4A_50/2012[1]

Judgment of October 16, 2012

First Civil Law Court

Federal Judge Klett (Mrs.), Presiding
Federal Judge Corboz,
Federal Judge Rottenberg Liatowitsch (Mrs.),
Federal Judge Kolly,
Federal Judge von Werdt,
Clerk of the Court: Hurni.

X._____ Lda., acting through Dr. M._____ Insolvency Administrator,
Represented by Prof. Dr. Felix Dasser,
Appellant,

v.

Y._____ Ltd.,
Represented by Mr. Saverio Lembo, Dr. Joëlle Becker and Mr. Daniel Hochstrasser and Mrs. Simone Fuchs,
Respondent,

Facts:

A.
A.a
X._____ Lda. (The Appellant) is a company under Portuguese law based in Q._____ (Portugal). It was created on July 2, 2008, as a joint venture of the German companies A._____ AG, A._____ GmbH and B._____ Group AG. Y._____ Ltd. (the Respondent) is a company under Chinese law, based in P._____ (China).

A.b
The dispute between the Parties refers to a Sales and Purchase Agreement (SPA) of January 16, 2008, between the Respondent and A._____ AG. According to the

[1] Translator's note: Quote as X._____ Lda. *v* Y._____ Ltf., 4A_50/2012. The original decision is in German. The text is available on the website of the Federal Tribunal www.bger.ch

agreement, the Respondent undertook to deliver multicrystaline silicon wafers to A._____ AG over five years at contractually agreed upon prices.

Art. 18 of the contract contains an arbitration clause worded as follows:

> *Article 18. Disputes and Applicable Law*
>
> *18.1 Any dispute, controversy or difference which may arise between the parties out of or in relation to or in connection with this Agreement or for the breach thereof shall be amicably settled by consultation between the parties.*
>
> *18.2 In case any such dispute, controversy or difference cannot be solved amicably, it shall be finally and exclusively settled under the Rules of Arbitration of the International Chamber of Commerce, Paris ("Rules") by three arbitrators appointed in accordance with the said Rules without recourse to the courts of any jurisdiction. ... Arbitration shall take place in Geneva (Switzerland). ...*[2]

A.c
On December 8, 2008, A._____ AG transferred the contract to the Appellant. A dispute arose between the Parties as to the appropriate fulfillment of the contract in the summer of 2009.

On July 31, 2009, the Appellant declared itself insolvent. On August 12, 2009, the Commercial Court of Vila Nova de Gaia (Portugal) opened the insolvency proceedings of the Appellant and appointed Dr. M._____ as Insolvency Administrator.

On November 16, 2009, the General Meeting of the creditors of the Appellant decided to liquidate the insolvent entity.

In a letter of November 17, 2009, the receiver communicated the following to the Respondent:

> *(...) upon the insolvency declaration, the mandatory applicable law to the Agreement is Portuguese law, particularly the PlC [Portuguese Insolvency Code]. Under section 102 of the PlC, the Agreement must be qualified as a "current agreement". The insolvent estate of X._____ Lda. has identified breaches in Y._____ Ltd.'s delivery obligations under the Agreement. Acting as the Insolvency Administrator of X._____ Lda. and within the legal powers of my function, I hereby formally refuse compliance with the outstanding contractual obligations under the Agreement grounded on sections 102(1) and*

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

> *103(1) of the PlC. Conversely, for all due and legal purposes, under the applicable Portuguese Law, the Agreement shall be deemed terminated. In view of the above, based on sections 102(1) and 103(1) (a) of PlC, I hereby request Y._____ Ltd. to return at once the total down-payment amount it has received under the Agreement, in an amount of USD 41.797.000.00 (...) to the insolvent estate of X._____ Lda...*[3]

On July 10, 2010, the Appellant called in the bank guarantees the Respondent had provided through Bank of China.

On July 26, 2010, the Respondent initiated legal proceedings before the Chinese Court, seeking a provisional order prohibiting the Bank of China from paying the guarantees. An order was issued by the Chinese Courts, temporarily suspending the obligation to pay on the guarantees.

B.

B.a

On August 6, 2010, the Respondent initiated arbitration proceedings against the Appellant in the International Chamber of Commerce (ICC). The Respondent argued that the Appellant had breached its duties under the SPA, unlawfully called in the guarantees, and it sought a finding of the alleged breached of contract by the Appellant as well as a determination of the amount of the damages owed. In its answer of October 15, 2010, the Appellant challenged the jurisdiction of the Arbitral Tribunal to decide the dispute between the Parties, as a consequence of the insolvency proceedings it was the subject of in Portugal.

