4P_115/2003[1]

Judgment of October 16, 2003

First Civil Law Court

Federal Judge Corboz, Presiding
Federal Judge Walter,
Federal Judge Rottenberg Liatowitsch,
Federal Judge Nyffeler,
Federal Judge Favre,
Clerk of the Court: Carruzzo

X. _____ S.A.L.,
Y. _____ S.A.L.,
A. _____,
Appellants,
All represented by Mrs. Caroline Ferrero Menut,

v.

Z._____ Sàrl,
Respondent,
Represented by Mr. Francois Knoepfler and Mr. Philippe Schweizer,

Facts:

A.
Pursuant to a tender, Z._____ Sàrl (hereafter "Z._____"), a company under Lebanese law, entered into a work contract with Lebanese companies Y._____ S.A.L. (hereafter "Y._____") and X._____ S.A.L. (hereafter "X._____") acting as a principal and representative of the principal respectively, on October 15, 1997, for the purpose of realizing construction works in the framework of a large real-estate project in Lebanon. Lebanese law was the applicable law to the contract.

At 67(1) of the specific conditions of the contract, the parties inserted an arbitration clause, worded as follows:

> "All disagreements or disputes which may arise in connection with the interpretation, the performance, or the termination of this Tender, which could not be resolved amicably between the parties within 56 days after one of it [*sic*] notified its intent to resort to arbitration, will be finally settled according to the Rules of conciliation and arbitration of the International Chamber of Commerce (ICC) by three arbitrators appointed in conformity with

[1] Translator's note: Quote as X._____ et al *v.* Z._____, 4A_115/2003. The original decision is in French. The text is available on the website of the Federal Tribunal www.bger.ch.

these rules. The seat of arbitration shall be in Geneva (Switzerland). The language of the arbitration shall be French. Applicable law shall be Lebanese Law."

In a letter of October 27, 2000, Z._____ informed Y._____ and X._____ of its intent to terminate the contract for failure to pay an invoice for works it had performed.

As a consequence, a dispute arose that the parties could not settle amicably.

B.
On February 14, 2001, Z._____ sent a request for arbitration to the International Chamber of Commerce (ICC) directed not only at Y._____ and X._____ but also against A._____ because this Lebanese businessman had constantly intervened in the performance of the work contract. Arguing that A._____ had not signed the work contract, the Defendants asked that he be removed for lack of arbitral jurisdiction. The Claimant proposed Mr. D._____ as arbitrator. As to the Defendants, they advanced the name of Mr. E._____. The co-arbitrators appointed Mr. S._____ as chairman of the Arbitral Tribunal. The ICC ratified these choices.

The proceedings will be described hereafter to the extent necessary to address the grievances raised by the Parties in this respect.

In a final award of April 22, 2003, issued by a majority of the Arbitrators, the Arbitral Tribunal found that the termination of the work contract by Z._____ was justified. Consequently, it ordered Y._____ and X._____ severally to pay a total amount of about USD 1'746'000 to the Claimant on various counts, with interest added. Holding that A._____ had been legitimately brought into the arbitral proceedings, it found him jointly liable for the payments ordered against the two defendant companies. Finally, the Arbitral Tribunal partially upheld the counterclaim and ordered Z._____ to pay them the amount of USD 50'000, with interest, as damages for the defects in the work.

C.
Y._____, X._____, and A._____ filed a Public law appeal to the Federal Tribunal with a view to obtaining an annulment of the arbitral award. Relying on Art. 190(2)(a), (b), and (c) PILA,[2] the Appellants argue that the Arbitral Tribunal, more precisely the majority Arbitrators, closed the evidentiary phase when some essential facts brought to light by subsequent expert opinions had not been clarified and that minority Arbitrator E._____ had not been consulted in the process of elaborating the final text of the award, which was issued against an individual, A._____, who was not bound by the arbitration clause inserted in the work contract. The three arguments will be set out in greater detail hereunder as they are reviewed.

The Respondent submits that the appeal should be rejected to the extent that the matter is capable of appeal. The Arbitral Tribunal did not file an answer.

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.

D.
In the alternative, the Appellants simultaneously filed, in a separate brief, a request for revision in which they invited the Federal Tribunal to annul the award under appeal, to order the Respondent to pay USD 1'000'000 (as a restitution of the amount received in excess of the quantum) and moreover to send the matter back to the Arbitral Tribunal to handle the case in line with the reasons of the judgment.

In an order of June 19, 2003, the Presiding judge of this Court rejected the requests for a stay of enforcement submitted both with regard to the Public law appeal and as to the revision.

On September 22, 2003, Counsel for the Appellants, sent to the Federal Tribunal a letter from Arbitrator E._____ dated August 19, 2002 (*recte:* 2003), and its French translation, as well as the letter sent to the aforesaid Arbitrator by the Chairman of the Arbitral Tribunal on April 16, 2003.

The Federal Tribunal considers the following in law:

1.
In parallel to the Public law appeal, the Appellants filed a request for revision against the same decision, namely, the final award of April 22, 2003, which was *res judicata* as from its notification (Art. 190(1) PILA). The Federal Tribunal has jurisdiction to decide both these extraordinary legal recourses (Art. 191(1) PILA; ATF 118 II 199 at 2). There is no specific provision, such as Art. 57(1) OJ,[3] for the recourse in civil matters or Art. 6(1) PCF[4] in connection with Art. 40 OJ for the other appeals, which would set a priority between the Public law appeal and the request for revision of an award issued in the framework of an international arbitration. The purpose of these provisions – to avoid unnecessary proceedings by ensuring that the Federal Tribunal will not deal with a case as long as the decision may be annulled by a cantonal authority (ATF 83 II 422) – plays no role in this context, because the same authority has jurisdiction over these connected legal remedies. However, it must be stated that revision, particularly at the cantonal level, is generally considered a subsidiary recourse as compared to the priority legal recourses otherwise available to a party (*see, among others*, Fabienne Hohl, Procédure Civile, vol. II, at 3079; Philippe Schweizer, Le Recours en Révision, thèse Neuchâtel 1985, p. 331). Federal case law considers, in the same spirit, that the grounds at Art. 136 OJ cannot base a request for revision of an international arbitral award, as they may be invoked in the framework of a Public law appeal within the meaning of Art. 190(2) PILA (judgment 4P.104/1993 of November 25, 1993, at 2; ATF 118 II 199, at 4). It is therefore logical to address the Public law appeal as a priority. However, this is only a general rule and it is quite possible that in certain cases – such as the one anticipated by Art. 136 OJ – it may be justified to start with the request for revision.

