued an award consistent with this interpretation. He did not therefore disregard the principle of contractual fidelity. That the Appellant does not agree with the result of the interpretation does not change anything.

3.2.2 According to the Appellant, the Respondent engaged in behaviour contrary to the rules of good faith, which was highly prejudicial to it: while evading its obligation to attempt prior conciliation, the Respondent would eventually have deliberately fabricated alleged damages, substituting other transactions unbeknownst to the Appellant. The arbitrator should have sanctioned such abusive behaviour.

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On this issue, the appeal consists only, in a series of peremptory assertions that its author submits to the Federal Tribunal, as if it were arguing in front of a court of appeal. Such assertions are completely inadequate, in themselves, to substantiate the grievance under review. The arbitrator moreover, had to deal with the issue of the Respondent's obligation to reduce its damages (award, n. 35 ff, 92, 96 to 98). Under n. 28 of his award, he also mentions an attempt to resolve the dispute amicably which failed. The grievance, whose capability of appeal is more than doubtful, is also manifestly unfounded.

4.
The Appellant also claims that the arbitrator violated its right to be heard.

4.1 According to Art. 190 (2) (d) PILA, an award may be appealed when the equality between the parties or their right to be heard in contradictory proceedings was violated. The right to be heard provides each party with the right to state all its factual and legal arguments on the object of the dispute and to submit necessary evidence, as well as the right to participate in hearings and to be represented or assisted in front of the arbitrators (ATF 133 III 139 at 6.1 p. 143).

4.2 Essentially, the Appellant alleges that the arbitrator ordered it to repair damages which are unproven. Such a grievance falls outside of the guarantee of the right to be heard.

The Appellant also claims that the arbitrator did not review the arguments in par. 34 to 43 of its Statement of defence. If it is attempting to demonstrate that these arguments were ignored by the arbitrator, it is mistaken, since they were expressly referred to in the award under appeal (n. 106 ff). If it does not agree with the considerations made by the arbitrator in this respect, it submits a grievance that does not fall within the scope of Art. 190 (2) (d) PILA. In both cases, the grievance based on the violation of this provision appears inconsistent.

5.

6 Translator's note: in English in the original text.
In conclusion, the appeal cannot but be rejected to the extent that the matter is capable of appeal. The Appellant shall pay the costs of the federal proceedings (Art. 66 (1) LTF) and the Respondent’s costs (Art. 68 (1) and (2) LTF).

Therefore, the Federal Tribunal pronounces:

1. The appeal is rejected to the extent that the matter is capable of appeal.
2. The judicial costs set at CHF 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 15, 2010

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

The Presiding Judge (Mrs): The Clerk:

KLETT CARRUZZO