On July 7, 2011, the Arbitral Tribunal held a hearing on its jurisdiction. During the hearing the Arbitral Tribunal heard, among others, Prof. N._____ (presented by the Appellant) and Prof. O._____ (presented by the Respondent) as experts on Portuguese law.

B.b

In a partial award of November 23, 2011, the Arbitral Tribunal held that it had jurisdiction to decide the dispute at hand (§ 2 of the holding) and postponed a decision on costs until the award on the merits (§ 3 of the holding).

C.

In a civil law appeal, the Appellant submits that the Federal Tribunal should annul § 2 of the holding of the award of November 23, 2011, and that arbitral jurisdiction should be denied. Alternatively, the case should be sent back to the Arbitral Tribunal to issue a

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

decision of inadmissibility for lack of jurisdiction. Furthermore § 3 of the holding of the arbitral award of November 23, 2011, should be annulled and the Arbitral Tribunal invited to award costs. Under the caption "procedural submissions," the Appellant then submits that, in any case, a legal opinion should be obtained as to the impact of Art. 87 of the Portuguese Insolvency Law with regard to the legal capacity of an insolvent party to be a party to an arbitration.

The Respondent submits in its brief that the appeal should be rejected. The Arbitral Tribunal waived the opportunity to file a brief. The Parties exchanged a reply and a rejoinder. The file of the arbitral proceedings was submitted to the Court.

Reasons:

1.
According to Art. 54(1) BGG,[4] the Federal Tribunal issues its decision in an official language,[5] as a rule in the language of the decision under appeal. When the decision was issued in another language, the Federal Tribunal resorts to the official language chosen by the parties. The decision under appeal is in English. As this is not an official language and the Parties used German before the Federal Tribunal, the judgment of the Federal Tribunal shall be issued in German.

2.
In the field of international arbitration a civil law appeal is allowed under the requirements of Art. 190-192 PILA[6] (SR 291) (Art. 77 (1) (a) BGG).

2.1
The seat of the arbitral tribunal is in Geneva. Both Parties were based outside Switzerland at the relevant time. As the Parties did not opt out of the provisions of Chapter 12 PILA in writing, they are applicable (Art. 176 (1) and (2) PILA).

2.2
The award under appeal is a preliminary award on jurisdiction. According to Art. 190 (3) PILA, it may be appealed on the grounds stated at Art. 190 (2) (a) and (b) PILA by way of a civil law appeal (BGE 130 III 76 at 3.1.3 p. 79, at 3.2.1 p. 79 ff, at 4 p. 82 ff).

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[4] Translator's note: BGG is the German abbreviation for the Federal Statute of June 17, 2005, organizing the Federal Tribunal, RS 173 110.

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

[6] 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.

2.3
A civil law appeal within the meaning of Art. 77 (1) BGG may, in principle, seek only the annulment of the decision under appeal (see Art. 77 (2) BGG, ruling out the applicability of Art. 107 (2) BGG, to the extent that the latter empowers the Federal Tribunal to decide the matter itself). However, to the extent that the dispute involves the jurisdiction of the arbitral tribunal there is an exception to the effect that the Federal Tribunal may itself assess the jurisdiction of the arbitral tribunal or the lack thereof (BGE 136 III 605[7] at 3.3.4 p. 616 with references).

2.4
According to Art. 77 (3) BGG the Federal Tribunal addresses only the grievances which are raised and reasoned in the appeal; this corresponds to the duty to submit reasoned arguments contained in Art. 106 (2) BGG as to the violation of constitutional rights and cantonal or intercantonal law (BGE 134 III 186 at 5 p. 187 with reference). Criticism of an appellate nature is not allowed.

To meet these requirements, it is of particular importance to address the reasons of the decision under appeal in the brief and to show in detail where there is a violation of the law. The Appellant may not merely reiterate the legal arguments submitted in the arbitral proceeding, he must point out in his critical argument the reasons of the lower court he alleges are legally erroneous (see BGE 134 II 244 at 2.1 p. 245 ff).

2.5
The Appellant disregards these requirements in part to the extent that over several pages of its brief (p. 9-17) he merely submits arguments as to Portuguese insolvency law unconnected with the reasons in the award and thus essentially reinforces the arguments its submitted in the arbitral proceedings without specifically addressing the award under appeal. This does not need to be addressed any further.

3.
The Appellant argues that the Arbitral Tribunal erred in finding that it has jurisdiction to decide the matter. As a consequence of the insolvency proceedings begun in Portugal, the Appellant no longer has the capacity to be a party to an arbitration. This would result from Art. 87 (1) of the Portuguese Insolvency Law (p-IL). According to the Appellant, the Arbitral Tribunal interpreted the Portuguese Insolvency Law incorrectly, disregarded the convincing explanations given by the Appellant's legal experts, and wrongly denied that the Appellant lost the standing to act as a party in an arbitration.

