4A_84/2015[1]

Judgment of February 18, 2016

First Civil Law Court

Federal Judge Kiss (Mrs.), Presiding
Federal Judge Klett (Mrs.)
Federal Judge Kolly
Federal Judge Hohl (Mrs.)
Federal Judge Niquille (Mrs.)

Clerk of the Court: Mr. Carruzzo

X._____ Co.,
Represented by Mr. Homayoon Arfazadeh,
Appellant

v.

Z._____ Ltd.,
Represented by Mr. Andrea Molino and Mrs. Geraldine Bronz,
Respondent

Facts:

A.

A.a. X._____ Co., also known as Seven Diamonds Industries Co. (hereafter: X._____), which is based in [name of city omitted] (Iran), is a company active in the production of several types of steel products.

[1] Translator's Note: Quote as X._____ Co. *v.* Z._____ Ltd., 4A_84/2015.
The decision was issued in French. The full text is available on the website of the Federal Tribunal, www.bger.ch.

Z._____ Ltd. (hereafter: Z._____) is a company specializing in brokering, purchasing, selling, transporting, and distributing iron and steel in particular. Its seat is in [name of city omitted] (Cyprus). It has a branch in [name of city omitted].

A.b. In the spring of 2012, the two companies, which had no previous relationship, began negotiations with a view to the Cypriot company selling steel products to the Iranian company.

On March 29, 2012, Z._____ sent three *pro forma* invoices to X._____ concerning the sale of 15'000 metric tons of such products for a total amount of EUR 7'845'000. The Iranian bank designated by X._____ never made any payment in favor of the Cypriot company.

On May 14, 2012, Z._____ sent a *pro forma* invoice n. xxx to X._____ concerning the sale of 5'000 metric tons of steel products at the price of EUR 2'618'000. The merchandise was to be shipped from a Russian port to [name of city omitted] in Iran. In contrast to the previous invoice, X._____ signed this invoice at the bottom.

Two days later, on May 16, 2012, the parties executed the *Sales Contract for Payment by Draft* (hereafter: the Sales Contract) to formalize the transaction. According to this Contract, X._____ agreed to pay 10% of the sales price in advance as a guarantee, namely EUR 261'800, an amount that was immediately paid.

On July 19, 2012, Z._____ issued a commercial invoice amounting to EUR 2'555'948.75, in reference to the *pro forma* invoice n. xxx of May 14, 2012.

Between September 11, 2012, and October 2, 2012, the parties exchanged several emails in which Z._____ sought payment of the payment of the commercial invoice of July 19, 2012, to be able to deliver the merchandise according to the Sales Contract of May 16, 2012. For its part, X._____ explained in substance that it was unable to obtain currency due to the collapse of the Iranian financial system as a consequence of the international sanctions imposed upon Iran and the urgent measures adopted by the government to tackle the crisis.

On December 17, 2012, the parties executed a *Memorandum of Understanding* (hereafter: the MoU), pursuant to which Z._____ agreed to reduce the amount of the aforesaid commercial invoice due to the unfavorable exchange rate on the free market for currencies in Iran and thus reduced the sales price to EUR 2'047'039. X._____ did not pay this amount.

A.c. On May 16, 2012, namely the day the Sales Contract was signed, Z._____'s Mrs. A._____ sent an email to X._____'s Mr. B._____ entitled *Frame Contract*, to which a Framework Contract was attached, written on Z._____ letterhead, and containing various clauses concerning the implementation of the sales of steel products in the framework of a long-term commercial relationship then contemplated by

the parties. In her email, she pointed out that the Framework Contract should be "*duly signed from your side*."[2]

At its Art. 13, the Framework Contract contained an arbitration clause stating the following (*sic*):

> Any dispute, controversy or claim arising out of or in relation to this Contract, including the validity, invalidity, breach or termination thereof shall be settled by amicable negotiations and friendly discussions between both parties. In case no settlement can be reached, such dispute shall be resolved by arbitration in accordance with the Swiss Rules of International Arbitration of the Swiss Chambers of Commerce in force when the Notice of Arbitration is submitted in accordance with these Rules.
>
> The numbers of arbitrators shall be one or three. The seat of the arbitration shall be Lugano. The arbitral proceedings shall be conducted in English.
>
> This Contract is governed, constructed, interpreted in accordance with the laws of Switzerland in every respect without regard to the conflict of law rules. The United Nations Convention on Contracts for International Sale of Goods of April 11, 1980 does not apply.[3]

Her email remained unanswered and Mrs. A._____ contacted Mr. B._____ on August 30, 2012, inviting him to return the signed Framework Contract to her as soon as possible.

On September 2, 2012, X._____'s Mr. C._____ sent a version of the Framework Contract containing various changes proposed by the legal department of the Iranian company and some comments. As to the arbitration clause more specifically, the words emphasized above in the first two paragraphs of the initial version of the clause were substituted with "ICC France" and "Paris", whilst the adverb "why?" was added between brackets at the end of the third paragraph.

On September 4, 2012, Mrs. A._____ answered Mr. C._____ and sent him a new version of the Framework Contract. She advised him that Z._____ could not accept the change of venue of the arbitration, which should remain in Lugano. The arbitration clause was now at Art. 14 of the revised version and contained the same text as the original clause except that, at the end of the third paragraph, there was no longer any reference to the United Nations Convention on Contracts for the International Sale of Goods. The email in question concluded as follows: "*Awaiting your acceptance and a copy of the signed contract*."[4]

On September 8, 2012, Mr. B._____ sent an email to Z._____'s Mr. D._____ to which he attached a fourth version of the Framework Contract that he called a *counter proposal*, which contained a number of changes made by X._____ but left the arbitration clause at Art. 14 unchanged.

