4A_44/2011[1]

Judgment of April 19, 2011

First Civil Law Court

Federal Judge KLETT (Mrs), Presiding
Federal Judge CORBOZ,
Federal Judge KOLLY,
Clerk of the Court: CARRUZZO.

A.X._____,
Appellant,

Represented by Mr. Raphaël TREUILLAUD

v.

1. B.X._____,
2. C.X._____,
3. D.X._____,
4. V.X._____ BV,
Respondents,

Represented by Mrs. Anne-Véronique SCHLAEPFER, Mr. Alexandre MAZURANIC and Mrs Julie RANEDA

Facts:

A.

A.a This case concerns a long lasting dispute between the members of X._____ family, which has been active in private banking and asset management in Switzerland and abroad, particularly in France, for several generations. It originates in the unsuccessful attempt by B.X._____ and his

[1] Translator's note : Quote as A.X._____ *v.*, B.X._____ *et al.* 4A_44/2011. The original of the decision is in French. The text is available on the website of the Federal Tribunal www.bger.ch.

two sons A.X._____ and C.X._____ (hereafter collectively the B.X._____ branch) to exclude D.X._____, B.X._____'s brother, from Bank W.X._____ and Cie (hereafter: the Bank).

A.b After that attempt failed the members of the X._____ family entered into discussions with a view to organizing a friendly separation of the interests of the respective branches of the two brothers, B.X._____ and D.X._____. Besides the aforesaid Bank and the group of companies affiliated to it, they also controlled the Dutch company R._____ NV (hereafter: R._____), which owned the entirety of the capital of V.X._____ BV (hereafter: VX._____). The latter company, also governed by Dutch law, had a majority participation in Z.X._____, a company under French law, which itself owned an important part of the capital of Y._____ company a French financial company listed on the stock exchange.

The separation contemplated would take place in two steps: the first, which was carried out, was the acquisition by B.X._____ and his two sons of D.X._____'s shares in the Bank and the other companies of the group. The second, so far unfinished, anticipated that D.X._____ would be brought out from R._____ by the repurchase of his shares in the various companies of the group against payment of a certain amount of money and delivery of the Y._____ shares belonging to Z.X._____. The fulfillment of that second step required that the money and the Y._____ shares held by Z.X._____ should be assigned to V.X._____. For that purpose Z.X._____ had to reduce its capital by acquiring its own shares from V.X._____ (to annul them eventually) against payment of a certain amount and delivery of the Y._____ shares. As to the separation of the D.X._____ branch from the B.X._____ branch it was to take place through an increase of capital of V.X._____. B.X._____, C.X._____ and A.X._____ would subscribe the new V.X._____ shares by assigning their Z.X._____ shares to V.X._____, A.X._____ having to deliver Z.X._____ 70'187 shares in exchange for the V.X._____ shares. Once this was done, D.X._____ would sell his R._____ shares to V.X._____ and receive the Y._____ shares and the cash acquired by V.X._____ in the meantime.

In order to formalize the project, D.X._____, B.X._____, A.X._____ and C.X._____ (hereafter collectively the X._____ partners) entered into a Protocol and a specific reiterative Agreement on November 23, 2007 (hereafter designated globally as the Agreements). They attached a number of spreadsheet to the first of these two documents spelling out the fourteen

steps to be taken in order to allow D.X._____ to leave the R._____ group (Step Plan). These two Agreements, governed by Swiss law, contain an arbitration clause of similar contents, entrusting a three members arbitral tribunal sitting in Geneva with deciding all disputes arising from them according to the applicable rules of the Geneva Chamber of Industry and Services (GCIS).

A.c The numerous steps purporting to enable D.X._____ to leave the R._____ group were carried out in part. Thus the necessary permits from the competent French administrative bodies, required as a consequence of Y._____'s legal status, were applied for and issued; the reduction of the Z.X._____ capital was voted and so was the increase of the capital of V.X._____.

On May 5, 2009 the partners of the Bank decided to put an end to A.X._____'s management position and to exclude him from the company. A dispute arose as a consequence and an arbitral tribunal found against A.X._____.