[7] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/independence-and-impartiality-of-a-party-appointed-arbitrator-in/

3.1
In the reasons of the award under appeal, the Arbitral Tribunal stated that its jurisdiction depended upon the validity of the arbitration clause and upon whether or not the Parties had the capacity to participate in an arbitration. These issues arose in the case at hand, especially with regard to the Appellant, as it had been declared bankrupt in Portugal.

3.1.1
As to the issue of the validity of the arbitration clause, the Arbitral Tribunal referred to Art. 178 (2) PILA. According to that provision, the arbitration clause is valid when it corresponds either to the law chosen by the parties, to the law applicable to the dispute and in particular to the main contract or to Swiss law (rule of *favor validitatis*). The Arbitral Tribunal mentioned that, according to BGE 117 II 94, the arbitration clause survives bankruptcy according to Swiss law and binds the insolvency administrator. Therefore, according to Swiss law, bankruptcy does not result in the invalidity of the arbitration clause as to the insolvent Appellant. It must therefore be assumed that the arbitration clause is valid.

3.1.2
With regard to the issue in dispute as to the legal capacity, the Arbitral Tribunal then determined applicable law. It came to the conclusion that the legal capacity and the standing to act of a legal person are governed by the law of the state according to which the legal person is organized (incorporated). Accordingly the legal capacity of the Appellant is to be determined by Portuguese law.

The Arbitral Tribunal was thus faced with the issue of the influence of the Portuguese bankruptcy upon the legal capacity of the Appellant.

3.1.2.1 The Arbitral Tribunal stated in this respect that, according to the Appellant's legal experts, a Portuguese insolvent no longer had the capacity to participate in an arbitration as a party. According to the views of the Respondent's legal experts however, the opening of the bankruptcy would not lead to the incapacity of the insolvent according to Portuguese law. It could not be considered as incapable of participating in an arbitration.

3.1.2.2 According to the award under Appellant, the appeal deducts its incapacity to be a party from Art. 87 of the Portuguese Insolvency Law (p-IL). This is under the caption "*Convenções arbitrais*" and reads as follows:

> *Fica suspensa a eficácia das convenções arbitrais em que o insolvente seja parte, respeitantes a litígios cujo resultado possa influenciar o valor da massa, sem prejuízo do disposto em tratados internacionais aplicáveis.*

> *Os processos pendentes à data da declaração de insolvência prosseguirão porém os seus termos, sem prejuízo, se for o caso, do disposto no n.º 3 do artigo 85.º e no n.º 3 do artigo 128.º*

The following English translation is in the award under appeal:

> *Without prejudice to provisions contained in applicable international treaties, the efficacy of arbitral agreements relating to disputes that may potentially affect the value of the insolvency estate and to which the insolvent is party shall be suspended.*
> *Procedures that are pending at the moment of the declaration of the insolvency shall continue, without prejudice to the provisions set forth in Article 85(3) and of the Article 128(3) if applicable.*[8]

Freely translated into German:

[German translation omitted]

According to the Appellant, the suspension of the arbitration clause according to Art. 87 (1) p-IL should be understood as "nullity or termination" of the validity of the arbitration clause. This would cause the legal incapacity of the bankrupt. According to the Appellant's legal experts, the drafters of the Portuguese law favored the concept of "invalidity" as opposed to that of "nullity" or "termination" so that arbitration clauses could again acquire full validity as soon as the insolvency was terminated ("to allow the agreements to return to full effect, if the insolvency situation ceases").[9]

According to the Arbitral Tribunal this interpretation finds little support except in the Appellant's legal opinion. To the extent that this could be ascertained the Portuguese Courts had not yet issued a decision interpreting Art. 87 p-IL.

3.1.2.3 The Arbitral Tribunal then considered that neither of the two legal experts was in a position to quote case law and legal writing supporting the thesis that Art. 87 p-IL would influence the legal capacity of the bankrupt or leave it untouched. There were some opinions among legal writers mentioning Art. 87 (1) p-IL in the context of legal capacity, but other legal writers took the view that Art. 87 (1) p-IL referred only to the validity of the arbitration clause or to its scope *ratione personae*. Moreover, the legal writers mentioning Art. 87 (1) p-IL in the context of the legal capacity did not explain in detail what specific consequences the insolvency would have as to legal capacity. For instance, one author merely mentioned that arbitration clauses would be suspended. Another writer explained that the insolvent party was limited in its capacity to act,

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

which would not lead to a legal incapacity technically speaking. Yet another writer explains that the insolvent entity would not be completely incapable.

According to the view of the Arbitral Tribunal neither of the positions taken by the party experts nor the legal materials submitted by the Parties provided a persuasive answer as to whether Art. 87 (1) p-IL relates to the legal capacity of a bankrupt entity and could suppresses the Appellant's capacity to be a party to an arbitration.

