4A_709/2014[1]

Judgment of May 21, 2015

First Civil Law Court

Federal Judge Kiss (Mrs.), Presiding
Federal Judge Hohl (Mrs.)
Federal Judge Niquille (Mrs.)
Clerk of the Court: Mr. Carruzzo

A._____ SA,
Represented by Mr. Marc Oederlin,
Appellant

v.

B._____ Sàrl,
Represented by Mr. Francis Nordmann and Mrs. Chloé Terrapon Chassot,
Respondent

Facts:

A.
A.a. On November 20, 2012, the Luxembourg company, B._____ Sàrl (hereafter: B._____) as owner and the Swiss company A._____ SA (hereafter: A._____) as general contractor signed a general contractor's agreement with a view to renovating an apartment building in Bienne for a flat price of CHF 5'085'000. A year earlier, the owner entered into an architect contract as to the same project with company C._____ SA, whose chairman of the board is a certain D._____.

Art. 2 of the general contractor's agreement set forth a number of documents according to a specific order of priority that would form an integral part of the agreement; in the same manner, it stated that the previsions on the Swiss Code of Obligations (CO) would apply. At Art. 16 of the aforesaid contract, an arbitration clause stated the following:

[1] Translator's Note: Quote as A._____ SA *v.* B._____ Sàrl, 4A_709/2014.
The original of the decision is in French. The full text is available on the website of the Federal Tribunal, www.bger.ch

> "All disputes arising as to this agreement, including as to the interpretation or the application of this agreement, shall be exclusively decided by a sole arbitrator. The parties appoint D._____ as sole arbitrator, who will decide according to the principle *ex aequo et bono* and declare that they shall acknowledge his judgment as final and binding without any possibility of recourse to another arbitrator or a tribunal."

A.b. In a registered letter of his representative sent to A._____ on April 3, 2014, B._____ invoked Art. 366 CO and terminated the general contractor's agreement without notice. Consequently, a dispute arose between the parties as to their respective obligations.

B.

B.a. On April 9, 2014, B._____ relied on the arbitration clause in the general contractor's agreement to send a request for arbitration to D._____, the *ad hoc* sole arbitrator (hereafter: the Arbitrator) designated in the aforesaid clause. He also communicated it to A._____. On April 15, 2014, the Arbitrator notified a "Procedural Order No. 1" to the parties. According to this procedural order, which could be modified by the Arbitrator at any time, Geneva would be the seat and French the language of the arbitration. The procedure would be written as to the manner in which witnesses should testify, yet the Arbitrator would retain the option of holding a hearing to allow the other party to interrogate the witnesses. New facts and evidence would not be accepted after the first brief of the party invoking them was filed. Finally, it ordered that the other party should step in and pay the share of the deposit of the defaulting party.

A._____ did not pay its share of the deposit and after receiving the statement of claim of May 6, 2014, complained several times as to alleged procedural deficiencies of Procedural Order No. 1. On May 16, 2014, it formally requested that the Arbitrator step down after seizing the Court of First Instance of the Canton of Geneva of a similar request in its capacity as state court in support of the arbitration.

In an interlocutory award of June 2, 2014, the Arbitrator rejected the challenge. The Court of First Instance held the similar request before it was inadmissible in a judgment of September 23, 2014. In short, the Court held that when the Petitioner signed the general contractor's agreement including the aforesaid arbitration clause, it was already aware of the future role the Arbitrator would play in the execution of the work, that the architect had no legal background, and his connections with the parties and various companies close to them. Moreover, the Court held that the Appellant was late in acting after receiving Procedural Order No. 1, which meant that it was barred from being able to invoke the content of the order to base a challenge.

This procedural matter being settled, the arbitration continued according to modalities which will be described hereunder only to the extent that they are important to the grievances raised in the appeal submitted to this Court.

Pursuant to A._____'s request, the Arbitrator held a hearing on October 31, 2014, to hear B._____'s witnesses and oral arguments. At the end of the hearing, the Arbitrator held the file to prepare his decision.