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[2] Translator's Note: In English in the original text.
[3] Translator's Note: In English in the original text.
[4] Translator's Note: In English in the original text.

In an email of September 10, 2012, Mrs. A._____ explained to Mr. B._____ that Z._____ had modified the Framework Contract once again, whilst accepting some of the changes made by X._____. She stated her hope that the version attached to her email could be accepted as final and that she awaited a copy signed by the Iranian company. This fifth version of the Framework Contract left the arbitration clause untouched.

No other version of the Framework Contract was exchanged by the parties after September 10, 2012.

The following day Mr. B._____ answered the aforesaid email, advising Mr. D._____ that the latest version of the Framework Contract had been submitted to the legal department of X._____ for verification and approval.

The situation did not change subsequently except for the emails exchanged between September 11, and October 2, 2012, as to the terms of the payment to be made by X._____ and the execution of the MoU on December 17, 2012 (see here above, A.b., last two paragraphs).

At the end of the day, the Framework Contract was not signed and Z._____ did not receive the price of the merchandise in the Sales Contract, which it never shipped to X._____.

B.

B.a. On August 9, 2013, Z._____ relied on Art. 14 of the last version of the Framework Contract to send a request for arbitration to the Chamber of Commerce and Industry of Ticino. As compensation for its alleged damage, it claimed the payment by X._____ of at least EUR 2'277'387.78, CHF 25'000, and CHF 400, and compensation for lost profit to be computed during the proceedings, all with interest.

In its answer of October 12, 2013, X._____ raised a jurisdictional defense. On January 27, 2014, the court appointed a Geneva lawyer as sole arbitrator (hereafter: the Arbitrator) before rejecting, on February 25, 2014, a challenge raised by X._____. In its Procedural Order No. 1 of April 9, 2014, following a procedural hearing by phone on March 13, 2014, the Arbitrator advised the parties that he would issue an award on jurisdiction.

On April 30, 2014, Z._____ sent its submissions to the Arbitrator as to jurisdiction. For its part, X._____ did not avail itself of its right to submit comments on this issue. On August 4, 2014, the Arbitrator issued Procedural Order No. 2 with a view to obtaining additional information from the parties as to the title and position attributed by both companies to the individuals acting for them whose names appeared in the electronic correspondence and the exhibits in the arbitration file. X._____ and Z._____ answered the Arbitrator's questions on September 19, and 20, 2014, respectively, then each filed a reply on September 29.

B.b. In an Award on Jurisdiction on January 2, 2015, the Arbitrator rejected the jurisdictional defense and accepted jurisdiction in the dispute between the parties. He pointed out that the costs concerning the jurisdictional phase would be adjudicated in the final award. The reasons for which he accepted jurisdiction may be summarized as follows.

Art. 178(3) PILA[5] recalls the cardinal principle of the autonomy of the arbitration clause with respect to the main contract. The nullity and even the existence of the latter therefore do not necessarily impact the arbitration clause. In such a case, one should instead research whether or not the parties validly, mutually, and consistently expressed their will as to the aforesaid clause, an agreement on this issue being possible even before the conclusion of the main contract or even independently therefrom. According to some legal writers, this may be the case when, in the framework of an exchange of several successive amended projects of the main contract, the arbitration clause undergoes various changes at the request of the parties and then remains unchanged in the final modified version despite one or several subsequent changes of drafts of the main contract. This is exactly what happened in the case at hand. The arbitration clause contained at Art. 14 of the last version of the Framework Contract meets the formal requirements of Art. 178(1) PILA.

The Appellant denies that the individuals acting in its name would have had the authority to commit it to the Respondent. In the case at hand, in view of the facts found and in the light of Swiss law applicable to this issue as *lex causae*, one must hold that whilst the individuals acting as representatives of the Appellant may not have had power to do so according to Iranian law, the Respondent was nonetheless entitled to assume in good faith, and according to the principle of reliance, that the individuals dealing with it in the Appellant's name had the authority to validly consent to arbitration on the latter's behalf. Be this as it may, the contents of a letter sent to the Respondent by a vice president of the management committee of the Appellant on November 13, 2012, reveals that the Iranian company ratified the acts of its representatives thus retroactively confirming the validity of the agreement of the parties to submit to arbitration to resolve their disputes.

The validity of the arbitration agreement on the merits must also be examined. According to Art. 178(2) PILA, this will be done on the basis of Swiss law, as the parties did not choose another law to resolve the issue. In the case at hand, the clause at Art. 14 of the Framework Contract contains all *essentialia negotii* of an arbitration agreement. The correspondence and the drafts exchanged by the parties contained clear proof of their reciprocal will to set aside any recourse to state justice in favor of arbitration, namely in favor of the usual dispute resolution mechanism in international trade, in which both parties are experienced operators. Indeed, the Appellant's legal department carefully examined the content of Art. 14 of the Framework Contract and suggested changes, then accepted their rejection by the Respondent so that the agreement of the parties as to arbitration became perfect within the meaning of Art. 1 CO[6] as of September

[5] Translator's Note: PILA is the most commonly used English abbreviation for the Federal Statute on International Private Law of December 18, 1987, RS 291.

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

8, 2012, irrespective of the fate of the main contract. Moreover, the subsequent behavior of the parties, including the execution of the MoU, does not question this conclusion. Hence, the arbitration clause at Art. 14 of the Framework Contract is valid on the merits as it expresses the real and mutual will of the parties to submit their possible disputes to arbitration according to the Swiss Rules of International Arbitration of the Swiss Chamber of Commerce (SRIA), with its seat in Lugano.