3.1.2.4 Starting from this, the Arbitral Tribunal considered that Art. 87 p-IL contains no explicit reference to the legal capacity or to the influence of the insolvency upon the legal capacity. Instead, Art. 87 p-IL refers to the "efficacy of arbitral agreements,"[10] rather than to the validity of arbitration clauses. Furthermore, Art. 87 (2) p-IL provides that a person or a legal entity as to which insolvency issue could arise when an arbitral proceeding is pending would keep its standing as a party during the arbitration. According to Art. 85 (1) p-IL an insolvent entity would not lose the capacity to be a party before the State Courts. According to Art. 224 and 226 p-IL the insolvent company could continue its business under the supervision of the Insolvency Administrator and where the law limits the capacity of the insolvent company to act, the Insolvency Administrator could do so on its behalf (Art. 81 (4) and (5) p-IL). According to the Arbitral Tribunal, all this indicates that an insolvent entity would retain its legal capacity under Portuguese law.

Finally, the explanations of the Appellant's legal experts, according to whom the Portuguese drafters of Art. 87 (1) p-IL preferred the concept of "inefficacy" to that of "nullity" or "termination", specifically "to allow the agreements to return to full effect, if the insolvency situation ceases,"[11] reinforce the Arbitral Tribunal's view that Art. 87 (1) p-IL addresses one aspect of the validity of the arbitration clause rather than one aspect of the legal capacity of the insolvent.

3.1.2.5 In summary, the Arbitral Tribunal came to the conclusion that Art. 87 (1) p-IL relates to the validity of the arbitration clause towards a bankrupt and not to its legal capacity. This results first from the wording of the provision which refers to "efficacy of arbitral agreements"[12] and not to "capacity."[13] Secondly, the reservation of treaties in Art. 87 (1) p-IL would argue against a reference to legal capacity in the provision. Furthermore there are no indications that the Portuguese legislator would have wanted to defer the issue of the legal capacity of Portuguese companies to treaties as this is an area in which, as a rule, national legislators want to control with their own provisions. Thirdly, it was not clear to the Arbitral Tribunal how an alleged loss of the legal

[10] Translator's note: In English in the original text
[11] Translator's note: In English in the original text
[12] Translator's note: In English in the original text
[13] Translator's note: In English in the original text

capacity of an insolvent party could be dependent upon the nature of the dispute. In fact, in the Portuguese literature, it was stated that legal capacity is an absolute concept.

Finally the Arbitral Tribunal held that contrary to the Appellant's view, there is not a single author in Portuguese literature holding the view that a Portuguese bankrupt would be legally incapable.

According to the Arbitral Tribunal the Appellant is therefore a legally capable person pursuant to Portuguese law, which as such is capable to be a party to arbitration proceedings seated in Switzerland.

3.1.2.6 The Arbitral Tribunal supplemented these conclusions with some observations as to the *Vivendi* judgment of the Federal Tribunal (judgment 4A_428/2008[14] of March 31, 2009, at 3.1, publ. in: ASA Bulletin 1/2010 p. 104 ff) on which the Appellant essentially based its argument that it had no standing as a party. The Arbitral Tribunal pointed out that the provision in dispute in the *Vivendi* case (Art. 142 of the Polish Bankruptcy and Rehabilitation Law) addressed one aspect of the legal capacity of a Polish insolvent according to the views of Polish law professors. The Arbitral Tribunal stated that Art. 87 of the Portuguese Insolvency Law was therefore different from the Polish provision as to this very issue because it did not address the legal capacity of an insolvent participating in arbitral proceedings but the validity of the arbitration clause. According to the Arbitral Tribunal, the *Vivendi* judgment thus has no significance for the case at hand.

3.2.
The capacity to conclude an arbitration agreement and to appear as a party in an arbitration (the so-called subjective arbitral capacity, also arbitral capacity *ratione personae*; *arbitrabilité subjective*) is to be examined according to Art. 190 (2) (b) PILA in the context of a jurisdictional appeal (BGE 117 II 94 at 5b p. 98 with reference; judgment 4A_428/2008[15] of March 31, 2009, at 3.1, publ. in: ASA Bulletin 1/2010 p. 104 ff; 4P.126/1992of October 13,1992, at. 4a, publ. in: SZIER 1994, p. 131 ff).The Federal Tribunal exercises free judicial review as to the legal issues of a jurisdictional appeal, including the preliminary issues of substantive law which are relevant to the decision as to jurisdiction (leading case: BGE 117 II 94 at 5a p. 97; also see BGE 129 III 727 at 5.2.2 p. 733; 128 III 50 at 2a p. 54; 119 II 380 at 3c p. 383; each references).