In a letter of November 13, 2014, A._____ restated several grievances it had raised previously and asked that the minutes of the aforesaid hearing be rectified.

B.b. In a final award of November 14, 2014, the Arbitrator ordered A._____ to pay to B._____ an amount of CHF2'459'324.08 with interest at 5% per year from April 9, 2014, and CHF 70'000 of costs. The costs of the arbitration, set at CHF 70'000 too were to be paid by A._____ and all other submissions rejected.

C.
On December 17, 2014, A._____ (hereafter: the Appellant) filed a civil law appeal with a request for a stay of enforcement. First raising the manner in which the Arbitral Tribunal was composed (Art. 190(2)(a) PILA[2]), it also argues that the Arbitrator decided beyond the submissions made (Art. 190(2)(c) PILA), violated its right to be heard (Art. 190(2)(d) PILA), and issued an award incompatible with public policy (Art. 190(2)(e) PILA). The Appellant submits that the Federal Tribunal should annul the November 14, 2014, final award.

The Arbitrator submitted his file and stated in a letter of January 21, 2015, that he holds the Appellant's grievances as unfounded.

In its answer of February 9, 2015, B._____ (hereafter: the Respondent) submitted that the appeal should be rejected to the extent that the matter is capable of appeal.

The Appellant confirmed its submissions at the outset of its reply of February 25, 2015, and the Respondent waived the possibility of a rejoinder whilst emphasizing in a letter of March 12, 2015, that all observations in the reply are disputed.

Reasons:

1.
In the field of international arbitration, a civil law appeal is admissible against the decisions of arbitral tribunals pursuant to the requirements of Art. 190 to 192 PILA (Art. 77(1) LTF[3]). Whether as to the subject of the appeal, the standing to appeal, the time limit to appeal or the grounds for appeal invoked, none of these admissibility requirements raises any problem in the case at hand. There is therefore no reason not to address the appeal. A review of the admissibility of the various grievances raised in the appeal brief is however reserved. Moreover, it must be pointed out that the possibility of a waiver of the right to appeal,

[2] 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.

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

which could perhaps be based on the aforesaid arbitration clause, is not to be considered in the case at hand as one of the parties is incorporated in Switzerland (*see* Art. 192(1) PILA).
2.
2.1. For an admissible argument duly invoked in a civil law appeal to be capable of appeal, it must be reasoned as prescribed by Art. 77(3) LTF. This provision corresponds to what Art. 106(2) LTF states as to the violation of fundamental rights or provisions of cantonal and intercantonal law. Similar to this principle, it establishes the principle that a grievance must be raised (*Rügeprinzip*) and thereby excludes the admissibility of criticism of an appellate nature. Moreover, the appellant may not use the reply to invoke legal or factual arguments which it did not present in a timely manner, namely before the non-extendible time limit to appeal expired (Art. 100(1) LTF in connection with Art. 47(1) LTF) or to supplement after the time limit an insufficient reasoning (judgment 4A_199/2014 of October 8, 2014, at 3.1 and the precedent quoted).

2.2. The Federal Tribunal issues its decision on the basis of the facts found in the award under appeal (see Art. 105(1) LTF). This Court may not rectify or supplement *ex officio* the factual findings of the arbitrators, even if the facts were established in a manifestly inaccurate manner or in violation of the law (see Art. 77(2) LTF, which rules out the applicability of Art. 105(2) LTF). Thus, the Court's mission when seized of a civil law appeal against an international arbitral award is not to decide on the basis of a full judicial review as a court of appeal would but only to examine whether or not the grievances raised against the aforesaid award are founded or not (aforesaid judgment 4A_199/2014 at 4).

In the light of the principles recalled above, the admissibility and the validity of the arguments raised in the appeal must be examined.