Since being excluded from the Bank A.X._____ stopped collaborating to the implementation of the two aforesaid Agreements. He refused to subscribe to the increase of capital of V.X._____ and to bring his 70'187 shares of Z.X._____ to that company. Instead he expressed a wish to participate in the reduction of the capital of Z.X._____ by assigning the aforesaid shares to the latter against payment of a certain amount, which was not consistent with his undertaking in this respect. Moreover A.X._____ initiated legal proceedings in the Netherlands, which paralyzed the implementation of the alternate solution devised to substitute for his refusal to collaborate (transfer by V.X._____ to R._____ of the Y._____ shares and of an amount in cash as dividends, then purchase by R._____ of his own shares held by D.X._____ against payment in cash and assignment of part of the Y._____ shares). Finally, in a letter of December 8, 2009, he invalidated the entirety of the Agreements entered into in 2006 and 2007, claiming material error, the rules of good faith and the theory of unforeseeable consequences; he eventually pointed out that the latter also meant that the aforesaid Agreements were terminated for breach.

A.d D.X._____ is still to receive the amount of EUR 1'448'513,70 and the Y._____ shares to which it is entitled, namely 183'796 shares. These shares are mainly held by V.X._____ presently.

B.

On July 17, 2009 B.X._____, D.X._____ and C.X._____ as well as V.X._____ filed a request for arbitration against A.X._____ with the GCIS. They essentially submitted that he should be ordered to bring the 70'187 Z.X._____ shares he possesses into V.X._____ within 45 days from the award, to cease any action purporting to block the implementation of the Agreements and to pay damages.

A.X._____ submitted that the Arbitral tribunal should decline jurisdiction towards V.X._____, find that the company has no standing to sue and hold that the Agreements were terminated *ex nunc*, consequently finding that he is no longer bound by his obligation to bring the Z.X._____ shares he owns into V.X._____ and finally, to reject all submissions by B.X._____, D.X._____ and C.X._____.

A three members Arbitral tribunal was created under the aegis of the GCIS. In a final award in French of December 10, 2010 the Arbitral tribunal found that it had jurisdiction as to V.X._____, that A.X._____ was bound by the Agreements and was not entitled to terminate them unilaterally, ordered him to bring the 70'187 Z.X._____ shares to V.X._____ within 45 days after the award, issued a decision on the costs of the arbitration and rejected all other submissions by the Parties.

As to the issue of jurisdiction towards V.X._____ and that company's standing to act, the Arbitral Tribunal recalled the principles of case law applicable in this respect and found that A.X._____, with the latter being aware of it, had irrevocably undertaken to participate in the increase of capital of the company by delivering his Z.X._____ shares to V.X._____ for that purpose. As the addressee and the beneficiary of that commitment V.X._____ accordingly sought its implementation. In law the arbitrators held that the aforesaid commitment was a contract in favor of a third person within the meaning of Art. 112 (2) CO[2], adding that A.X._____ had specifically conceded in one of his pleadings that the agreement contained such a contract in favor of a third person. Accordingly, in their view, V.X._____ had its own right to obtain performance of what he had promised in its favor. It was accordingly entitled to rely on the arbitration clause in the Agreements. The Arbitral tribunal adds that its jurisdiction as to V.X._____ is even more certain because the aforesaid company, which recognizes and claims that jurisdiction, participates in the implementation of the Agreements in several respects, although it is not a signatory of them, a

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

circumstance indicating the common intent of the Parties to see V.X._____ bound by the arbitration agreement.

C.
On January 21, 2011 A.X._____ filed a Civil law appeal with the Federal Tribunal relying on Art. 190 (2) (b), (d) and (e) PILA[3] with a view to obtaining the annulment of the aforesaid award and a finding that the arbitral proceedings which led to the award are themselves annulled.

In their answer of February 25, 2011 the Respondents submitted that the appeal should be rejected and cast doubt as to the capability of the matter to be appealed.

The request for a stay of enforcement contained in the appeal was granted by decision of the Presiding judge of February 24, 2011.

Reasons:

1.
In the field of international arbitration a Civil law appeal is possible against the decisions of arbitral tribunals under the conditions set forth by Art. 190 to 192 PILA (Art. 77 (1) LTF[4]). The seat of the arbitration was in Geneva. At least one of the parties (in this case V.X._____) did not have its domicile in Switzerland at the decisive time. The provisions of chapter 12 PILA are accordingly applicable in principle (Art. 176 (1) PILA).