Should such preliminary issues have to be decided according to foreign law, the Federal Tribunal also exercises free judicial review with full power in the framework of a

[14] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/effect-of-foreign-bankruptcy-on-icc-arbitration-in-switzerland-c/

[15] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/effect-of-foreign-bankruptcy-on-icc-arbitration-in-switzerland-c/

jurisdictional appeal as to how the foreign law was applied. In this respect, the Federal Tribunal follows the clearly dominant view in the applicable foreign legal order and in case of controversy between case law and legal writing, the Court follows the case law of the highest court (judgment 4A_428/2008[16] of March 31, 2009, at 3.1, publ. in: ASA Bulletin 1/2010 p. 104 ff; 4P.137/2002 of July 4, 2003, at 7.2.1).

3.3

3.3.1

Objective arbitrability (Art. 177 (1) PILA) and subjective arbitrability in an international arbitration seated in Switzerland are determined according to Chapter 12 PILA (see PIERRE-YVES TSCHANZ, in: Commentaire romand, 2011, nr 60 to Art. 178 PILA). However Art. 177 (2) PILA features a specific rule as to subjective arbitrability with regard to legal entities controlled or organized by the State. Chapter 12 PILA contains no specific provision as to the issue in dispute as to the standing of non-state parties. According to the case law of the Federal Tribunal, the general procedural rule applies, according to which the capacity to act as a party in an arbitration depends upon the substantial preliminary legal issue of the legal capacity (judgment 4A_428/2008[17] of March 31, 2009, at 3.2, publ. in: ASA Bulletin 1/2010 p. 104 ff with references).

3.3.2

According to case law of the Federal Tribunal, the legal capacity of a party in an international arbitration seated in Switzerland is assessed with a view to the legal status of the person or of the legal entity, on the basis of the applicable law pursuant to Art. 33 (f) PILA (for persons) or Art. 154, 155 (c) PILA (for legal entities) (see judgment 4A_428/2008[18] of March 31, 2009, at 3.2, publ. in: ASA Bulletin 1/2010 p. 104 ff with references).

Some authors object to the reference to provisions outside Chapter 12 PILA, in that such a reference calls into question the autonomy of chapter 12 as a "law within the law" or an "Arbitration Act" [19] (GEORG NÄGELI, Die Auswirkungen der Konkurserklärung auf ein hängiges Schiedsverfahren, in: Jusletter 31. August 2009, Rz. 38 f.; AEBI/FREY, Impact of Bankruptcy on International Arbitration Proceedings, ASA Bulletin 1/2010, p. 118; KAUFMANN-KOHLER/LÉVY/ SACCO, The Survival of the Arbitration Agreement and Arbitration Proceedings in Cases of Cross-Border Insolvency: An Analysis from the Swiss Perspective, Les Cahiers de l'Arbitrage,

[16] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/effect-of-foreign-bankruptcy-on-icc-arbitration-in-switzerland-c/

[17] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/effect-of-foreign-bankruptcy-on-icc-arbitration-in-switzerland-c/

[18] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/effect-of-foreign-bankruptcy-on-icc-arbitration-in-switzerland-c/

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

The Paris Journal of International Arbitration, 2/2010, S. 377; MICHAEL GÜNTER, Internationale Schiedsgerichtsbarkeit und Insolvenz, 2011, N. 370; kritisch auch FELIX DASSER, in: Oberhammer [Hrsg.], Kurzkommentar ZPO, 2010, N. 22 vor Art. 353 - 399 ZPO). The law applicable to the legal capacity would instead be determined according to the arbitral conflict rule in Art. 187 (1) PILA (NÄGELI, a.a.O., Rz. 39; BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 2nd § 2010, Rz. 328). However this view does not take into account that Art. 187 (1) PILA determines the law applicable to the dispute and therefore gives priority to the autonomy of the parties. Art. 188 (1) PILA is not tailored to the determination of the legal capacity of the parties as a preliminary issue (see rightly PIERRE-YVES TSCHANZ, in: Commentaire romand, 2011, nr 60 to Art. 178 PILA; POUDRET/BESSON, Comparative Law of International Arbitration, 2nd ed. 2007, nr 271).

There is accordingly no conflict rule with regard to the legal capacity of the parties to an arbitration in Chapter 12 PILA. Therefore, the legal capacity of the parties to an arbitration must be determined within the meaning of federal case law, with reference to the general rules of Art. 33 (f) PILA (for persons) and Art. 154, 155 (C) PILA (for legal entities).