3.
3.1. The Appellant argues first that the award was issued in violation of Art. 190(2)(a) PILA because it was decided by two arbitrators – namely architect D._____ and the Geneva lawyer E._____ – who were also assisted by a secretary (Mr. F._____, an attorney in Geneva), when the arbitration clause in the general contractor's agreement provided for a sole arbitrator, specifically named, *i.e.* D._____, and did not provide the option to appoint a secretary. According to the Appellant, the hearing of October 31, 2014, which lasted more than four hours, was conducted entirely by Mr. E._____ who, as opposed to Arbitrator D._____, took copious notes. The Appellant adds that it criticized this approach in a letter sent to the Arbitrator on November 13, 2014.

As opposed to the Appellant, the Respondent states in its answer that lawyers E._____ and F._____ merely gave administrative support to Arbitrator D._____ without participating in the decision in any manner, so their role can be compared to that of legal secretaries. It points out that when the Appellant opposed the participation of these two lawyers to the aforesaid hearing, it was in bad faith and only to torpedo the arbitral procedure, particularly as it knew from the beginning that the Arbitrator had decided to create a legal secretariat at his own cost (as he informed the parties in a letter of May 21, 2014).

3.2.

3.2.1. Pursuant to Art. 190(2)(a) PILA, an award issued in an international arbitration may be challenged when the arbitrator was irregularly appointed or the arbitral tribunal irregularly composed.

According to case law, Art. 190(2)(a) PILA covers two grievances: the violation of contractual (Art. 179(1) PILA) or legal (Art. 179(2) PILA) rules as to the appointment of arbitrators on the one hand; the failure to abide by the rules concerning impartiality and independence of the arbitrators (Art. 180(1)(b) and (c) PILA) on the other hand (judgment 4A_146/2012[4] of January 10, 2013, at 3.2). The argument that the Arbitral Tribunal was irregularly composed also includes a scenario in which the Arbitral Tribunal was constituted in breach of the agreement of the parties. This is the case when the number of arbitrators specified in the arbitration agreement is not complied with (ATF 139 III 511 at 4, p. 515). As to a challenge, when the state court decided on an *ad hoc* petition according to Art. 180(3) PILA, its decision cannot be challenged indirectly in the framework of an appeal against a subsequent award on the basis of Art. 190(2)(a) PILA (ATF 138 III 270[5] at 2).

3.2.2. The jurisdictional mission entrusted to the arbitrator is eminently personal and the arbitrator's contract is concluded *intuitu personae*. This implies that the arbitrator must fulfill his mission himself without delegating to a third party, even to a colleague working in the same firm if he is an attorney (Thomas Clay, *L'arbitre*, 2001, n. 422, 632, 785 and 895). When the decision is to be made, it is therefore important that the arbitrator should know the file, deliberate, and participate in shaping the will of the arbitral tribunal; to this effect, the chairman must keep intellectual control of the outcome of the dispute and the co-arbitrators must contribute to the decision-making process (Kaufmann-Kohler and Rigozzi, *Arbitrage international*, 2nd ed. 2010, n. 678). An award issued in violation of this unwritten rule, sometimes disregarded in arbitration practice (Clay, *op. cit.*, n. 785), may be annulled by way of a civil law appeal based on Art. 190(2)(a) PILA (Berger and Kellerhals, *International and Domestic Arbitration in Switzerland*, 3rd ed. 2015, n. 975).

The prohibition of delegating arbitral tasks to a third party does not necessarily exclude the arbitrator availing himself of the assistance of third parties (Berger and Kellerhals, *op. cit.*, n. 1007). Thus, it is generally admitted that Art. 365(1) CPC[6] (RS 272), which gives the arbitral tribunal the option of appointing a secretary in a domestic arbitration, also applies to international arbitration, even though Chapter 12 PILA does not mention it (Berger and Kellerhals, *op. cit.*, n. 1008; Tarkan Göksu, *Schiedsgerichtsbarkeit*, 2014, n. 883). As the latter author quoted emphasizes, the draft version of the Federal Council[7] submitted the appointment of a secretary to the agreement of the parties (FF 2006 7103) but this requirement was

[4] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/federal-tribunal-will-not-review-decision-foreign-court-appointing-arbitrator-when-party-failed-do

[5] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/an-international-arbitral-tribunal-seating-in-switzerland-is-gen

[6] Translator's Note: CPC is French abbreviation for the Swiss Federal Code of Civil Procedure.