Filed in the legally prescribed format (Art. 42 (1) LTF) and timely (Art. 100 (1) LTF in connection with Art. 46 (1) (c) LTF) as legally required against a final award, the appeal is based exclusively on the grounds stated at Art. 190 (2) PILA and is accordingly acceptable from that point of view. However the submission by which the Appellant seeks a finding by the Federal Tribunal that "the international arbitration proceedings which led to the award [under appeal] are themselves void and annulled" is not admissible. Such a submission indeed disregards that a Civil law appeal against an international arbitral award as stated at Art. 77 (2) LTF may only seek the annulment of the award. This Court could at most issue a finding of lack of jurisdiction of the Arbitral tribunal as to V.X._____ if it admitted the corresponding grievance contained in the appeal (see ATF 136 III

[3] 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.

[4] Translator's note : LTF is the French abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173.110.

605 at 3.3.4 p. 616). Moreover the Respondents deny that the matter is capable of appeal in respect of some of the arguments in the appeal and a review of that issue must be reserved.

2.

Firstly the Appellant argues that the Arbitral tribunal was wrong to assume jurisdiction as to V.X._____. The analysis of that argument, which is based on Art. 190 (2) (b) PILA, requires a summary of the reasons in support of the argument and those which the Respondents submit in defense.

2.1

2.1.1 First of all the Appellant argues that the existence of a contract in favor of a third person, namely V.X._____, cannot be inferred from the Agreements. According to him the complex mechanisms conceived by the signatories of the Agreements – in particular his bringing the Z.X._____ shares to V.X._____ in the framework of the increase of capital of that company – were in favor of the X._____ partners themselves and particularly D.X._____ by allowing the latter to leave the family group and the members of the B.X._____ branch to buy his shares. As to V.X._____, entirely dominated by the X._____ partners, its only purpose was as a cog in the implementation of these mechanisms, similar to other companies of the X._____ group (R._____, Y._____, Z.X._____, etc.) without any economic interest in its favor from the purchase of the Z.X._____ shares.

According to the Appellant, if V.X._____ was not the beneficiary of the commitments made by the X._____ partners, then it was even less entitled to claim from them a personal right to the implementation of such commitments, so that the very idea of a contract in favor of a third person in its favor could not be taken into account in this case.

Finally and above all, the Appellant argues that an alleged contract in favor of a third person could not cause its beneficiary to submit to the arbitration agreement contained in the contract containing that particular pattern of implementation of the obligation, contrary to what prevails in case of the assignment of a claim, in the assumption of an obligation or the transfer of a contractual relationship.

2.1.2 For their part the Respondents start by casting doubt on the Appellant's legally protected interest to invoke the alleged lack of jurisdiction of the Arbitral tribunal as to V.X._____. In their

opinion, should the argument of lack of jurisdiction *ratione personae* be admitted, only the first point of the award under appeal should be annulled, which finds jurisdiction of the Arbitral tribunal towards that company. As to the other points of the award, particularly the one ordering the Appellant to bring his Z.X._____ shares into V.X._____ according to the commitment underwritten in favor of D.X._____, B.X._____ and C.X._____ in the Agreements, they should be maintained, particularly because the Appellant too had made submissions on the merits in their respect. Hence on the basis of the arbitral award confirming the validity and the enforceability of that commitment, the Respondents may demand from the Appellant that he brings his Z.X._____ shares to V.X._____. Thus, according to the Respondents, the Appellant has no legally protected interest to obtain the annulment of the first item in the award as this would change nothing to his obligation to bring the shares, which would remain anyway.

The Respondents then dispute the argument as to the lack of jurisdiction of the Arbitral tribunal as to V.X._____. They point out, as the arbitrators did, that the Appellant himself admitted the existence of contracts in favor of a third person included in the Agreements in his post-hearing brief. According to them, all parties except the Appellant would moreover consider that the intent of the signatories of the Agreements was to create a contract in favor of X._____. That common intent would also appear from the circumstances of the case. V.X._____ had to play an active part in the process of restructuring group X._____; in that framework it had not only some rights but also some obligations for the implementation of which it had to be able to obtain the Z.X._____ shares, if necessary through arbitral proceedings; its situation was different from that of the other companies of the X._____ group to the extent that it was the only company committed towards third parties, in this case the French regulator. Consequently it cannot be denied the right to act in the arbitration next to the other Respondents in order to obtain implementation of the Appellant's commitments.