In this case there is no reason to derogate from the rule. It would be even less justified considering that in its answer to the request for revision, the Respondent submits that the matter is not capable of revision because the same grievances would be raised as in the Public law appeal filed in parallel and they would fall within the contents of Art. 190(2) PILA. The arguments contained in the Public law appeal must therefore be examined first.

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[3] Translator's Note: OJ is the French abbreviation for the statute organizing the Federal Courts in force in 2003.
[4] Translator's Note: PCF is the French abbreviation for the Federal Law of Civil Procedure in force in 2003.

2.
2.1.
According to Art. 85(c) OJ, a Public law appeal to the Federal Tribunal is available against an arbitral award pursuant to the requirements of Art. 190 PILA.

The arbitration clause between the parties set the seat of the Arbitral Tribunal in Switzerland (in Geneva) and at least one of the parties (in this case both) did not have its domicile or its habitual residence in Switzerland at the time that the arbitration agreement was concluded. Art. 190 ff PILA are accordingly applicable (Art. 76(a) PILA) and the Parties (as to this, see judgment 4P.54/2002 of June 24, 2002, at 3) did not rule out their application in writing by choosing to exclusively apply the rules of cantonal procedure concerning arbitration (Art. 76(2) PILA). Moreover it does not matter that all parties are domiciled in the same country (Lebanon) and that the dispute relates to the performance of a work contract concerning a real-estate project in that country. Indeed, to determine the international character of an arbitration, PILA does not resort to a substantive criterion such as the involvement of the interests of international trade (see in this regard, in French law, Art. 1492 of the new Code of Civil Procedure) but rather a purely formal criterion (Bernard Dutoit, Commentaire de la Loi Fédérale du 18 décembre, 1987, 3rd Ed., n.2 and Art. 176, p. 548) so that the international character of the arbitration does not depend upon the object of the dispute (Pierre Lalive, Jean-François Poudret, and Claude Reymond, Le Droit de l'Arbitrage Interne et International en Suisse, n. 4; Art. 176 PILA; and Bernard Corboz, Le Recours au Tribunal Fédéral en Matière d'Arbitrage International, in SJ 2002 II, p.1 ff 4).

The appeal to the Federal Tribunal provided by Art. 191(1) PILA is available because the parties did not choose a cantonal court instead (Art. 191(2) PILA) and because they did not "opt-out" of the appeal (*see* Art. 192(1) PILA).

The appeal may be based on one of the grounds limitatively spelled out at Art. 190(2) PILA (ATF 128 II 50 at 1.a., p. 53; 127 III 279 at 1.a. p. 282; and 119 II 380 at 3.c., p. 283). A Public law appeal being available in this case, it must still be ascertained whether procedural requirements were complied with.

2.2
As to an appeal concerning international arbitration, the proceedings in the Federal Tribunal are governed by the provisions of the Federal Law on Judicial Organization concerning Public law appeals (Art. 191(1) second sentence, PILA). The Appellants are directly affected by the award, which orders them to pay certain amounts to the Respondent. Therefore they have a personal, present, and legally protected interest to ensure that the award was not issued in violation of the guarantees arising from Art. 190(2) PILA, which gives them standing to appeal (Art. 88 OJ).

Filed in a timely manner (Art. 89(1) OJ), in the legally prescribed format (Art. 90(1) OJ), the appeal is admissible in principle. However, the Federal Tribunal will not take into account the explanations contained in the letter that the Appellants sent on September 22, 2003, well after the time limit to appeal expired. In any event, for the reasons explained hereunder, these explanations and the two exhibits in support cannot modify the outcome of the dispute (*see* 3.3 and 3.4).

2.3
Since the procedural rules applicable are those of a Public law appeal, the Appellant must present its arguments in accordance with Art. 90(1)(b) OJ (ATF 128 III 50, at 1.c.; 127 III 279 at 1.c.; 117 II 604 at 3, p.606). Seized of a Public law appeal, the Federal Tribunal reviews only the admissible grievances

invoked and sufficiently reasoned in the appeal brief (ATF 127 I 38, at 3.c.; 127 III 279, at 1.c.; 126 III 524 at 1.c., 534 at 1.b.). Therefore, the Appellants must indicate which of the requirements of Art. 190(2) PILA are met in this case in their view. They must show, on the basis of the award under appeal and in an appropriate manner, what the violation of the principle invoked consists of in their view (ATF 127 III 279, at 1.c.). Whether this requirement is complied with will be verified during the review of the various grievances raised in the Public law appeal. This will not be done in the sequence chosen by the Appellants but in connection with the – *distinct* – consequences that upholding one of these grievances would entail. Indeed, if the argument based on the composition of the Arbitral Tribunal were upheld, the award under appeal must be annulled *ipso fact,* no matter the fate of the other arguments in the appeal. Similarly, assuming the Appellant's right to be heard was violated as they claim, the consequence would be the annulment of the award with no need to research whether A._____ was rightly or wrongly implicated in the arbitral proceedings initiated by the Respondent.

3.
The Appellants argue that the Arbitral Tribunal was irregularly composed (Art. 190(2)(a) PILA) and that their right to be heard was violated (Art. 190(2)(d) PILA) because one of the three Arbitrators – Prof. E._____ – was not consulted and did not have the opportunity to state his views as to the final text of the award, which was approved by the ICC International Court of Arbitration (hereafter "Court of Arbitration"). The review of this double-argument requires recalling how the Arbitral Tribunal proceeded to deliberate and decide the matter.

3.1
On December 23, 2002, the Chairman of the Arbitral Tribunal sent a draft award to the two other Arbitrators.

The Arbitral Tribunal met to discuss the draft on January 25, 2003. During this meeting, Arbitrator E._____ told his colleagues about his disagreement as to a number of items and that he intended to file a dissenting opinion.

Further to this meeting, the Chairman of the Arbitral Tribunal sent a new draft award to his co-arbitrators on February 12, 2003, and invited them to check the changes and the corrections made to the initial draft.

On February 14, 2003, Arbitrator D._____ faxed his comments and proposals as to the new draft to the Chairman. Arbitrator E._____ did not respond.

A third draft, taking into account Arbitrator D._____'s proposals and observations, was sent to the two other arbitrators by Chairman S._____ on February 17, 2003. E._____ did not respond.

After receiving a March 3, 2003, letter from the Court of Arbitration inviting the Arbitral Tribunal to act diligently, S._____ sent the draft final award to the Court of Arbitration, with a letter of March 5, 2003, pointing out that Arbitrator E._____ had made it known that he did not wish to sign the award and that he intended to issue a dissenting opinion. The Chairman of the Arbitral Tribunal sent the draft award to his two colleagues simultaneously. Arbitrator E._____ made no remark or objection.