[7] Translator's Note: The Federal Council is the executive branch of the Swiss government.

abandoned upon the initiative of the Council of States[8] in favor of the organizational autonomy of the arbitral tribunal and to avoid delays (BO 2007 CE 641). Yet, the common will of the parties to the arbitration agreement or in a subsequent agreement must be reserved to exclude the appointment of a secretary (Göksu, *op. cit.*, n. 880). The role of the legal secretary is comparable to a clerk in state proceedings: to organize the exchange of briefs, to prepare the hearings, to keep the minutes, to prepare the statements of costs, *etc.* They do not exclude some assistance in drafting the award under the control of and in accordance with the directives from the arbitral tribunal, or if it is not unanimous, from the majority arbitrators, which presupposes that the secretary participates in the hearings and the deliberations of the arbitral tribunal. However, but for an agreement of the parties to the contrary, the secretary is forbidden from carrying out any function of a judicial nature, which must remain the prerogative of the arbitrators only (Göksu, *op. cit.*, n. 879; see also Kaufmann-Kohler and Rigozzi, *ibid*.).

Resorting to the services of a secretary is moreover not the only option afforded to an arbitral tribunal to obtain external assistance, as the assistance requested may come from various other sources (Berger and Kellerhals, *op. cit.*, n. 1013). It is always provided, as was stated above, that the arbitral tribunal does not abandon to its auxiliaries the prerogatives inherent to its mission, in particular that of deciding itself the dispute entrusted to it. Thus, in complex arbitrations of a commercial or technical nature, the arbitral tribunal often calls upon external consultants to help it handle non-legal, delicate issues, which it would not be able to fully master without being backed by experts in the field concerned, an approach which has obvious advantages but also some risks (see among others Bernhard F. Meyer and Jonatan Baier, *Arbitrator Consultants – Another Way to Deal with Technical or Commercial Challenges of Arbitrations*, Bulletin de l'Association Suisse de l'Arbitrage (ASA), 2015, p. 37 *ff*). It is admitted moreover that when the parties did not set the procedural rules, the arbitral tribunal, which sets the procedure itself pursuant to Art. 182(2) PILA, is entitled to appoint a consultant on its own initiative without requesting their prior consent (Meyer and Baier, *op. cit.*, p. 44).

3.3. The review of the argument based on Argument 190(2)(a) PILA requires a prior description of the pertinent procedural facts from this point of view. In a letter of May 20, 2014, following up on a similar request contained in a letter sent on May 16, the Appellant advised the Arbitrator that it was waiting, with interest, for a detailed explanation as to "the shadow lawyers" assisting him, if only to satisfy itself that nothing had been suggested by the Respondent's law firm. The Arbitrator answered as follows in a letter of May 21, 2014: "I confirm being assisted by independent legal counsel with great experience in arbitration who is not the counsel of one of the parties and whose compensation I shall personally and entirely cover."

The Appellant apparently did not raise the issue again until the hearing of October 31, 2014. According to the minutes of the hearing, the Arbitrator was assisted by Mr. F._____ and Mr. E._____, mentioned above as secretary and counsel respectively. The Appellant's counsel opposed in vain Mr. E._____'s presence as "counsel to the Arbitrator" as the witnesses were heard during the hearing. However, the

[8] Translator's Note: The Council of States is the higher chamber of the Swiss parliament.

minutes or any other items in the arbitration file do not show that the role of the two Geneva lawyers on this occasion – and in particular that of Mr. E._____ – went beyond mere legal and administrative support in handling the procedural issues before the Arbitrator. Nothing supports the Appellant's statements seeking to demonstrate that the Geneva lawyer took over the actual leadership of the proceeding in lieu of the Arbitrator, who merely attended the hearing passively without taking any notes. The Appellant admittedly complained, in a letter of November 13, 2014, that the minutes were deficient as to this issue and invited the Arbitrator to rectify the document. The request appears not to have been addressed and it is manifestly inapt to prove the accuracy of the Appellant's statements.