As to the extension of the arbitration clause to V.X._____ the Respondents point out that case law of the Federal Tribunal is not formalistic in this field, particularly as to the possibility to bring into an arbitration a third party getting involved in the implementation of the contract containing the arbitration clause. This would be the case of the aforesaid company, which is directly concerned by the implementation of the Agreements and which intervened repeatedly in their implementation. According to the Respondents moreover, if it is true that the beneficiary of a contract in favor of a third party inserted into a contract containing an arbitration clause cannot be compelled to participate in the arbitration, that specific requirement is not applicable to the instant case because

the beneficiary of the contract in favor of a third party was a claimant in the arbitral proceedings. Hence the Respondents and the arbitrators hold the view that the arbitration clause contained in the Agreements bound V.X._____ as well.

2.2 Seized of the grievance of lack of jurisdiction the Federal Tribunal freely reviews the legal issues, including the preliminary issues determining jurisdiction of the arbitral tribunal or lack thereof (ATF 134 III 565 at 3.1). However this Court reviews the factual findings on which the arbitral award under appeal rests only if one of the grievances spelled out at Art. 190 (2) PILA is raised against them or when some new facts or evidence are exceptionally taken into account in the framework of the Civil law appeal (judgment 4A_234/2010 of October 29, 2010 at 2.1).

2.3 A matter is capable of Civil law appeal only to the extent that the appellant has a legally protected interest to the annulment or to the modification of the decision under appeal (Art. 76 (1) (b) LTF in the wording prior to the amendment of January 1st, 2011), which implies that the appellant should have failed to obtain his submissions as to rights belonging to him and that he should still have an interest to the modification of the decision (judgment 4A_503/2008 of April 7, 2009 at 2.3 and the writer quoted).

From that point of view it is not certain that the matter is capable of appeal in this respect. At paragraph 4 of the award the Arbitral tribunal ordered the Appellant to bring the 70'187 Z.X._____ shares he owns to V.X._____. It did so after emphasizing in the reasons of the award that the Appellant does not deny being bound by the Agreements to bring his Z.X._____ shares to V.X._____ (nr. 227) and does not challenge procedurally the authority of the Arbitral tribunal to issue an injunction (nr. 228). Faced with an action by all natural persons having entered with him into the Agreements imposing the duty to fulfill that obligation in favor of a third party, the Appellant cannot escape from that duty simply because the third party would not be bound by the arbitration clause contained in the aforesaid Agreements. Hence the issue as to whether or not the existence of a contract in favor of a third party can be deducted from a contract and whether or not it is possible to make submissions in favor of that third party on the basis of a contract in favor of a third party, or perhaps for another reason, has no relationship with the issue of jurisdiction but belongs to the merits and must be resolved by the arbitrators (judgment 4P.141/1989 of November 20, 1989 at 2b/cc, reproduced by PATRICK KRAUSKOPF, Der Vertrag zugunsten Dritter, Fribourg 2000, p. 454 s.). In this case they decided that issue in the affirmative. The Appellant rightly refrains from arguing that the three other signatories of the Agreements and V.X._____ were necessary

Respondents towards him, an issue which could have an impact on the jurisdiction of the Arbitral tribunal. Consequently one hardly sees in what way he could still have a present and legally protected interest to obtain a finding that the Arbitrators allegedly had no jurisdiction to order him to fulfill the obligation at hand to the extent that the specific request came from V.X._____ when he does not deny that they had jurisdiction to issue the same injunction against him at the request of the other Claimants.

However the Appellant also argues that the undue participation of V.X._____ in the arbitral proceedings had serious consequences in several respects so that it justifies annulling the award if not the arbitral proceedings as such. Assuming therefore that he is right, he has an interest to obtain a finding by this Court that the Arbitral tribunal had no jurisdiction as to V.X._____. Consequently the matter is capable of appeal from that point of view.