On March 7, 2003, the Court of Arbitration acknowledged receipt of the Chairman's letter of March 5, 2003. It took notice of Arbitrator E._____'s wish to issue a dissenting opinion and asked him to do so by March 17, 2003. On that date, it acknowledged receipt of the dissenting opinion.

The draft final award was submitted to the Court of Arbitration at its session of March 28, 2003. The Court was informed of Arbitrator E._____'s dissenting opinion at this time. In a letter of March 31, 2003, sent to the three Arbitrators, it invited the Arbitral Tribunal to modify certain formal points of the draft award while drawing its attention to two items – the international character of the dispute and the possibility to draw A._____ as a party into the arbitral proceeding – which concerned the merits.

The corrected draft of the final award was sent to the Court of Arbitration on April 11, 2003.

On April 16, 2003, the Chairman of the Arbitral Tribunal sent the last draft award prepared by the two majority arbitrators to Arbitrator E._____ and drew his attention to the principal changes and the substantive additions made to the previous draft. He also advised him that the new draft was going to be approved by the Court of Arbitration on April 17, 2003, in principle. As of the latter date, the Court of Arbitration informed the three arbitrators that it had approved the final draft. It invited them to send three signed copies of the award and stated that Arbitrator E._____'s dissenting opinion would be communicated to the Parties with the revised final award.

In accordance with this request, the Chairman of the Arbitral Tribunal sent three signed copies of the final award dated April 22, 2003 to the Court of Arbitration, signed by him and Arbitrator D._____.

On April 23, 2003, the Secretariat of the Court of Arbitration notified the final award to Counsel for the Parties.

3.2
When the arbitral tribunal is composed of several members, deliberation is an essential step that must take place even if it is not specifically required by law. This is both a right of the parties, arising from the right to be heard according to several commentators, and a right and a duty of each arbitrator (Jean-François Poudret and Sébastien Besson, Droit Comparé de l'Arbitrage International, n. 733, p.689, with other references; Andreas Bucher, Le Nouvel Arbitrage International en Suisse, p. 112, n. 324; Markus Wirth, Commentaire Bâlois, n.9 ad. Art. 189 PILA). In Switzerland, Art. 31(1) of the Arbitration Concordate requires all arbitrators to participate in each deliberation and decisions of the arbitral tribunal. The new Swiss law of international arbitration does not specifically contain the same requirement, which however arises implicitly from Art. 189 PILA and constitutes, in any event, an unwritten rule of international public policy applicable to any international arbitration (Poudret/Besson, *op. cit.*, n. 733, p. 690; Dutoit, *op. cit.*, n. 4 ad. Art. 189 PILA, p. 588). The violations concerning the deliberation fall within the anticipations of Art 190(2)(a) PILA, which sanctions the irregular composition of the arbitral tribunal, whether as a structural deficiency or as a specific problem (Stephen V. Berti and Anton K. Schnyder, Commentaire Bâlois, n. 26 ad. Art. 190 PILA). They could also fall within Art. 190(2)(d) (violation of the rule of equal treatment or of the right to be heard) or (e) (procedural public policy) PILA.

Federal law says nothing as to the format of a deliberation. The issue is left to the agreement of the parties or to the rules they choose. Deliberation may take place by circulating drafts if the arbitrators so agree – specifically or by conclusive acts (ATF 111 Ia 336 at 3.a.; Bucher, *ibid*.; Wirth, *op. cit.*, n. 10 ad.

Art. 189 PILA). It is necessary and sufficient for each arbitrator to have the opportunity not only to state his opinion but to state his views as to those of his co-arbitrators (ATF 128 III 234 at 3.b./a.a. p. 239 and references, in particular the judgment of the French *Cour de Cassation* of January 28, 1981, published in Revue de l'Arbitrage [Rev. Arb.] 1982, p. 425 onwards; Poudret/Besson, *op. cit*., n. 734).

3.3
It appears from the chronological description of the deliberation procedure (at 3.1) that in this case the Arbitral Tribunal combined oral deliberation with a written procedure, which is usual in an international arbitration (*see* Poudret/Besson, *op. cit.*, n. 734, p. 692). Thus the three arbitrators met on January 15, 2003, at first, to discuss the first draft award prepared by the Chairman of the Arbitral Tribunal. On this occasion, Arbitrator E._____ told his colleagues that he wanted to file a dissenting opinion. Eventually the deliberation procedure continued in writing with the active involvement of Arbitrator D._____, who made proposals and observations as to the various draft awards sent by Chairman S._____ to his co-arbitrators. Arbitrator E._____ did not respond after the meeting of January 15, 2003, except to communicate his dissenting opinion to the Court of Arbitration on March 17, 2003. It is not known if, during this meeting, the three arbitrators specifically agreed to continue a written deliberation. Be this as it may, there was at least tacit acceptance of this new manner of deliberating by the co-Arbitrators. The modalities of deliberation adopted by the Arbitral Tribunal are therefore beyond criticism. It must be emphasized that the various draft awards were sent to Arbitrator E._____, who was thus given the opportunity to participate actively in the preparation of the award.

However, the Appellants argue by reference to the aforesaid French case law, that Arbitrator E._____ was not given the opportunity to make all necessary remarks as to the amendments made by the two arbitrators to the initial draft award after the observations by the Court of Arbitration. This statement is inaccurate. Indeed, as was already pointed out above, the Chairman of the Arbitral Tribunal sent the final draft award of the two majority arbitrators to Arbitrator E._____ on April 16, 2003 and drew his attention to the principal modifications and adjunctions made to the previous draft. He also informed him of the fact that the new draft was going to be approved by the Court of Arbitration on April 17, 2003. Admittedly one does not know when E._____ received the Chairman's letter with the final draft of the award and it is not impossible that he became aware of it the very day it was approved by the Court of Arbitration or even one or two days later. Assuming this, the arbitrator could have and should have reacted immediately upon receipt of this letter – and even more after the letter of the Court of Arbitration of April 17, 2003 informing him that the final draft award had been approved – if, after staying out of the deliberation process until then, he deemed it indispensible on the basis of the final draft award that the arbitrators meet a second time or if he simply wanted to share his written observations with them with a view to obtaining the suspension of the notification process of the award to the parties, or to provoke a new deliberation – either orally or in writing – of the Arbitral Tribunal and to solicit the approval of the final version of the draft award by the Court of Arbitration. Modern technology afforded him all the necessary means of communication to act immediately (phone, fax, email). Yet, the fact is that Arbitrator E._____, who had not contacted his colleagues since the meeting of January 15, 2003, did not do so even upon receipt of the two aforesaid letters, although it was normal and logical that he immediately share with the Chairman of the Arbitral Tribunal and/or the Court of Arbitration his categorical refusal to accept the deliberation process instituted by Chairman S._____ to reach a final award, if he considered he had been unduly kept away from the deliberation process by his co-arbitrators. As a matter of fact, the minority arbitrator reacted only through his letter of May 23, 2003, instead of the spontaneous reaction that could have been expected from him

under such conditions. Moreover, he did not do so upon his own initiative, but pursuant to a request from the Appellants forwarded to him by the Secretariat of the Court of Arbitration.