Moreover, the file shows that the Respondent complied with the preliminary requirement of the arbitration clause by seeking to find an amicable solution to the dispute with the Appellant both before and after the arbitration request was filed.

As the Appellant did not argue that the dispute would not fall within the scope of the arbitration clause, nothing therefore prevents the Arbitrator from accepting jurisdiction *ratione materiae* and addressing the matter before issuing a decision on the merits of the Respondent's claims.

C.

On February 2, 2015, X._____ (hereafter: the Appellant) filed a civil law appeal with a request for a stay of execution. Arguing a violation of Art. 190(2)(b) PILA, it invites the Federal Tribunal to annul the award of January 2, 2015, and to find that the Arbitrator had no jurisdiction. According to the Appellant, the principle of autonomy of the arbitration clause was not applicable in the case at hand because the Framework Contract has a critical flaw – the absence of agreement of the parties – which also impacts the arbitration clause it contains. Moreover, the latter would not be formally valid because it was not signed by the parties despite the fact that they had agreed to conclude it in written form as provided by Art. 16 CO. Moreover, the parties never manifested the will to commit to an arbitration clause. Finally, it argues that the individuals acting on behalf of the Iranian company were not authorized to represent it.

On February 9, 2015, Z._____ (hereafter: the Respondent) requested security for costs, which was rejected by decision of the presiding judge on March 13, 2015.

In its answer of April 22, 2015, the Respondent submitted that the appeal should be rejected.

The Arbitrator submitted the file of the case and implicitly suggested that the appeal should be rejected in his answer of May 4, 2015.

A stay of enforcement was granted by decision of the presiding judge of May 7, 2015.

On May 20, 2015, the Appellant filed a reply in which it stated its views on the arguments advanced in the Respondent's answer and in the Arbitrator's.

On the same date, the Respondent submitted its observations as to the Arbitrator's answer.

The latter submitted a short rejoinder on June 5, 2015, whilst the Respondent stated in its letter of May 29, 2015, that it waived the right to do so.

On June 5, 2015, the Appellant submitted some final observations.

Reasons:

1.

According to Art. 54(1) LTF,[7] the Federal Tribunal issues its judgment in an official language,[8] as a rule in the language of the decision under appeal. When it is in another language (here English) the Federal Tribunal resorts to the official language chosen by the parties. Before this Court they both used French. Therefore, this judgment shall be issued in French.

2.

In the field of international arbitration, a civil law appeal is permitted against the decisions of arbitral tribunals pursuant to the requirements of Art. 190 to 192 PILA (Art. 77(1)(a) LTF). Whether as to the subject of the appeal, the standing to appeal, the time limit to appeal, the Appellant's submissions, or the ground for appeal invoked, none of these admissibility requirements raises any problem in the case at hand. The merits of the appeal may therefore be addressed.

3.

Invoking Art. 190(2)(b) PILA, the Appellant argues that the Arbitrator was wrong to accept jurisdiction in the case at hand.

3.1. Seized of a jurisdictional defense, the Federal Tribunal freely reviews the legal issues, including the preliminary issues, in determining the jurisdiction of the arbitral tribunal or the lack thereof. However, this does not make it a court of appeal. Thus, it does not behoove this Court to research which legal arguments could justify upholding the ground for appeal of Art. 190(2)(b) PILA in the award under appeal. Instead, it behooves the Appellant to draw the Court's attention to them in order to comply with the requirements of Art. 77(3) LTF (ATF 134 III 565[9] at 3.1 and the cases quoted). With that proviso and as the case may be, the Federal Tribunal, in the framework of its free judicial review of all legal issues involved (*jura novit curia*)

[7] Translator's Note: LTF is the French abbreviation of the Federal Statute of June 17, 2005, organizing the Federal Tribunal, RS 173. 110.

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

[9] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/extension-of-arbitration-clause-to-non-signatories-case-of-a-gua

may reject the argument in question on other grounds than those indicated in the award under appeal as long as the facts found by the arbitral tribunal are sufficient to justify substituting different reasoning (judgment 4A_392/2008 of December 22, 2008, at 3.2). Conversely and with the same proviso, the Court may uphold the jurisdictional defense on the basis of new legal arguments developed by the appellant on the basis of the facts found in the award under appeal. However, the Federal Tribunal reviews the factual findings on which the award under appeal is based – even as to the issue of jurisdiction – only if one of the grievances mentioned at Art. 190(2) PILA is raised against such factual findings or when some new fact or evidence is exceptionally taken into account, in the framework of the civil law appeal (Art. 99(1) LTF) (see ATF 129 III 727 at 5.2.2; 128 III 50 at 2a and the cases quoted).

3.2.