2.4

2.4.1 When examining whether or not it has jurisdiction to decide the dispute at hand the Arbitral tribunal must resolve the issue of the subjective bearing of the arbitration agreement among other issues. It must determine which are the parties bound by that agreement and, as the case may be, whether one or several third parties not mentioned nonetheless fall within its scope. That issue of jurisdiction *ratione personae*, which belongs with the merits, must be resolved in the light of Art. 178 (2) PILA. The aforesaid provision embodies three alternate connections in *favorem validitatis*, without creating a hierarchy between them, namely the law chosen by the parties, the law governing the object of the dispute *(lex causae)* and Swiss law (ATF 134 III 565 at 3.2 p. 567).

In view of the principle of relativity of contractual obligations, the arbitration agreement contained in a contract binds only the contractors. However in a number of hypotheses such as the assignment of a claim and the assumption of an obligation or the transfer of a contractual relationship, the Federal Tribunal has long held that an arbitration agreement may bind even those who did not sign it and are not mentioned in it. Moreover the third party which implicates itself in the performance of the contract containing the arbitration clause is deemed to have conclusively adhered to it if its intent to be bound by the arbitration agreement can be inferred from that participation. However when it comes to guarantees, such as a contract of guarantee, a contract to the charge of a third person or a bank guarantee, it was held that an arbitral tribunal cannot assume jurisdiction as to the creditor's rights towards the guarantor merely because the contract between the creditor and the debtor contains an arbitration agreement (ATF 134 III 565 at 3.2 and references).

As to the contract in favor of a third party, legal writers principally examined the issue as to whether or not the beneficiary of such a contract is bound by the arbitration clause that the other parties inserted in the contract they entered into with a view to creating some obligations, so that he could be drawn against his will into the arbitral proceedings concerning the obligation stipulated in his favor. The answers given, often with nuances, are not unanimous. For some writers the beneficiary of the third party contract is bound by the arbitration clause in principle only if he consents to the dispute being submitted to arbitration (Fouchard/Gaillard/Goldman, Traité de l'arbitrage commercial international, n° 498 p. 298; Wenger/Müller, in Commentaire bâlois, Internationales Privatrecht, 2e éd. 2007, n° 66 ad art. 178 LDIP; apparently agreeing: Kaufmann-Kohler/Rigozzi, Arbitrage international, 2e éd. 2010, p. 146 note 172). Other legal writers hold the view that the arbitration agreement contained in the contract generating the obligations can bind the third party *ipso jure* (Schwab/Walter, Schiedsgerichtsbarkeit, 7e éd. 2005, n° 36 ad chap. 7; Jens-Peter Lachmann, Handbuch für die Schiedsgerichtspraxis, 3e éd. 2008, n° 502 p. 141; Rüede/Hadenfeldt, Schweizerisches Schiedsgerichtsrecht, 2e éd. 1993, p. 81; Krauskopf, op. cit., n° 1043) or, at the very least, when the beneficiary accepted the rights stipulated in his favor (Poudret/Besson, Comparative Law of International Arbitration, 2e éd. 2007, n° 289 and the writers quoted in footnote 658 p. 252). As to Berger/Kellerhals (International and Domestic Arbitration in Switzerland, 2e éd. 2010, nos 455 et 514) they examine the issue from another perspective because they wonder whether the arbitration agreement itself can be entered into in favor of a third party. There is no need to examine the issue any further. In the case at hand indeed the issue is not to impose on the beneficiary of the alleged contract in favor of a third party a duty to participate in the arbitral proceedings because it took the initiative to join the other Claimants in the filing of the arbitration request. Providing that the contract in favor of a third party which V.X._____ claims actually existed, one does not see why the Appellant, who signed the Agreements containing the arbitration clause, could argue that the beneficiary of the contract in favor of a third party should not be able to bring his claim into the same proceedings that the other parties to the Agreements chose to resolve any possible disputes, namely arbitration. Moreover, except for an agreement to the contrary not existing in this case, the beneficiary of a contract in favor of a third party within the meaning of Art. 112 (2) CO acquires a claim against the debtor (or the promisor) with all preference and accessory rights connected thereto, including the arbitration agreement (*mutatis mutandis* ATF 128 III 50 at 2b/bb p. 56 as to the assignment of a claim). If he intends to use such rights in arbitral proceedings it is not in the power of the other parties to prevent him from doing so.