On November 14, 2014, the Arbitrator issued the award under appeal. In its Chapter 2, he states that he was appointed by the parties as Sole Arbitrator before making the following remark:

> "In view of the openly hostile attitude adopted by A._____ SA, the Arbitral Tribunal chose to be assisted by Mr. E._____ and Mr. F._____ of the law firm of G._____ in Geneva, at its own expense and only to keep the minutes of the hearing, to advise the Arbitral Tribunal during the hearing as to the innumerable objections raised by A._____ SA in particular, and to assist the Arbitral Tribunal in drafting the award. These two lawyers kept the minutes and advised the Arbitral Tribunal so that the elementary rules of arbitral procedure, with which the Sole Arbitrator is not necessarily entirely familiar as a non-lawyer, would be complied with. By doing so, Mr. E._____ and Mr. F._____ acted only upon the request of the Arbitral Tribunal in the framework of Art. 365 CPC without participating in the decision-making process or in the outcome of the award that the Arbitral Tribunal is alone responsible for, without influence or advice."

Finally, in his observations to the Federal Tribunal of January 21, 2015, the Arbitrator stated the following:

> "However, I wish to point out that the arbitration clause compels me to decide *ex aequo et bono* and that I took the initiative to be assisted by a law firm only to guarantee compliance with mandatory procedural rules. That being said, I wish to emphasize that I issued the arbitral award in dispute according to my personal conviction and after hearing the parties and their witnesses without any influence of the lawyers on the decision-making process."

3.4. Applied to the procedural facts just stated, the legal principles recalled above call for the following remarks.

In its judgment of September 23, 2014, the Court of First Instance of the Canton of Geneva held that the Appellant's challenge to the Arbitrator was inadmissible. This decision can no longer be revisited, albeit indirectly, in the framework of an appeal based on Art. 190(2)(a) PILA. Indeed, the Appellant does not do so. However, the judgment does not keep it from arguing, on the same basis, that the deficiencies affected the proceedings conducted by the Arbitrator because, to believe the Appellant, they would essentially lie in

the manner in which the hearing of October 31, 2014, took place, thus in a circumstance after the aforesaid judgment.

To claim that the Arbitral Tribunal was composed of "two arbitrators" – D._____ and E._____ – as the Appellant does, is not consistent with reality. The remarks made above show instead that D._____ did decide as Sole Arbitrator even though he benefited from the advice of a lawyer (Mr. E._____) to implement the arbitral procedure and he called upon the services of a legal secretary, namely Mr. F._____. Contrary to the Appellant's view, this procedural set up did not at all violate the provisions of the arbitration clause inserted in the general contractor's agreement.

Along with the Respondent (answer n. 80), one may wonder whether the Appellant acted in a manner incompatible with the rules of good faith by waiting for the hearing of October 31, 2014, to complain about the external assistance sought by the Arbitrator, despite the fact that he had informed the parties of it some five months earlier, in a letter of May 21, 2014.