3.2.1. Pursuant to Art. 178(3) PILA, the validity of an arbitration agreement may not be challenged because the main contract is not valid. This provision codifies the principle of the autonomy of the arbitration agreement in relation to the main contract (in English, *separability* or *severability*), which has long been enshrined in case law (ATF 59 I 177; see also ATF 140 III 134 at 3.3.2 *i.f.* and the cases quoted). The provision is not sufficiently precise on two counts: on the one hand because its text is too restrictive and addresses only the validity of the main contract, even though the issue of severability of the arbitration clause may arise even if the main contract does not exist (Marco Stacher, *Einführung in die internationale Schiedsgerichtsbarkeit der Schweiz*, 2015, n. 65; Poudret and Besson, *Comparative Law of International Arbitration*, 2nd ed. 2007, n. 169, p. 137), as pointed out for example by Art. 21(2) SRIA ("*The arbitral tribunal shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms part*"); on the other hand, the text is too broad when the quoted provision wrongly suggests that the invalidity of the main contract may never impact the validity of the arbitration clause (Lalive, Poudret and Reymond, *Le droit de l'arbitrage interne et internationale en Suisse*, 1989, n. 23 ad Art. 178 PILA). There are a number of situations in which the arbitration clause shares the fate of the main contract (ATF 121 III 495 at 6a and the case quoted; Kaufmann-Kohler and Rigozzi, *International Arbitration – Law and Practice in Switzerland*, 2015, n. 3.08). Situations of this kind, which legal writing in German refers to as *Fehleridentität* (in English: "identity of defect"[10]) are met, in particular, when a party does not have the capacity to contract, or does not have the authority to represent the party wishing to contract, or where the main contract was concluded under duress (Berger and Kellerhals, *International and Domestic Arbitration in Switzerland*, 3rd ed. 2015, n. 683).

The principle of severability of the arbitration clause means that the mere allegation of the non-existence of the main contract is not sufficient to put an end to the Arbitrator's jurisdiction. However, if he finds that the main contract does not exist and that the cause of such non-existence also impacts the arbitration agreement, he must deny jurisdiction (Fouchard, Gaillard, and Goldman, *Traité de l'arbitrage commercial international*, 1996, n. 411 p. 226). A French legal writer sees in the absence of consent of one of the parties the least implausible hypothesis of non-severability (Pierre Mayer, *Les limites de la séparabilitié de*

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

la clause compromissoire, in *Revue de l'arbitrage*, 1998, p. 359 *ff*, 364 n. 8; in the same sense, Berger and Kellerhals, *op. cit.*, n. 683, 4th indent, and footnote 39). According to him, if the behavior of the addressee of an offer to contract does not amount to acceptance of the offer, the main contract is not concluded and the arbitration agreement contained in the offer does not become more effective than the other clauses for lack of a specific exchange of consent in respect of it (*ibid*.). Part of the legal writing, whose authority the Arbitrator invokes, nonetheless holds the view that in exceptional circumstances, an arbitration agreement may be created before the main contract of which it should be a part is concluded, even if the aforesaid contract does not come into existence after all. Admittedly, the mere exchange of drafts in the framework of negotiations between the potential co-contractors is not normally sufficient to conclude, on the basis of the principle of reliance, that the parties intended to bind themselves as to an individual clause of the future contract, even before the latter was concluded. Neither is it usual in business relationships to enter into an arbitration agreement by way of an exchange of draft contracts which are not binding from a substantive point of view. However, the existence in a given situation of certain qualified additional circumstances may sometimes lead to the opposite conclusion as an exception and to ground the jurisdiction of the arbitral tribunal to address a claim based on *culpa in contrahendo* on the basis of an exchange of drafts of a contract. This could happen, for instance, when in the past, the parties had previously entered into several contracts, each time containing the same arbitration clause, when they have a recognizable and objectively understandable interest to submit to arbitral jurisdiction, irrespective of whether or not the main contract was concluded (neutrality of the forum, choice of an international language, confidentiality, *etc.*), or if the drafts they exchanged reveal their common will to conclude an arbitration agreement, irrespective of the outcome of the negotiations concerning the main contract; the latter hypothesis may be the case when, in the framework of successive exchanges of several amended drafts of the main contract, the parties make various changes to the arbitration clause and the final modified version then remains unchanged throughout one or several subsequent exchanges of drafts of the main contract (Gabriel and Wicki, *Vorvertragliche Schiedszuständigkeit*, in *Bulletin ASA 2009*, p. 236 *ff*, 252 to 254; see also: Dieter Gränicher, *Commentaire bâlois, Internationales Privatrecht*, 2nd ed. 2013, n. 90 ad Art. 178 PILA, p. 1784; Stefanie Pfisterer, *Commentaire bernois, Schweizerische Zivilprozessordnung*, 2014, vol. III, n. 63 ad Art. 357 CPC; Felix Dasser, *Kurzkommentar ZPO*, 2014, n. 33 ad Art. 357 CPC; most frequently cited: Tarkan Göksu, *Scheidsgerichtsbarkeit*, 2014, n. 438; Lukas Wyss, *Aktuelle Zuständigkeitsfragen im Zusammenhang mit internationalen kommerziellen Schiedsgerichten mit Sitz in der Schweiz*, Jusletter of June 25, 2012, n. 8/9).

3.2.2. The Appellant argues that the award under appeal "already decided" that the Framework Contract is "nonexistent" (appeal n. 84). The Arbitrator denies this by reference to n. 75 of the aforesaid award in which he states that his conclusions as to the arbitration agreement "*are without prejudice as to the merits of the case, in particular as to the extent the Parties are bound by and can rely on the various contractual documents they exchanged*"[11] (answer p. 3, n. 2). Admittedly, such statements are hard to reconcile with

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

the following terms at n. 115(v) of the same award: "*… the Parties were both aware that the final approval and signature of the Frame Contract had remained outstanding on the Respondent's side*."[12]

Be this as it may, the decisive factor in the case at hand is the fact that the Arbitrator reasoned on the premise that the Framework Contract in dispute may not have been concluded. Therefore, it is on the basis of this assumption that one must review hereunder, pursuant to the principle of severability of the arbitration clause and on the basis of the teachings of the aforesaid legal writers, whether, as the Arbitrator held, the parties entered into an arbitration agreement binding them despite the possible non-existence of the Framework Contract.