3.3
According to Art. 154 (1) PILA corporations are subject to the law of the state according to whose rules they are organized when they meet the requirements of registration or publicity under that law or, where there are no such provisions, when they are organized according to the law of that state (so called incorporation theory: BGE 117 II 494 at 4b p. 497). Art. 156-161 PILA being reserved, the law applicable to the legal entity determines in particular the legal capacity (BGE 117 II 494 at 4b p. 497; judgment 4C.245/2001 of November 23, 2001, at 4d).

3.3.4
Legal capacity must be understood as the capacity to be the holder of rights and obligations (instead of all, see HAUSHEER/AEBI-MÜLLER, Das Personenrecht des Schweizerischen Zivilgesetzbuches, 3rd § 2012, nr 02.01; EUGEN BUCHER, in: Berner Kommentar, 1976, nr 8 to Art. 11 ZGB). An entity has legal capacity when it can be allocated rights and obligations (BUCHER, a.a.O., nr 11 to Art. 11 ZGB).

When a foreign law applies to the issue of the legal capacity it must therefore be determined whether or not the entity organized under foreign law can be allocated rights and obligations. A foreign entity organized as a legal entity according to its own law and therefore holder of rights and obligations, has legal capacity in Switzerland and consequently the standing to be a party (see also BGE 135 III 614 at 4.2 p. 617, according to which the legal personality of the foreign entity – beyond the mere legal

capacity – can be connected in principle to the capacity to act and therefore to stand in proceedings ; see in this respect FLORENCE GUILLAUME, in: Commentaire romand, 2011, N. 13 zu Art. 155 IPRG).

The same rule must apply with regard to the capacity to stand as a party in an arbitration. When the foreign entity is a legal person according to its status at the place of incorporation, it is also capable of standing as a party in an international arbitration seated in Switzerland. Possible limitations of the legal status as a person or a legal entity that are specific to the arbitral proceedings and leave the legal personality of the foreign entity untouched, are fundamentally irrelevant from the point of view of the capacity to be a party to an arbitration seated in Switzerland (see TSCHANZ, a.a.O., nr 63 to Art. 178 PILA).

3.3.5
The Appellant is a limited liability company under Portuguese law (*Sociedade por quota limitada; Lda*.). According to Art. 154, compared with Art. 175 (c) PILA, the assessment of the Appellant's legal capability is governed by Portuguese law, as the Arbitral Tribunal rightly concluded. This is not challenged by the Appellant.

3.4
3.4.1
The Appellant submits however that the Arbitral Tribunal wrongly applied Portuguese law. It argues in particular that Portuguese law distinguishes between the legal personality as "the ability of a person to be addressee of legal provisions" and the legal capacity as "the substantive measure of the rights and obligations that everyone can have." The legal capacity would thus have a quantitative aspect in Portuguese law. As opposed to the legal personality, the legal capacity of legal entities would have to be assessed "according to the principle of specialty." This would mean that the legal capacity of a Portuguese company would exist only within the limits set by the laws, by-laws, regulations, and decisions of the General Assembly. Legal entities in particular would have no legal capacity in Portugal for acts which are prohibited by law. Due to its position pursuant to company law, the Appellant would lack the capacity to be a party in an arbitration because Art. 87 p-IL deprived it of this capacity, for it would be forbidden by law to participate in a new arbitration and this would also be outside the limited scope of an insolvent company in liquidation.

3.4.2
The argument is unpersuasive. Even if Art. 87 p-IL prevented an insolvent Portuguese entity from appearing as a party in a Portuguese arbitration, this would have no influence on its capacity to be a party in an international arbitration seated in Switzerland. It is decisive in this respect that Portuguese law affords the Appellant a legal personality through which it may be allocated rights and obligations (see above at

3.3.3). It is undisputed that this is the case here, as it is conceded even by the Appellant when it states: "the Appellant specifically does not claim that insolvents would not be legally capable." Art. 5 of the Portuguese Code on Commercial Corporations (*Código das sociedades comerciais*), provides that trading companies have legal personality. Pursuant to Art. 141 (1) compared to Art. 146 (2) of the aforesaid Code, legal personality remains untouched even when a company is in liquidation after bankruptcy. Finally, it results from Art. 87 (2) p-IL – according to which arbitration proceedings pending when bankruptcy is declared are continued – that the legal capacity of an insolvent is not affected under Portuguese law even as to ongoing arbitral proceedings.

All of this shows that a Portuguese insolvent remains the holder of rights and obligations until its full liquidation and thus enjoys legal personality. This means that it can be a party to an arbitration under Chapter 12 PILA (above at 3.3.3). Even if some kind of "arbitral incapacity" could be derived from Art. 87 (1) p-IL for future (Portuguese) arbitrations, this would be irrelevant to the capacity to be a party according to the Swiss *lex arbitri* as long as the insolvent has legal personality, which is undisputed here. Thus the recourse to an additional legal opinion, as proposed by the Appellant, is unnecessary.