Under such exceptional circumstances, which make this case a special one, it is possible to conclude that the deliberation process was regular. Moreover, even if some doubt should be left in this respect, one would have to conclude that the Appellants cannot in good faith challenge the regularity of the composition of the Arbitral Tribunal simply because the arbitrator they appointed may not have been sufficiently associated with the final phase of a deliberation process from which he had heretofore voluntarily kept his distance. This being so, the appeal will be rejected to the extent that it relies on Art. 190(2)(a) PILA.

3.4
In the same context, the Appellants furthermore rely on a violation of the principle of equal treatment and of their right to be heard (Art. 190(2)(d) PILA).

It is not certain that they are entitled to raise this argument together with the one based on the irregular composition of the Arbitral Tribunal (*see* ATF 128 III 234 at 3.c. and the author quoted therein). In any event, the argument underlying the grievance is not different from that which the Appellants argued with reference to Art. 190(2)(a) PILA, so that it can be rejected without further examination on the same grounds as those justifying the rejection of the argument based on the latter provision.

4.
The Appellants argue that the Arbitral Tribunal violated their right to be heard by closing the evidentiary phase when some factual issues essential to decide the dispute had not been resolved and by refusing to take into account the subsequent expert opinions shedding light on these facts. Reviewing this grievance, which is based on Art. 190(2)(d) PILA, requires recalling at first the main steps the Arbitral Tribunal took during the evidentiary phase pursuant to the requests of the Parties to verify the quality of the work performed by the Respondent.

4.1
On December 3, 2000, *i.e.* before the request for arbitration was filed, the Court for Injunctive Relief of Metn, acting pursuant to a request by Y._____ and X._____, joined by Z._____, asked G._____ to report on the state of the works carried out by this firm. In his report of February 28, 2001, the expert reached the conclusion that the works were almost entirely finished and that only some minor repairs should be made. At the hearing of October 8-9, 2001, attended by the parties and counsel, the Arbitral Tribunal heard the expert, among other persons. On this occasion, the Defendants submitted a statement made by one of the Claimants' workers – C._____ – before a notary, mentioning some important latent defects.

In the meantime, the Defendants had sought the appointment of a new expert by claiming that some serious defects affected the work performed by the Claimant. In an order of April 28, 2001, the Court for Injunctive Relief of Metn upheld the request and entrusted Mr. B._____ with shedding light on this issue. The expert visited the site eight times and examined the work with great care. In an extremely detailed and precise report, the expert pointed to a number of defects, in particular to seepage problems and he estimated the total cost of the repair work to USD 28'902,37.

Convinced that all light had not been shed, Y._____ applied to the Court for Injunctive Relief of Metn to obtain the appointment of a third expert, whose mission would be to give a clear picture of the entire project. In an order of July 5, 2001, the Court appointed F._____ for this purpose. On December 21, 2001, it broadened the expert's task because it had not specifically referred to the works performed by the Claimant. The expert report concerning these works mentions a number of defects but does not refer to any latent defects which could endanger the stability of the building and mentions no faults or fraudulent acts. It was filed on June 17, 2002 only. Hence the Defendants required and obtained a Procedural Order of July 9, 2002, stating that the evidentiary phase, which had been closed on March 29, 2002, be reopened.

On July 26, 2002, the Arbitral Tribunal heard F._____. The expert stated that his mission was finished, yet that he was not in a position to determine the responsibilities as to the defects alleged by the Defendants and that new investigations should be undertaken for this purpose. At the end of the hearing, the Parties were given two weeks – until August 12, 2002 – to file a note of synthesis.

The Defendants filed their note of synthesis as to the testimony of expert F._____ on August 17, 2002, *i.e.* after the time limit had expired. Yet the Arbitral Tribunal agreed to include it in the file and again closed the evidentiary phase at the latter date.

On October 2, 2002, the Defendants submitted a second request to reopen the proceedings based on an expert report issued by French engineering consultant H._____ at their request. They also made a new submission with a view to obtaining that the Claimant be ordered provisionally to pay an amount of USD 1'000'000 as compensation for the serious faults found by expert H._____, as the latter had pointed out, in particular, a significant difference between the quantities invoiced by the Claimant and the measurements on the basis of surveys made by company W._____. In a Procedural Order of October 10, 2002, the Arbitral Tribunal rejected the request that the evidentiary phase be reopened, rejected expert H._____'s report, and ruled the new counterclaim inadmissible. As to the first item, it held that the Parties had been given sufficient opportunities to be heard and that there was no reason to reopen the evidentiary phase on the basis of a report issued upon the request of one of the parties in non-adversarial proceedings without intervention of the Arbitral Tribunal or of a state court.

The Defendants then applied to the Court for Injunctive Relief of Metn to extend expert F._____'s mission to the items pointed out by engineering consultant H._____. On January 8, 2003, the expert issued a second preliminary report confirming the engineering consultant's conclusions. On the basis of this document the Defendants submitted a new request to reopen the evidentiary phase on January 13, 2003. They received no answer from the Arbitral Tribunal and did not have more success by applying to the Court of Arbitration directly.

The Appellants also mention a criminal investigation that, according to them, was opened against the Respondent in Lebanon as a consequence of the discovery of these facts which they consider "new".

4.2

According to 190(2)(d) PILA, an arbitral award may be appealed when the rule of equal treatment of the parties or their right to be heard in contradictory proceedings was not complied with. This ground for appeal merely sanctions the mandatory procedural rules reserved by Art. 182(3) PILA, in particular the

right to be heard, strictly speaking, the contents of which are not different from what is contained in Art. 29(2) Cst.[5]

This provision guarantees the parties, among other rights, the right to adduce pertinent evidence, in a timely manner, in the required form. The evidence must be specific and capable of being adduced during ordinary proceedings (*see* ATF 119 II 386 at 1.b. and cases quoted).