It must therefore be determined whether the formal and substantive requirements to which Art. 178(1) and (2) PILA subjects the validity of an arbitration agreement are met in the case at hand.

3.3.

3.3.1. An arbitration clause is an agreement by which two or more determined or determinable parties agree to entrust an arbitral tribunal or a sole arbitrator – in lieu of the state court that would otherwise have jurisdiction – with the task of issuing a binding award on one or several disputes in existence (arbitration agreement) or arising in the future (arbitration clause) pursuant to a specific legal relationship (judgment 4A_676/2014 of June 3, 2015, at 3.2.2). The will of the parties to waive the jurisdiction of the state court normally having jurisdiction in favor of the private jurisdiction of an arbitral tribunal must appear plainly. As to the arbitral tribunal to be called upon to address the dispute, it must be determined or at least determinable (ATF 138 III 29[13] at 2.2.3, p. 35).

From a formal point of view, the arbitration agreement is valid if entered into in writing, by telegram, telex, telecopy or any other means of communication that permits it to be evidenced by a text (Art. 178(1) PILA). The particular form prescribed by this provision is a condition of validity of the arbitration agreement. It seeks to avoid any uncertainty as to the choice of the parties to opt for this type of private dispute settlement and any capriciously-given waiver of the natural forum and means of recourse existing in state court proceedings (Pierre-Yves Tschanz, *Commentaire romand, Loi sur le droit international privé Convention de Lugano*, 2011, ns. 25/26 ad Art. 178 PILA).

[12] Translator's Note: In English in the original text.
[13] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/jurisdiction-of-the-cas-upheld-a-pathological-clause-has-to-be-s

The text must contain the essential elements of the arbitration agreement, namely the identity of the parties, their intent to resort to arbitration, and the subject of the arbitral procedure (ATF 138 III 29[14] at 2.2.3, and the cases quoted; Kaufmann-Kohler and Rigozzi, *op. cit.*, n. 3.58).

Art. 178(1) PILA is satisfied with simplified written form. Contrary to Art. 13 CO[15] applicable to the contracts for which the law imposes written form, it does not require the arbitration agreement to be signed. Thus, an arbitration clause entered into by electronic mail (email) is formally valid (Kaufmann-Kohler and Rigozzi, *op. cit.*, n. 3.67; Tschanz, *op. cit.*, n. 28 ad Art. 178 PILA; Gränicher, *op. cit.*, ns. 13 and 15 ad Art. 178 PILA).

Like Art. 177(1) PILA concerning arbitrability, Art. 178(1) PILA establishes a substantive rule of international private law. Thus, when the parties choose Switzerland as the seat of the arbitration, the formal validity of the arbitration agreement is mandatorily governed by this legal provision. Therefore, the parties may not submit it to a law other than Swiss law (Kaufmann-Kohler and Rigozzi, *op. cit.*, n. 3.60 and 3.61; Gränicher, *op. cit.*, n. 6 ad Art. 178 PILA), even if, resorting to the ability to choose afforded by Art. 182(1) PILA, they choose a foreign procedural law to govern the arbitral proceedings involving them (Berger and Kellerhals, *op. cit.*, n. 420). The prohibition preventing choice of a foreign law as to the form of the arbitration agreement exists irrespective of whether the contemplated foreign law may be more or less strict than Art. 178(1) PILA. Hence, the broader question of the mandatory nature – or not – of this provision as such arises in the same context. It would doubtlessly be impractical to loosen its formal requirement and to satisfy oneself, for instance, of an arbitration agreement arising from a telephone conversation between the parties, even though they would agree to do so, as this would disregard the very text of this legal rule and the safeguard purpose it was assigned. Yet, it is more delicate to determine whether, and under what condition(s), the parties could agree to apply increased requirements as to the form of the arbitration agreement, particularly by conditioning its validity on compliance with the strict written form with a handwritten signature, as does Art. 16 CO in connection with Art. 13 and 14 CO for Swiss law contracts not subject to special form (the issue of restricted form). The Arbitrator takes the view that Art. 178(1) PILA is mandatory and requires answering the question in the negative (answer p. 4 *i.f.*). However, several authors of legal doctrine do not share this opinion. To them, the quoted provision does not prevent the parties from agreeing upon a stricter form and to agree, for instance, that the arbitration agreement will be valid only once it is signed by all parties (Tschanz, *op. cit.*, n. 113 ad Art. 178 PILA; Gränicher, *op. cit.*, n. 15 ad Art. 178 PILA, Stacher, *op. cit.*, n. 68; Berger and Kellerhals, *op. cit.*, n. 423). Another issue is closely connected to the previous one: if the main contract provides that it will be concluded only when the parties sign it, does this restricted form also apply to the arbitration agreement contained in the contract to be concluded? According to Tschanz (*op. cit.*, n. 114 ad Art. 178 PILA), who raises the question, there is no reason *a priori,* in view of the severability of the arbitration agreement, that the parties would want to remove the power to decide as to the existence of the main contract or even as to pre-contractual liability

[14] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/jurisdiction-of-the-cas-upheld-a-pathological-clause-has-to-be-s

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

from the Arbitral Tribunal, particularly in connection with a matter of agreed-upon form. It is therefore a matter of interpretation of the arbitration agreement (in the same meaning, see Gränicher, *ibid.*; Stacher, *ibid.*). However, Berger and Kellerhals (*op. cit.*, n. 437) appear to presume the extension, albeit implicitly, of any reservation of a special form agreed upon for the main contract to the arbitration clause as well. The burden of proving the adoption of a qualified written form for the arbitration agreement falls upon the Respondent (Stacher, *op. cit.*, n. 68, p. 34).