3.5

The Appellant argues that the Arbitral Tribunal wrongly refused to find that it was not capable to appear as a party by reference to the aforesaid *Vivendi* judgment of the Federal Tribunal (4A_428/2008[20] of March 31, 2009, at 3.1, publ. in: ASA Bulletin 1/2010 p. 104 ff). It points out in particular that the Federal Tribunal "confirmed in that judgment that the provisions of an insolvency law rendering ineffective an arbitration agreement when insolvency proceedings are opened against a party to the arbitration clause result in the party concerned losing the capacity to be a party in an arbitration."

3.5.1

Art. 142 of the pertinent provision of the Polish Bankruptcy and Rehabilitation Law in the *Vivendi* case was worded as follows:

[20] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/effect-of-foreign-bankruptcy-on-icc-arbitration-in-switzerland-c/

> *Any arbitration clause concluded by the bankrupt shall lose its legal effect as of the date bankruptcy is declared and any pending arbitration proceedings shall be discontinued.*[21]

According to the observations of the Arbitral Tribunal in the *Vivendi* case, which were based in particular on legal opinions of Polish law professors, an insolvent Polish entity lost the capacity to be a party in an arbitration when bankruptcy was declared. The Federal Tribunal saw no reason to question this legal assessment and concluded that Art. 142 pBRL removed the subjective arbitral capacity of a bankrupt Polish entity (judgment 4A_428/2008[22] of March 31, 2009, at 3.3).

3.5.2

This judgment was widely discussed in Swiss and international legal writing. With the exception of one isolated general criticism (PIERRE A. KARRER, The Swiss Federal Supreme Court got it wrong, wrong, wrong and wrong a fourth time, in: ASA Bulletin 1/2010, p. 111 ff), several commentators took the view that the Federal Tribunal had drawn the appropriate consequence, to the extent that the decision was based on an accurate premise, namely that Art. 142 p-BRL actually interfered with the capacity of a bankrupt Polish entity to be a party and the issue of conflict of laws was one concerning legal capacity (AEBI/ FREY, a.a.O., S. 120, 123; LARS MARKERT, Arbitrating in the Financial Crisis: Insolvency and Public Policy Versus Arbitration and Party Autonomy - Which Law Governs?, Contemporary Asia Arbitration Journal 217 [2009], S. 233; SPOORENBERG/FELLRATH, The Uneasy Relationship between Arbitration and Bankruptcy, ILO Newsletter 30 July 2009; BERNHARD BERGER, Die Rechtsprechung des Bundesgerichts zum Zivilprozessrecht im Jahre 2009, 3. Teil: Schiedsgerichtsbarkeit, S. 555 ff.; wohl auch STEFAN KRÖLL, Arbitration and Insolvency - Selected Conflict of Laws Problems, in: Ferrari/Kröll [Hrsg.], Conflict of Laws in International Arbitration, München 2011, p. 232 ff). However, the commentators were almost unanimous in their opinions that the aforesaid two premises were not met. They take the view that the Federal Tribunal inaccurately considered the issue as one of subjective arbitral capacity and wrongly interpreted Art.142 pBRL as a provision interfering with the capacity of a Polish bankrupt entity to be a party. Art. 142 pBRL addresses one aspect of the validity of the arbitration clause and would therefore be irrelevant pursuant to Art. 178 (2) PILA (*favor validitatis*), because according to Swiss law, the arbitration clause retains its validity even in the case of the bankruptcy of a party to the arbitration (NÄGELI, a.a.O., N. 21 ff.; KRÖLL, a.a.O., p. 251; MARKERT, a.a.O., S. 233 f.; KAUFMANN-KOHLER/ LÉVY/SACCO, a.a.O., S. 378 ff.; DOMITILLE BAIZEAU, Arbitration and Insolvency: Issues of Applicable Law, in: Müller/Rigozzi [Hrsg.], New Developments

[21] Translator's note: In English in the original text
[22] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/effect-of-foreign-bankruptcy-on-icc-arbitration-in-switzerland-c/

in International Commercial Arbitration 2009, 2009, S. 114 f.; MARK ROBERTSON, Cross-Border Insolvency and International Commercial Arbitration: Characterization and Choice of Law Issues in Light of Elektrim S.A v. Vivendi S.A and Analysis of the European Insolvency Regulation, p. 129; GERHARD WAGNER, Insolvenz und Schiedsverfahren, in: KTS Zeitschrift für Insolvenzrecht 71 [2010], p. 60; CHRISTIAN LUCZAK, Beschwerde gegen Schiedsgerichtsentscheide, in: Geiser et al. [Hrsg.], Prozessieren vor Bundesgericht, 3. Aufl. 2011, N. 6.55; kritisch auch MICHAEL MRÀZ, in: Basler Kommentar, 2010, N. 34 zu Art. 393 ZPO und KAUFMANN-KOHLER/RIGOZZI, Arbitrage international, 2nd §. 2010, Fn. 152, also to some extent from a policy point of view BERGER, a.a.O., p. 562).