In the field of international arbitration, particularly in ICC arbitration, the Federal Tribunal has acknowledged well before the entry into force of the Federal Law on International Private Law, the right to order a forensic investigation under certain conditions (*see* 8.a. ATF 102 Ia 493 [*unpublished*]). This Court has confirmed – several times – under the aegis of PILA that there is such a guarantee, connected to the right to adduce evidence and, more generally, to the right to be heard within the meaning of Art. 182(3) PILA (*see* judgments 4P.203 of June 10, 1996, at 2.a. and 2 [*unpublished*]; ATF 121 III 331; ATF 119 II 386 at 1.b., p. 389; 4P.23/1991 of May 25, 1992, at 5.b. and 6.c. [*unpublished*]; ATF116 II 373). The conditions to which case law subjects the right to have a forensic investigation in an international arbitration were examined in more detail by Jean-François Poudret (Expertise et Droit d'Être Etendu dans l'Arbitrage International, in: Etudes de Droit International en l'Honneur de Pierre Lalive, p. 608ff, 614-616). First, the party invoking this right must have specifically required a forensic examination. The *ad hoc* request must also have been submitted in the agreed-upon format, in a timely manner, and the parties must have accepted to advance the costs. Finally, the forensic report must address pertinent facts, namely facts that can influence the award, be capable of proving them, and appear necessary. This will be the case only if the facts are technical or require special expertise in any other way, so they cannot be proved otherwise and also if the arbitrators do not have the necessary expertise themselves. As Jean-François Poudret rightly points out (pp. 615-616) by making the pertinence of the fact to be proved a condition of the right to adduce evidence, the latter is deprived of the purely formal nature the right to be heard has as a matter of principle. In other words, the violation of the right cannot be assessed in itself, but only in connection with the solution given to the dispute. The Court seized of a request for annulment based on the rejection of a forensic analysis, must consequently determine whether the adducing of this evidence could have led to a different award, and hence address both a question of appreciation and an issue concerning the merits. However, Art. 190(2)(e) PILA prevents the State Court from reviewing the assessment of the evidence, so that the application of the law and the solution given by the arbitral tribunal may be reviewed only from the limited perspective of public policy and the Court will most often exercise only a very limited review as to the violation of the right to adduce evidence, even though the law sees a specific ground of appeal in this (in the same vein, *see* paragraph 2b of ATF 121 III 331 [*unpublished*]). Moreover the Court may rule out the evidence adduced if an assessment of the evidence in advance suggests either that it will fail for lack of conclusive evidentiary value or that it cannot modify the result of other evidence already adduced (Poudret, *op. cit.*, p. 611). This general principle (ATF 119 Ib 492, at 5b/bb and cases quoted) also applies to international and domestic arbitration and particularly as to a forensic examination (*see* aforementioned judgment 4P.23/1991 at 5b *in fine*; at 8b [*unpublished*] from ATF 102 Ia 493). When seized of a Public law appeal based on the violation of the right to be heard, the Federal Tribunal reviews the anticipated assessment of the evidence by the lower court only from the perspective of arbitrariness in the refusal to grant a request for a forensic examination (ATF 119 Ib 492 at 5b/bb, p. 505 *in fine*, 117 Ia 262 at 4b and c; 115 Ia 97 at 5b). The Court may not broaden its power of review when the same issue is raised in the framework of an appeal against an international arbitral award. To

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

the contrary, the concept of public policy, which is the decisive criterion as to the final award and in particular as to the assessment of the evidence by the arbitrator, imposes even more restraint upon this Court in reviewing the issue.

4.3
4.3.1
The Appellants argue that the Arbitral Tribunal closed the evidentiary phase when some important issues of the case had not been clarified, whether they are latent defects diminishing the value of the work or fraudulent maneuvers by the Respondent in making the measurements. According to them the Arbitral Tribunal should have given expert F._____ an additional time limit to complete his report because he had stated at the hearing of July 26, 2002, that he was not in a position to determine the responsibilities as to the defects alleged by the Defendants and that in order to do so he had to carry out some new investigations. Indeed, establishing the responsibilities as to the defects of the work was of paramount importance to decide the dispute. Indeed, assuming fraud and deceit by the Respondent had been proven, its termination of the contract would not have been justified and this would have led to the rejection of its monetary claim.

The Appellants also argue that the Arbitral Tribunal should not have rejected consultant engineer H._____'s report as it answered some of the issues left open by expert F._____. Yet they too acknowledge that the report was unilateral. According to them this is the very reason for which they had obtained the official appointment of an expert (Mr. F._____) from the Court for Injunctive Relief of Metn. The latter expert having confirmed H._____'s conclusions completely in his report of January 8, 2003, the Appellants had sought a new reopening of the evidentiary phase on January 13, 2003, a request which the Arbitral Tribunal left unanswered and that it did not even deem necessary to mention in the final award, thus violating their right to be heard again.

4.3.2
As the Respondent rightly points out in its answer, it is doubtful that the matter is capable of appeal in this respect. Indeed the Appellants do not explain why the evidence not adduced would have been such as to have a real impact on the award issued by the Arbitral Tribunal. They merely claim in the abstract the existence of latent defects and fraudulent maneuvers by the Respondent to deduce that the latter would have terminated the work contract unjustifiably, yet they do not state precisely the legal ground on which they base this deduction. Be this as it may, the Appellants' argument that the Arbitral Tribunal violated their right to adduce evidence is inconsistent.

Admittedly, expert F._____ told the Arbitral Tribunal at the hearing that determining the responsibilities as to the defects he had found would require new investigations. Yet, contrary to what the Appellants seem to want to suggest, this does not mean that the arbitrators should have given him, on their own initiative, some additional time to continue his investigations. Actually it is neither established nor even alleged that the arbitral proceedings should have been conducted *ex officio*. Hence it behooved the Appellants to seek an additional investigation on the issues left open by expert F._____. They claim to have done so specifically, yet they abstain from pointing out when, where, and how they made a request to that effect. It does not behoove the Federal Tribunal to look itself for a possible *ad hoc* request in the arbitration file. In any event, the minutes of the hearing of July 26, 2002, during which the Arbitral Tribunal heard expert F._____ in the presence of the parties do not show such a request being made.

As was stated above (at 4.1) the Arbitral Tribunal rejected the request to reopen the evidentiary phase in its Procedural Order of October 10, 2002. It recalled in the Procedural Order that the three expert reports established at the request of the Parties by experts appointed by the Court for Injunctive Relief of Metn had been submitted to the Arbitrators, that two of the three experts had been interrogated by the parties at length, and that they had exchanged several briefs concerning these expert reports. Thus, in the Arbitral Tribunal's view, the Parties had been given sufficient opportunities to be heard. As to the filing of engineering consultant H._____'s report, it was not such as to modify its opinion on this issue as it was a document established in non-adversarial proceedings upon request from one of the parties without intervention of the Arbitral Tribunal or a State Court. The Appellants do not demonstrate at all why the reasons advanced by the Arbitral Tribunal in this Procedural Order would violate their right to be heard. As to the specific refusal to take into account engineering consultant H._____'s report, such refusal was based on an anticipated assessment of the probative value of the evidence at hand, an appreciation which is beyond criticism from the limited point of view of public policy, which is the only decisive one in this respect. The pertinence of the assessment is moreover confirmed indirectly by the Appellant's very admission that they sought from the State Court the official designation of an expert with a view to confirming the conclusions of the private expert opinion because they had been sensitive to the views of the Arbitral Tribunal.