The idea that the parties may be authorized to agree to submit their arbitration agreement to a stricter requirement than Art. 178(1) does not appear to be precluded from the outset. After all, the arbitration agreement is merely a contract, though one of a singular nature, so that it is not justified to restrict the freedom of the co-contractors more than necessary. Moreover, it would not go against the spirit of the provision at issue to allow the parties, if they agree, to tighten the former requirements at which they would agree to entrust an arbitral tribunal with deciding the disputes which may arise between them some day as to the contract they intend to conclude. To the contrary, the goal of security and protection, which the formal requirements fulfills, will be better reached if there is the least possible uncertainty as to the existence of an agreement of the parties to submit their potential disputes to arbitration. However, the issue needs not be given a definitive answer for the reasons explained hereafter.

3.3.2.
3.3.2.1. That the arbitration agreement allegedly arising from the emails exchanged between the parties between May 16, and September 8, 2012 (see A.c., above) meets the requirement of simplified written form within the meaning of Art. 178(1) PILA, is not disputable. Neither is it really disputed, incidentally. Similarly, there is no doubt, on the basis of its latest version that the arbitration clause, formally valid, which was inserted into the draft Framework Contract, encompasses all the essential elements characterizing an arbitration agreement.

3.3.2.2. However, the Appellant objects that the parties had agreed upon a stricter form than that of Art. 178(1) PILA. In other words, they agreed to exclude being bound by the arbitration agreement until and as long as the Framework Contract containing it was not signed itself by both of them. According to the Appellant, the Arbitrator's factual findings clearly show "*that the requirement of signature within the meaning of Article 13 CO though Article 16(2) CO, was considered by the parties as an essential condition of the validity of the contractual obligations they underwrote and that such a condition was perfectly agreed upon, in particular when they engaged in the exchange of drafts of the Frame Contract*" (appeal brief, n. 91). According to the Appellant, the requirement of signature agreed upon by the parties as a formal condition of validity of the Framework Contract and its other clauses, including the arbitration clause, was therefore, "*at the core of the arguments before debates in the Arbitral Tribunal*" (reply, p. 4), which the two excerpts of its briefs reproduced in its final observations of June 5, 2015, also demonstrate. This Court cannot follow the Appellant on this ground. In this respect, as the Arbitrator himself underlines, the argument drawn from an agreement between the parties as to the choice of a stricter form than that set at Art. 178(1) PILA was not submitted to him in the arbitration, *"*(as) *the Appellant merely insisted upon the*

requirement of signature for the conclusion of [the Framework Contract] *as such, without indicating why this requirement should prevail upon Art. 178(1) as to the arbitration agreement of Art. 14* [of the Framework Contract]'" (answer, p. 4). The Arbitrator's opinion as to the issue is of course not decisive because the author of the award on jurisdiction has an interest in its being upheld. Yet, one hardly sees why he would have remained silent in respect of such an argument in his award if it had really been submitted by the Appellant. That the latter did not do so appears, moreover, *a contrario* to the main passage of its briefs on which it bases its argument. That is n. 23 of its memorandum of October 12, 2013, entitled Answer to the Notice of Arbitration (see reply p. 4, paragraph before last), where one may read the following:

> Article 13 of Swiss Code of Obligations (…) provides that a contract required by law to be in writing must be signed by all persons on whom it imposes obligations. In the case at hand, neither the proposed Frame Contract, nor the arbitration agreement is signed.[16]

This excerpt shows, insofar as necessary, that the issue of a potential form stricter than the simplified written form contained at Art. 178(1) PILA reserved by a possible agreement did not even cross the mind of Iranian counsel hired by the Appellant who assumed – wrongly – that, insofar as this provision requires the arbitration agreement to be "*made in writing*," Art. 13 CO would apply an *ipso jure* application and consequently require that the arbitration clause be signed by the entities involved.

Moreover, the telling absence of any reference to Art. 16 CO in the passages of its briefs that the Appellant quotes in support of its demonstration must be noted, particularly in those it reproduced in its last brief.

The foregoing considerations show that the Arbitrator did not factually find in his award the existence of any common will of the parties to waive the written form foreseen by Art. 178(1) PILA in favor of a stricter conventional form by which the parties subjected the validity of the arbitration agreement to their signing it or at least to their signatures at the bottom of the Framework Contract, of which the aforesaid arbitration agreement was intended to be one of the clauses. Failing this factual premise, the Federal Tribunal cannot therefore address the new legal argument advanced by the Appellant to seek a finding that the arbitration agreement in dispute is void for failing to comply with the form chosen by the parties (see 3.1, above).

The formal validity of the arbitration clause inserted into the draft Framework Contract must therefore be admitted.

4.

The Appellant argues, moreover, that the Arbitrator was wrong to hold that the individuals involved in the negotiation of the Framework Contract had the necessary representational powers (appeal brief n. 127 to 139).