2.4.2 A contract in favor of a third person within the meaning of Art. 112 CO is a contract by which a party, the stipulator, causes another party, the promisor, to commit in favor of a third party, the beneficiary (Pierre Engel, Traité des obligations en droit suisse, 2e éd. 1997, p. 417). When such was the intent of the parties the third party or its successors may seek performance personally (Art. 112 (2) CO). In that case the contract in favor of a third person perfect.

The Appellant must be granted that the circumstances of the case at hand are not typical of that legal pattern, certainly very frequent in practice but generally in other fields of the law than that involving companies or the relationships between partners, such as insurance or the relationship between the banks and their clients (for some examples see Engel, op. cit., p. 422 to 424). Thus the real purpose of the Agreements was to enable D.X._____ to leave the family group and for the members of the B.X._____ branch to buy back his shares. As to B.X._____, D.X._____ and C.X._____ (the stipulators), their prime intent was not to give V.X._____ (the beneficiary) the right to claim personally from A.X._____ (the promisor) that he should deliver his 70'187 Z.X._____ shares when it would increase its capital. Such a contribution was only one of the fourteen steps of the significant transactions that had to be carried out with a view to reaching the goal sought and which also implied other companies than V.X._____. It would also remain to be shown that the latter would itself have found an advantage in the acquisition of the Z.X._____ shares held by A.X._____ against delivery to him of its own newly issued shares.

However it appears from the award under appeal that notwithstanding the appearances, the signatories of the Agreements did indeed want to give to V.X._____ its own right to obtain the promised performance and that accordingly there is a contract in favor of a third party. Indeed the Arbitrators draw such a conclusion from the fact that the Appellant specifically admitted this in his post-hearing memorandum (award nr. 142 ff). Moreover they find on the basis of the Appellant's statements in the various Agreements that he irrevocably committed to participate in the increase of capital of V.X._____, which was aware of the commitment, by the delivery of his Z.X._____ shares (award nr. 137 to 139). These conclusions of the Arbitrators, based on the Appellant's statements before and after the arbitration was initiated, show the true intent of that party, consistent with that of the others incidentally, and accordingly bind the Federal Tribunal as they are in the realm of facts (ATF 131 III 606 at 4.1 p. 611).

Entitled to claim performance from the Appellant V.X._____ was accordingly entitled to sue the promisor to obtain performance. As it used the arbitral route foreseen in the Agreements in order to

do so, the Appellant is wrong to argue that the Arbitral tribunal had no jurisdiction towards that party (see here above at 2.4.1 *in fine*). Similarly it is in vain that it challenges the latter's standing to act as to the claim arising from the contract in favor of a third party.

2.4.3 Be that as it may, even if that legal concept were to be set aside, the jurisdiction of the arbitrators towards V.X._____ would have to be admitted. Indeed the Arbitral tribunal holds that the aforesaid company was supposed to participate actively in the implementation of the Step Plan and specifically in its Steps 6 and 7. In its opinion "such a participation in the implementation shows the common intent of the Parties to see V.X._____ bound by the arbitration agreement". By bringing to light their real intent to extend the arbitration agreement to that third party the arbitrators made a final finding of facts which prevents one of those parties to challenge *a posteriori* the right of V.X._____ to participate in the arbitration.

This being so, the argument based on a violation of Art. 190 (2) (b) PILA is unfounded even if the matter is capable of appeal.

3.
Under the heading "Importance and Consequence of the Errors of the Award" the Appellant makes three additional criticisms towards the Arbitral tribunal.

3.1
3.1.1 Firstly it is argued that the arbitrators would have disregarded that the unlawful participation of V.X._____ in the arbitral proceedings would have severely and materially affected the *locus standi* in the case and the solution given to the dispute within the meaning of Art. 190 (2) (d) PILA. The participation of that company would have caused the debtor to be held as a debtor defaulting towards a third party – V.X._____ - to which he could oppose nothing. Thus the Arbitral tribunal would have focused on that third party, thereby forgetting the very nature of the dispute, namely the liquidation of a partnership, thus harming the Appellant as compared to D.X._____ in the liquidation process. This would explain its erroneous decision not to admit that the Agreements had been invalidated or terminated by the Appellant.