The evidentiary phase was definitely closed by the Arbitral Tribunal on October 10, 2002. According to Art. 22 of the ICC Rules of Arbitration, no brief, argument, or evidence may be introduced after the closing of the proceedings, except upon request from or with the authorization of the arbitral tribunal. Consequently, on the basis of this provision, the arbitrators cannot be criticized for refusing to take into account F._____'s additional expert opinion of January 9, 2003, or for not upholding the new request to reopen the evidentiary phase submitted by the Appellants on January 13, 2003, namely after the Chairman of the Arbitral Tribunal sent the draft award to the other two arbitrators (December 23, 2002) and merely two days before the arbitrators met to discuss the draft (January 15, 2003). It was also natural for the Arbitral Tribunal not to mention the existence of an expert opinion and of a request submitted after the proceedings were closed. The aforesaid rule doubtlessly did not prevent the Arbitral Tribunal from reopening the case a second time as it had already done for the first time on July 9, 2002, with a view to giving the Parties an opportunity to interrogate expert F._____. Yet not doing so did not imply a violation of the right to adduce evidence to the Appellant's detriment in this case. Procedural efficiency indeed requires that the adducing of evidence should not be extended indefinitely and consequently, the proceedings should not be reopened each time one of the parties announces the discovery of new evidence it deems decisive as otherwise, the arbitration could be paralyzed by abusive maneuvers (*see* Lalive/Poudret/Reymond, *op. cit.*, n.3a ad. Art. 25 CIA p. 141 *in medio*). Moreover, assuming that a party would not have been able to introduce before the closing of the proceedings a piece of evidence apt to establish a fact it had regularly stated in the arbitration proceedings, the party concerned may be able to obtain, under certain conditions, the annulment of the arbitral award by filing a request for revision based on the grounds stated at Art. 137(b) OJ (*see* judgment 4P.225/1997 of April 8, 1998, at 2b).

The review of the case thus shows that the evidentiary proceeding followed by the Arbitral Tribunal did not violate the Appellant's right to be heard.

5.
Whether the Arbitral Tribunal had the jurisdiction to issue an award against A._____ must be examined as he had not signed the work contract that included the arbitration clause and his name does not appear in the clause.

5.1
5.1.1.
The majority of the Arbitral Tribunal held the following reasoning in substance to justify extending the arbitration clause to A._____.

The arbitration is international in nature, both as to Swiss and Lebanese law, contrary to what the Defendants argue and this renders inoperative the arguments they tried to derive from the provisions of the Lebanese Code of Civil Procedure concerning domestic arbitration and from other substantive rules of Lebanese law. Consequently, case law concerning the extension of an arbitration clause to non-signatory third parties in international arbitration is applicable in this case. French case law illustrates quite well in this respect the present tendency of international arbitral practice. According to this case law, the legal basis of extension of the arbitration clause to a non-signatory third party is found in the international trade usages, pursuant to which the non-signatory's participation in the conclusion or performance of the contract is the decisive element. That such an extension is possible is, moreover, admitted by Swiss law on the basis of the real intention of the parties or, failing that, pursuant to the principle of good faith. It is in the light of the latter law that it must be sought whether A._____ could be attracted into the pending arbitral proceedings. However, in accordance with Art. 17 of the ICC Rules, the arbitral tribunal must also take *lex mercatoria* into account, resorting to the trade usages being moreover justified by the principle of autonomy of the arbitration clause, according to which the latter is not necessarily governed by the law applicable to the contract.

It is undisputed that the land on which the buildings that were the subject of the work contract of October 15, 1997, were built belonged to A._____, which transferred them to a company, Y._____, controlled by his relatives, which remained entitled to the building permit much beyond the date of conclusion of the aforesaid contract. It is also possible and even likely that A._____ gave or lent his wife and his children the funds necessary to constitute the capital of companies Y._____ and X._____. Moreover, he personalized the presentation of the building project to the public and to the press in the extreme. However, these factual elements are insufficient by themselves to enable the Claimant to join him in the arbitral proceedings. Yet it appears from the documents in the file that A._____ manifestly and voluntarily involved himself not only in the direction of the Defendants as to the management of the real-estate project, but also in the performance of the work contract in this dispute, the terms and conditions of which he could therefore not be unaware of, in particular the arbitration clause contained therein. Furthermore it is clearly established that Y._____ and X._____ companies were obviously the mere instruments of A._____'s personal activity, the latter having thus manifested his intention to be personally a party to the arbitration agreement. Moreover it would be contrary to the rules of good faith, which govern international commercial relations, that an individual constantly and repeatedly intervening in the performance of a contract could eventually seek refuge behind the legal entities signing the contract and deny being bound by the clauses it contains and in particular by the arbitration clause. Under such conditions the arbitral clause included in the contract must be extended to A._____ personally and he was consequently legitimately joined to the arbitral proceedings.

5.1.2.
On the basis of Art. 190(2)(b) PILA, the Appellants claim that the Arbitral Tribunal did not have jurisdiction to hold that A._____ is jointly liable for the payments ordered against companies Y._____ and X._____. The argument is based on the grounds summarized hereunder.

Chapter 12 PILA, concerning international arbitration, applies in this case. Thus, pursuant to Art. 178(1) PILA, the extension to A._____ personally of a formally valid arbitration clause should also meet the formal requirements of this provision. Yet this was not the case because the arbitration file contains no document referring directly, indirectly, or by reference to such an extension. Consequently it is not valid as to the prescribed form already.

As to the merits, the opportunity to extend the arbitration clause to A._____ presupposed that the extension would meet the requirements of one of the three laws considered at Art. 178(2) PILA. In this case, only two laws came into consideration, namely Lebanese law as the law chosen by the parties and applicable to the contract (*lex causae*) and Swiss law as the law of the seat of the arbitration (*lex fori*). Yet instead of applying either one of these two laws, the Arbitral Tribunal chose to rely on the case law concerning the extension of the arbitration clause to a non-signatory third party even though it relies on factual circumstances totally alien to the ones characterizing the case at hand. If it had applied Swiss or Lebanese law, the Arbitral Tribunal would necessarily have reached the conclusion that there was no valid arbitration agreement between the Claimant and A._____, which would have led it to refuse to extend to this individual the arbitration clause inserted in the work contract in dispute.