3.5.3
The criticism raised against the *Vivendi* judgment must not be reviewed in detail. Indeed, the Appellant is wrong to claim the *Vivendi* judgment as a precedent to the case at hand. Contrary to what the Appellant attempts to suggest, the Federal Tribunal did not "confirm generally in judgment 4A_428/2008 that a provision in a foreign insolvency law that provides for the invalidity of an arbitration agreement in case of insolvency would lead to the bankrupt losing the capacity to participate as a party in an arbitration." The *Vivendi* judgment must rather be seen in the specific context of Polish law and the legal writing developed thereunder, as expressed in the legal opinions of Polish law professors. It may neither be generalized nor extend the observations made there as to Polish law to other legal orders. In particular, the Appellant may not infer from the fact that the Polish Art. 142 pBRL – similar to the Portuguese Art. 87 p-IL in dispute – contains no explicit reference to the legal capacity or to the capacity to be a party, that Art. 87 p-IL should be interpreted in the same way as the Polish provision was. Especially as such an interpretation is not the dominant interpretation in Portuguese case law or legal writing, as the Arbitral Tribunal convincingly demonstrated.

3.6
In summary, there is nothing to object to from the point of view of federal law when the Arbitral Tribunal reached the conclusion that Art. 87 (1) p-IL was irrelevant to the dispute at hand pursuant to the rule of *favor validitatis* according to At. 178 (2) PILA. Art. 87 (1) P-IL leaves the legal personality of a bankrupt Portuguese entity untouched and therefore also its capacity to be a party in an international arbitration seated in Switzerland. According to the Swiss *lex arbitri*, Art. 87 (1) p-IL therefore regulates one aspect of the substantive validity of the arbitration agreement, which is to be assessed according to Art. 178 (2) PILA. Under Swiss law at least, bankruptcy does not affect the validity of an arbitration agreement (BGE 136 III 107 at 2.5 p. 108) and therefore Art. 87 (1) p-IL may not deprive the arbitration clause of its validity. Moreover, it is not alleged that the Appellant was not legally capable at the time the arbitration

agreement was concluded or that it was not entitled to enter into the arbitration agreement.

4.
The Appellant argues furthermore that the Arbitral Tribunal wrongly failed to consider Art. 87 (1) p-IL as *loi d'application immédiate* (mandatory law) and therefore wrongly confirmed the validity of the arbitration agreement as to the Appellant.

4.1
The Federal Tribunal has not yet determined if and to what extent an arbitral tribunal must take into account the mandatory provisions of another state when assessing the validity of an arbitration agreement. The case at hand does not require to address this issue in general because Art. 87 (1) p-IL clearly does not have the character of a mandatory provision.

4.2
To make Art. 87 (1) p-IL mandatory, the Portuguese legislature could have made it internationally binding (KAUFMANN-KOHLER/RIGOZZI, a.a.O., nr 663; KAUFMANN-KOHLER/LÉVY/SACCO, a.a.O., p. 385) and made it strictly binding in nature (POUDRET/BESSON, a.a.O., nr 706). As the Arbitral Tribunal accurately stated, there is no such intent expressed in Art. 87 (1) p-IL. If the Portuguese legislator had wanted to provide Art. 87 (1) p-IL with an internationally binding character, it would hardly have included an explicit reservation in favor of international law in the text of the provision. The Appellant may not put this in question with the mere assertion that international law prevails over national law. The Respondent accurately replies that Art. 87 (1) p-IL is not mandatory because, according to Art. 192 (1) p-IL, the provisions of the Portuguese insolvency law may be waived in a settlement to which all creditors agree. Therefore Art. 87 (1) p-IL is not mandatory and the Appellant does not dispute this in its rejoinder. The Arbitral Tribunal rightly did not qualify Art. 87 (1) p-IL as *loi d'application immédiate*. The argument is therefore unfounded.

5.
In view of the foregoing, the appeal must be rejected to the extent that the matter is capable of appeal. In such an outcome the Appellant must pay the costs and compensate the other party (Art. 66 (1) and Art. 68 (2) BGG).

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 50,000 shall be borne by the Appellant.

3.
The Appellant shall pay to the Respondent an amount of CHF 60,000 for the federal judicial proceedings,

4. This judgment shall be notified in writing to the Parties and to the ICC Arbitral Tribunal.

Lausanne October 16, 2012

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

The Presiding Judge:	The Clerk:
Klett (Mrs.)	Hurni