3.1.2 With the Respondents, one may seriously doubt that the matter is capable of appeal with regard to the first argument. As it is presented it makes it impossible for the Federal Tribunal to know what the Appellant really argues the arbitrators failed to do pursuant to Art. 190 (2) (d) PILA.

In reality, under the guise of an alleged procedural error, which would affect the award under appeal, the Appellant appears to attempt to question the solution which the Arbitral tribunal reached as to the issues in front of it on the merits, such as the effectiveness of the invalidation or of the termination of the Agreements. Yet determining whether the solution was materially correct or not does not fall within the aforesaid provision or within public policy as provided by Art. 190 (2) (e) PILA, not invoked in this context incidentally.

It is also true, as the Respondents point out, that at the end of the hearing each Party stated that it had no objections as to the conduct of the proceedings (award nr. 37) so that the Appellant is acting in a manner hardly consistent with the rules of good faith when he argues unequal treatment or the violation of his right to be heard now that the arbitral proceedings are closed.

Be this as it may, the argument relies on the unsubstantiated assumption that V.X._____'s participation in the proceedings was "unjustified". Thus it cannot succeed.

3.2 Furthermore the Appellant argues that drawing V.X._____ into the arbitral proceedings also aimed at obtaining an enforceable decision, in the format of an arbitral award, which would allow the X._____ partners to spare ordinary law suits that the aforesaid company and Z.X._____ would have to conduct in France if they wanted to force him to bring his Z.X._____ shares into V.X._____ with a view to the latter's increase of capital or to enjoin him from assigning the aforesaid shares to Z.X._____ within the framework of the reduction of capital of that company through the acquisition of its own shares. In summary, according to the Appellant, the award under appeal would unduly provide V.X._____ with an enforceable title against him, thus depriving him of his natural forum.

The matter is not capable of appeal in this respect. Not only does it rely on an allegation – the goal sought by Claimants X._____ - which corresponds to no finding of fact in the award under appeal but it establishes no nexus with the violation of Art. 190 (2) (d) PILA. In particular the Appellant does not indicate what relationship there would be between that provision and the goal which the Claimants sought when they drew him in front of the Arbitral tribunal.

3.3 Finally the Appellant argues that the Respondents gave artificial international nature to the arbitration by introducing V.X._____ into the proceedings, thus depriving him of the appeals provided by the Intercantonal Convention on Arbitration of August 27, 1969 (hereafter: the

Concordate). That “subterfuge” by the Respondents would be contrary to public policy according to the Appellant and he points out that the Swiss and ordinary concept of public policy should be taken into account because in reality the guarantees of Art. 30 Cst[5] were “flouted“ in this case.

The matter is not capable of appeal in this respect as well. Indeed the Appellant is barred from raising that argument because he did not invoke the protection of the rules of the Concordate during the arbitral proceedings. To the contrary, he specifically referred to PILA in the briefs which are part of the record of the arbitration, for instance under paragraphs 51 and 53 of his answer of March 15, 2010.

4.

In conclusion the appeal must be rejected to the extent that the matter is capable of appeal. In such an outcome of the proceedings, the judicial costs shall be borne by the Appellant (Art. 66 (1) LTF) and he shall compensate the Respondents who are entitled to claim from him severally in this respect (Art. 68 (1) and (2) LTF).

Therefore the Federal Tribunal pronounces:

1. The appeal is rejected to the extent that the matter is capable of appeal.

2. The judicial costs, set at CHF 15’000.- ,shall be borne by the Appellant.

3. The Appellant shall pay to the Respondents as creditors severally an amount of CHF 17’000.- for the federal judicial proceedings.

4. This judgment shall be notified to the Representatives of the Parties and to the Chairman of the GCIS Arbitral Tribunal.

Lausanne, April 19, 2011

[5] Translator’s note : Cst is the French abbreviation for the Swiss Constitution.

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

The Presiding Judge: The Clerk:

KLETT (Mrs) CARRUZZO