5.1.3
In its answer to the appeal, the Respondent starts by pointing out a number of contradictions in the Appellant's arguments. Recalling that an arbitration agreement may bind even non-signatories, it then challenges the existence of the formal error alleged by the Appellants and argues that the arbitration clause included in the work contract of October 15, 1997, is formally valid under Art. 178(1) PILA. This being done, the Respondent seeks to refute the Appellant's argument as to the substantive validity of the arbitration clause. It emphasizes in this respect that the argument rests on the provisions of procedural and substantive Lebanese law, the application of which was however rightly excluded by the Arbitral Tribunal and that the Appellants do not address at all the reasons advanced by the majority arbitrators as to the subjective scope of the arbitration clause in the Lebanese law of international arbitration. The matter would therefore not be capable of appeal in this respect according to the Respondent,[6] which furthermore considers that the Arbitral Tribunal was entitled to interpret Lebanese law in the light of the French case law as to the issue of extending an arbitration clause to a non-signatory, in view of the similarity of the Lebanese and French texts governing international arbitration.

The Respondent moreover disputes that the Arbitral Tribunal disregarded Swiss case law concerning Art. 178(2) PILA. Finally, as to the Arbitral Tribunal's conclusion that A._____ had manifested his intention to be party to the arbitration agreement, the Respondent points out that the arbitrators did not reach it by way of a normative interpretation process but rather by specifically reconstructing the intention manifested by the parties on the basis of the clues revealed by the evidentiary process. According to the Respondent, this is an issue of fact, which the Federal Tribunal reviews only from the point of view of its compatibility with public policy and the solution of which could not be challenged by the criticism of an appellate nature that the Appellants submit as to this issue.

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[6] Translator's Note: There is a typo in the French original, which mistakenly refers to the Appellant.

5.2.
5.2.1
A._____ argues that the Arbitral Tribunal was wrong to accept jurisdiction as to the submissions against him. He therefore raises the ground for appeal contained at Art. 190(2)(b) PILA. This is indeed the ground corresponding to the Appellant's argument. Indeed when they determine whether they have jurisdiction to decide the dispute submitted to them the arbitrators must, among other things, determine the subjective scope of the arbitration agreement. It behooves them in particular to determine which other parties are bound by the agreement (ATF 128 III 50, at 2b/aa; ATF 117 II 94, at 5b, p. 98 and the authors quoted).

5.2.2
Seized for lack of jurisdiction, the Federal Tribunal freely reviews the issues – including the preliminary issues – which determine the jurisdiction of the arbitral tribunal or the lack thereof. However, the Court reviews the facts on which the award under appeal is based – even when jurisdiction is at issue – only when one of the grievances mentioned at 190(2) PILA is raised against such factual findings or when some new facts or new evidence (see Art. 95 OJ) are exceptionally taken into account in the framework of a Public law appeal (ATF128 III 50 at 2a and the cases quoted).

In this case, the Appellants did not submit – in a manner meeting the requirements of Art. 90(1)(b) OJ – a grievance based on Art. 190(2) in connection with the factual findings of the Arbitral Tribunal. They set forth their own version of the facts but it is not admissible to do so in a Public law appeal. In the absence of a sufficiently reasoned argument, one must remain with the factual findings of the award under appeal.

5.3
The work contract concluded by Y._____ and X._____ with Z._____ on October 15, 1997, contains an arbitration agreement setting the seat of the arbitration in Switzerland. It is not disputed and it would be impossible to dispute that the arbitration agreement meets the formal requirement of Art. 178(1) PILA, a provision applicable to any arbitration seated in Switzerland within the meaning of Art. 176 PILA, as this case is (*see* above, at 2.1). Thus the arbitration clause at issue is undoubtedly binding on the three companies that signed the work contract in dispute. The only – delicate – issue is whether A._____, who did not sign the contract and is not mentioned therein as a party, is also bound by the arbitration agreement.

5.3.1.
According to a current of doctrinal thinking which could be considered formalistic and the principal supporter of which is Professor Poudret, one should doubtlessly conclude that Defendant A._____ was not regularly brought into the arbitral proceedings. According to this writer, the intention of all the parties to submit to arbitration – including the party to which one wishes to extend the arbitration clause – must result from one or several documents, so that evidence by unwritten conclusive acts, such as the mere performance of a contract, is not sufficient and only some exceptional circumstances constituting an abuse of rights could exceptionally justify departing from the formal requirement of 178(1) PILA. It is only when this reduced requirement – the signature of the third party to which one wishes to extend the arbitration agreement is no longer necessary, though it was under the aegis of the Concordate – is fulfilled that the text(s) must be interpreted to determine if all parties really intended the third party, who did not sign the arbitration agreement, to be bound by it nonetheless (Jean-François Poudret,

l'Extension de la Clause d'Arbitrage: Approches Française et Suisse [quoted hereafter as "l'Extension"] in Journal du Droit International [JDI] 1995, p. 893§§, 904; *see also* Poudret/Besson, *op. cit.*, at 258, p. 233, at 260, p.236 and at 264, p. 239; *see also* the authors mentioned by Poudret/Besson, *op. cit.*, p. 233 in footnote 496). If one were to follow this opinion it would lead to the finding that there is no text at all from which one could infer the existence of a common intention of Z._____ and A._____ to arbitrate or, at the very least, to the advanced acceptance by the latter of his possible involvement in arbitral proceedings initiated by the aforesaid company.

However it is not at all certain that Professor Jean-François Poudret's opinion could be deemed a majority view, nor that it corresponds to the present case law of the Federal Tribunal in this respect, which is not suffused with formalism, but rather displays a liberal approach by the Federal Tribunal of the conditions for validity of the arbitration agreement in international arbitration (*see, among others*, Mark Blessing, Introduction to Arbitration – Swiss and International Perspectives, n. 504; *see also* note by Philippe Schweizer, in RSDIE 2002, p. 587).

Thus, in a number of situations, such as the assignment of a claim, the simple or joint assumption of an obligation or the transfer of a contractual relationship, the Federal Tribunal has long admitted that an arbitration agreement may bind even some non-signatories not even mentioned in it (*see* already ATF 120 II 155, at 3b/bb, p. 163 and [*more recent*] ATF 128 III 50, at 2b/aa; *see also* judgment 4P.126/2001 of December 18, 2001, at 2e/bb, published in the Bulletin de l'Association Suisse de l'Arbitrage [ASA] 2002 p. 482 §§ and in RSDIE 2002 p. 543 §§; and the judgment 4P.124/2001 of August 7, 2001, at 2c and d). The liberalism of federal case law considering the form of the arbitration agreement in international arbitration also appears in the flexibility with which case law addresses the issue of the arbitration clause by reference (*see* the aforementioned judgment 4P.126/2001, *ibid.*). It is even clearer in two recent decisions in which it was held that by a mere procedural step, a party adhered to an arbitration clause (judgment 4C.40/2003 of May 19, 2003, at 4; judgment 4P.230/2000 of February 7, 2001, at 2, translated in RSDIE 2002 p. 585 §§). Moreover, it has already been decided in the same perspective and more generally that depending on the circumstances, a given behavior may substitute for compliance with a formal requirement pursuant to the rules of good faith (judgment ATF 121 III 38 at 3, p. 45, confirmed by the aforementioned judgment 4P.124/2001, at 2c).