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

4.1. The Arbitrator applied Swiss law as the *lex causae* in this respect and held that even though the individuals acting on the Appellant's behalf may not have had the power to do so pursuant to Iranian law, the rules of good faith and the principle of reliance authorized the Respondent to assume that the individuals it was dealing with in the framework of the contractual negotiations had the authority to validly consent to arbitration on behalf of the Appellant (award n. 121 to 133). Then, he added the following (award n. 134):

> Even though the foregoing conclusion suffices for the purposes of the present analysis, the Sole Arbitrator also finds that the Respondent may be held to have ratified its representative's acts, and thus retroactively confirmed the validity of the Parties' agreement to arbitrate, by means of the letter sent, on 13 November 2012, by Mr E._____ (Member and Vice-Chairman of X._____'s board of directors) to Mr F._____ (Z._____'s then Chairman or UBO), unreservedly stating that he had asked Mr B._____ (who had sent most of the correspondence in relation to the Frame Contract, including the Respondent's last approved draft on 8 September 2012) " to rel[a]y nothing but the truth to [Z._____] as ever before and this is what he does.[17]

4.2. It must be recalled here that when a decision relies on two sets of independent reasons, the Appellant must point out, under penalty of inadmissibility, why each reason violates the law (ATF 133 IV 119 at 6.3, p. 121). This rule applies to international arbitration as well (judgment 4A_458/2009 of June 10, 2010, at 4.2.2).

In the paragraph of its award quoted above, to which the Respondent refers at n. 64 *i.f.* of its answer, the Arbitrator held that Mr. E._____ – the Appellant acknowledges that he was one of those authorized to represent it, even the only one who could (appeal brief n. 131, 136 and 137) – ratified the acts of the individual who dealt with the Respondent on the Appellant's behalf and thus retroactively confirmed the validity of the agreement of the parties to resort to arbitration. This is certainly a set of independent reasons because it would allow, in itself, upholding the Arbitrator's conclusion as to the issue of the power of representation, even if one had to admit that the alleged representatives of the Appellant did not have such power and the Respondent could not raise its good faith as a defense. Yet, the Appellant does not challenge this independent reasoning. Consequently, its argument as to the absence of representative power is inadmissible.

5.

Finally, the Appellant denies the substantive validity of the arbitration agreement.

5.1. Pursuant to Art. 178(2) PILA, the arbitration agreement is valid on the merits if it meets the requirements of either the law chosen by the parties, the law governing the matter in dispute, and, in particular, the law applicable to the main contract, or, finally, Swiss law. The aforesaid provision enshrines three alternative connecting factors *in favorem validitatis* – without any hierarchy between them – namely

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

the law chosen by the parties, the law governing the matter in dispute (*lex causae*), and Swiss law as the law of the seat of the arbitration (ATF 129 III 727 at 5.3.2, p. 736).

The Arbitrator reviewed the substantive validity of the arbitration agreement in light of Swiss law. Rightly, none of the parties challenged this and the Appellant's criticism in this chapter will be analyzed in the light of this law hereafter.

5.2. The dispute at hand relates to the very existence of the arbitration agreement alleged by the Respondent. Indeed, the parties disagree as to whether or not they manifested their will reciprocally and in a coordinated manner to see an arbitrator decide the disputes which may oppose them (see Art. 1(1) CO). This is the conflict that German terminology names *Konsensstreit*[18] (Gauch, Schluep and Schmid, *Obligationenrecht, Allgemeiner Teil*, vol. 1, 10th ed. 2014, n. 309).

5.2.1. In Swiss law, the interpretation of an arbitration agreement takes place pursuant to the general rules of interpretation of contracts. Like a state court, the arbitrator or the arbitral tribunal shall first attempt to ascertain the real and common will of the parties (see Art. 18(1) CO), empirically as the case may be, on the basis of evidence, without stopping at the inaccurate expressions or descriptions they may have used. Evidence as to this is not only the content of the statements of intent but also the general context, namely all circumstances that may be useful to uncover the will of the parties, whether statements prior to the conclusion of the contract, drafts of the contract, correspondence exchanged, or even the attitude of the parties after the contract is concluded (see judgment 4A_65/2012 of May 21, 2012, at 10.2 and the references). This subjective interpretation relies on the interpretation of the evidence. If it is conclusive, its result – namely the finding of a common and real intent of the parties – is in the realm of fact and consequently binds the Federal Tribunal (ATF 132 III 626 at 3.1; 131 III 606 at 4.1, p. 611). Otherwise, the person who undertakes interpretation shall apply the principle of reliance and research the meaning that the parties could and should have given in good faith to their reciprocal manifestations of will in the light of all the circumstances (ATF 140 III 134 at 3.2; 135 III 295 at 5.2, p. 302 and the cases quoted). This so-called objective interpretation is a matter of law and it takes place not only with reference to the text and the context of the statements but also in light of the circumstances preceding and accompanying them (ATF 131 III 377 at 4.2.1; 119 II 449 at 3a), to the exclusion of subsequent circumstances (ATF 132 III 626 at 3.1).

5.5.2. In the case at hand, the passage of the award under appeal devoted to examining the substantive validity of the arbitration agreement (n. 146 to 154), as summarized above (see B.b, paragraph before last), clearly shows that the Arbitrator, as he himself confirms in his answer to the appeal (p. 3, 1st paragraph and p. 5, n. 4, 1st paragraph), found the real and common will of the parties to resort to arbitration. It also shows that such a will, expressed in the latest version of Art. 14 of the draft Framework Contract, contained all essential elements of an arbitration agreement. The following terms used by the Arbitrator in the topical passage of his award show, moreover, that this is indeed subjective interpretation:

[18] Translator's Note: English translation: dispute as to consent.

> "...provides clear evidence of their mutual intent and agreement to arbitrate" (n. 148); "...the Parties' "agreement to arbitrate was "perfected", within the meaning of Article 1 CO, by 8 September 2012..." (n. 150); "[t]he Parties' subsequent conduct does not alter the Sole Arbitrator's finding as to their actual and mutual intent to arbitrate" (n. 152); "[i]n sum, the Sole Arbitrator sees no elements in the file that can affect his finding as to the Parties' intent and agreement to arbitrate their disputes" (n. 153); "...the sole Arbitrator holds that the arbitration agreement in Article 14 FC is valid as to its substance, in that it expresses the Parties' true and common intent to refer their disputes to arbitration under the SRIA with seat in Lugano" (n. 154).[19]

To establish the existence of this real and common will of the parties to waive recourse to the state courts that would otherwise have jurisdiction in favor of a private jurisdiction to decide their possible disputes, the Arbitrator relied first on the very text of the latest version of Art. 14 of the draft Framework Contract and found there the all essential elements upon which the validity on an arbitration agreement depends (award n. 146/147). The review of the behavior of the parties throughout the contractual negotiations and the exchange of various drafts of the Framework Contract before the aforesaid agreement became effective on September 8, 2012, strengthened his literal analysis as it brought out, in particular, that at no time did the Appellant challenge the very principle of resorting to arbitration to resolve the disputes it may have with the Respondent (award, n. 148 to 150).

Finally, by reviewing the behavior of the parties after the aforesaid date, the Arbitrator saw nothing there that would challenge the soundness of his initial conclusions (award n. 152/153). However, he did not research how the parties could and should understand in good faith the statements of will contained in the arbitration agreement at Art. 14 of the draft Framework Contract or the meaning that the Appellant could give in good faith to the Respondent's behavior throughout the contractual negotiations.

Yet, the Appellant is not now permitted to argue, as it does at page 4 of its reply in particular, that none of the facts found by the Arbitrator would have allowed him to establish the real will of the parties to be bound by the arbitration clause inserted into the drafts of the Framework Contract they had exchanged. In submitting such an argument, it challenges the result of the subjective interpretation by the Arbitrator, an issue which, as was seen, is beyond the scope of review of the Federal Tribunal.

5.2.3. Moreover, the Arbitrator points out that the Appellant did not argue that the dispute he was called upon to decide was not covered by the arbitration clause; there was instead an assumption of its validity (award, n. 160). Thus, it is doubtful that the Appellant may raise this issue before the Federal Tribunal as it seems to do (appeal, n. 84). Yet, even if it were, its new argument should be rejected for the following reasons.

According to the Appellant, and if one understands it well, the arbitration clause inserted in the draft Framework Contract would apply only to the disputes concerning the inexistence or the nullity of the

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

aforesaid contract or to the pre-contractual liability of the parties. Therefore, the arbitration agreement at Art. 14 of the draft Framework Contract could not be invoked by the Respondent because the latter asks the Arbitrator to decide the dispute connected with the Sales Contract of May 16, 2012, namely a separate contract entered into before the drafts of the Framework Contract. Thus, the Arbitrator's jurisdiction would have required entering into an *ad hoc* arbitration agreement, according to the Appellant.

It is not so. In conformity with the group of contracts theory, when several contracts are in a relationship of material connectedness – such as the Framework Contract and the various contracts connected to it – but only one of them contains an arbitration clause, unless there is a specific rule to the contrary it must be presumed that the parties intended to submit the other contracts of the same group to that arbitration clause as well (Wyss, *op. cit.*, n. 117 to 119). It could not be otherwise in the case at hand. A framework contract is a general contract by which the parties determine the main rules and conditions to which the execution contracts will be subjected (Nicolas Kuonen, *La responsabilité précontractuelle*, 2007, n. 871). Considered in isolation, it would serve no purpose. In the case at hand, the interdependence between the Framework Contract and the Sales Contract, the performance of which it should ensure, appears from the very text of its Art. 1.1, which states the following:

> Under the present Contract the Seller undertakes to sell and the Buyer to accept and to pay for steel products of nomenclature and quantity, stipulated in specifications hereto, being an integral part of the present Contract.[20]

Moreover, it is confirmed indirectly by the fact that the Sales Contract concluded on May 16, 2012, namely the very day of the first draft of the Framework Contract, does not contain an arbitration clause. That the clause in the Framework Contract should apply to this Sale Contract and to contracts of the same type which could be entered into subsequently, is therefore evident.

6.

The foregoing considerations show that the Arbitrator accurately applied the principle of severability of the arbitration agreement with respect to the main contract when he accepted jurisdiction on the basis of an valid arbitration clause formally and substantively binding the two parties, irrespective of whether or not the Framework Contract in dispute came into force or remained in draft form. The exceptional nature of the legal situation in the case at hand changes nothing in this respect. It could merely be contrasted with the Appellant's argument, according to which, the solution upheld would be a real threat to legal certainty because a party could be compelled to arbitration for exchanging mere drafts of contract in the framework of contractual negotiations. To set aside such a threat, however, it would have been sufficient for the Appellant to state black and white in its first email to the Respondent that under no circumstances would it be bound by the arbitration clause in discussion before the parties executed the Framework Contract containing the clause. Similarly, it could have struck off the arbitration clause altogether in the first draft of

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

the Framework Contract if, as it claims today, it was not practicable for it to submit to any arbitration. The argument based on a violation of Art. 190(2)(b) PILA therefore fails, which leads to the rejection of the appeal.

7.

The Appellant loses and shall pay the judicial costs of the federal proceedings (Art. 66(1) LTF) and compensate the Respondent (Art. 68(1) and (2) LTF).

Therefore the Federal Tribunal pronounces:

1.
The appeal is rejected.

2.
The judicial costs set at CHF 10'000 shall be borne by the Appellant.

3.
The Appellant shall pay an amount of CHF 12'000 to the Respondent for the federal proceedings.

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

Lausanne, February 18, 2016

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

Presiding Judge:	Clerk:
Kiss (Mrs.)	Carruzzo