In the light of this federal case law, there is accordingly no reason to impose any too strict requirements as to the formal validity of the extension of an arbitration clause to a third party. Admittedly it is not possible to disregard the formal requirement at Art. 178(1) PILA. Thus, assuming that one of the parties to an arbitration agreement entered into verbally starts arbitration proceedings against the other in an arbitral tribunal sitting in Switzerland and that the arbitral tribunal rejects the jurisdictional defense raised only by the third party drawn into the arbitration, the latter would be able to argue successfully in a Public law appeal based on Art. 190(2)(b) PILA – a possible abuse of rights being reserved – that he could not be validly drawn into the arbitration proceedings because the arbitration agreement did not meet the formal requirement of Art. 178(1) PILA. However this formal requirement applies only to the arbitration agreement itself, namely to the agreement (arbitration clause or arbitration agreement) by which the initial parties reciprocally stated their concurring intention to submit to arbitration. As to the issue of the subjective scope of an arbitration agreement formally valid under Art. 178(1) PILA – the parties bound by the agreement must be determined as well as whether or not one or several third parties not designated there would nonetheless fall within its scope *ratione personae,* as the case may be – this is an issue as to the merits and it must consequently be resolved in the light of Art. 178(2) PILA (*see in this respect*, Blessing, *ibid*.).

Applied to the case at hand, these principles lead to the rejection of the argument that A._____ was not validly drawn into the arbitral proceedings for lack of a formal manifestation within the meaning of Art 178(1) PILA of his intention to submit to the arbitration agreement binding Z._____ to companies Y._____ and X._____.

5.3.2
According to Art. 178(2) PILA, the arbitration agreement is valid when it meets the substantive criteria of either the law chosen by the parties – the law governing the dispute and in particular the law applicable to the main contract – or pursuant to Swiss law. The provision thus defines three alternate connections *in favorem validitatis*, namely the law chosen by the parties, the *lex causae*, and the law of the seat of the arbitration. There is no hierarchy between these three and it is sufficient for the agreement to be valid in the light of one of the three laws (*see aforesaid judgment* 4P.124/2001, at 2c; Dutoit, *op. cit.*, at 7; ad. Art. 178 PILA).

In this case only two possible connecting factors would have to be considered according to the Appellant. Swiss law, as the law of the seat of the arbitration and Lebanese law, as the law chosen by the parties to govern the arbitration clause (*see* Art. 67.1 of the work contract), the latter law being applicable to the contract (*see* Art. 5.1(b) of the contract in dispute) and applicable according to paragraph 53 of the Terms of Reference. Actually, this paragraph of the Terms of Reference shows that the parties extended the scope of the applicable law by inviting the Arbitral Tribunal to take into account the "relevant trade usages" as well, in accordance with Art. 17 of the ICC Rules of Arbitration.

To justify extending the arbitration clause to A._____, the Arbitral Tribunal referred in particular to the Lebanese law of international arbitration, which it interpreted in the light of *lex mercatoria* (*see* award under appeal, paragraph 246). In the light of the French case law which, according to the Arbitral Tribunal, illustrates the present tendency of international arbitration practice quite well, it recalled that according to this case law, the legal basis for extending the arbitration clause to a non-signatory third party is found in the usages of international trade, which see in the participation of the non-signatory to the conclusion or to the performance of the contract the decisive criterion to decide to extend the arbitration clause to the latter (*see* award under appeal, paragraphs 236 to 242). Reviewing then the circumstances of the case at hand pursuant to this criterion, it found that A._____ had involved himself totally in the performance of the work contract and deduced in accordance with the arbitration case law quoted that by so doing he had manifested his intention to become a party to the arbitration agreement (*see* award under appeal, paragraphs 253 to 254).

As the Respondent rightly points out in its answer, the Appellant's arguments do not address the reasons of the Arbitral Tribunal to justify extending the arbitration clause to A._____ so that they prove to be inconsistent. Indeed, the Appellant does not criticize at all the interpretation of the Lebanese law of international arbitration by the Arbitral Tribunal in the light of the principles deduced from *lex mercatoria*. Neither does he argue that the majority arbitrators wrongly drew a parallel between this law and the corresponding French law (on the similarities between the two laws *see* Marie Sfeir-Slim, Le Nouveau Droit Libanais de l'Arbitrage a Dix Ans, in Rev. Arb. 1993, p. 543 ff) and does not challenge its recourse to the relevant trade usages. He merely sets forth the principles governing the conclusion of contracts in Lebanese and Swiss law even though the Arbitral Tribunal specifically ruled them out (as to domestic Lebanese law) or implicitly (as to Swiss law) without the submission of a duly reasoned argument in this respect. Moreover the Appellant does not submit any admissible grievance as to the

factual findings of the Arbitral Tribunal regarding his strong involvement in the performance of the work contract in dispute. As it is presented, his criticism in connection with his involvement in the arbitral proceedings is therefore unfounded.

This being so, one may dispense with examining whether it is rightly or wrongly that the Arbitral Tribunal held that the extension of the arbitration clause to A._____ was also consistent with Swiss law.

5.4

In light of the foregoing, it must be concluded that the Arbitral Tribunal did not wrongly accept jurisdiction as to A._____.

6

The aforesaid reasons lead to this appeal being rejected completely. Consequently, the Appellants shall pay the costs of the federal proceedings (Art. 156(1) and (7) OJ) and compensate the Respondent for the federal proceedings (Art. 159(1) and (5) OJ).

For these reasons, the Federal Tribunal pronounces:

1.

The appeal is rejected.

2.

The judicial costs, set at CHF 17'000, shall be borne by the Appellants severally.

3.

The Appellants shall severally pay to the Respondent an amount of CHF 19'000 for the federal judicial proceedings.

4.

This judgment shall be notified in writing to the representatives of the parties and to the Chairman of the ICC Arbitral Tribunal.

Lausanne, October 16, 2003.

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

The Presiding Judge: The Clerk:

Corboz Carruzzo