Be this as it may, nothing prevented the Sole Arbitrator, an architect, designated by the parties in the case at hand, from deciding the dispute *ex aequo et bono*, nor from hiring counsel and a secretary to assist him in conducting the arbitral procedure, as his architectural training did not predispose him to deal with delicate procedural issues in an contentious arbitration. As to the secretarial function given to Mr. F._____, it does not call for any specific comments. Mr. E._____'s role, which the Respondent wrongly compares to a secretary of the Arbitral Tribunal (answer n. 83), was somewhat more unusual. He may be compared to a consultant, as mentioned above (see 3.2.2, 3rd §) except that, as opposed to the ordinary case mentioned, the consultant involved here was not chosen for his technical expertise in the field in which the dispute originated (construction) – the arbitrator was already skilled in the art – but due to the specific knowledge he had in the field of arbitral procedure. Moreover, the parties had not set the procedural rules themselves and the Arbitrator was entitled to appoint people who would assist him on his own initiative. He did so at his own expense without any cost to the parties. Moreover, the Appellant does not claim that it had any reason to challenge the secretary or the consultant and it did not take any steps in this respect. Finally, as was already mentioned, nothing suggests on the basis of the arbitration file that either of the two auxiliaries chosen by the Arbitrator exceeded his powers and turned himself into a *de facto* arbitrator.

That being so, the Appellant's argument as to the constitution of the Arbitral Tribunal is unfounded.

4.
Second, the Appellant argues that the Arbitrator decided *ultra petita* by ordering it to pay CHF 2'459'324.08 to the Respondent with interest when, in its final submission (an additional brief of October 7, 2014), the latter submitted on the merits that its opponent should be ordered to pay CHF 599'749.82 with interest for unpaid invoices of subcontractors and suppliers and CHF 316'990 with interest for loss of profit.

4.1. Art. 190(2)(c) PILA allows the challenge of an award in particular when the Arbitral Tribunal decided beyond the submissions before it. Falling within this provision are the awards awarding more or something

other than that which was asked for (*ultra* or *extra petita*). According to case law, however, the Arbitral Tribunal does not go beyond the submissions made by the parties if, in the end, it does not award more than the total amount sought by the claimant but assesses certain elements of the claim differently from that party; or when seized with a view to a finding that the right does not exist and in denying that claim it also finds in the operative part of the award that the legal relationship in dispute exists instead of rejecting the claim. The arbitral tribunal does not violate the principle *ne eat iudex ultra petita partium* when qualifying a claim differently from the claimant. The principle *jura novit curia*, which applies to arbitral proceedings, requires the arbitrators to apply the law *ex officio* without limiting themselves to the reasons advanced by the parties. They may therefore uphold arguments not invoked because one is not confronted with a new claim or a different claim but merely with a new qualification of the facts of the case. However, the arbitral tribunal is bound by the subject and the amount of the submissions, in particular when the claimant qualifies or limits its claims in the submissions themselves (judgment 4A_440/2010[9] of January 7, 2011, at 3.1 and the precedent quoted).

4.2. Applied to the case at hand, these principles lead to the rejection of the Appellant's argument based on Art. 190(2)(c) PILA.

Contrary to what the Appellant claims, the Respondent's final submissions are not those in the additional brief of October 7, 2014. Indeed, at 6.2.4 of the award, the Arbitrator finds in a manner that binds the Federal Tribunal (see 2.2, above) that the Respondent itemized its submissions at the hearing of October 31, 2014, by claiming payment of CHF 599'794.82, CHF 30'695, CHF 1'301'331'.06, CHF 483'317, and CHF 44'186.20, namely a total of CHF 2'459'324.08 with interest not included. Indeed, he reduced to this amount what was due by the Appellant in his view (CHF 2'895'691.63) so as not to go beyond the submissions of which he was seized (award n. 9.3 and 9.4).

The Appellant wonders in vain as to how the Arbitrator could ultimately reach the amounts he upheld because a possible contradiction between the reasons and the operative part of the award would remain without impact on the disposition of the argument under review. The same applies to its statement that the change in the submissions at the hearing would violate one of the provisions of Procedural Order No. 1. Indeed, deciding whether or not the Arbitrator remained within the boundaries of the submissions of which he was effectively seized does not depend upon the timely manner of such submissions in light of the applicable procedural rules.

5.
In a third argument, the Appellant argues a violation of its right to be heard in several respects.

[9] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/claim-of-award-ultra-petita-rejected-claim-of-violation-of-publi

5.1. As guaranteed by Art. 182(3) and 190(2)(d) PILA, the right to be heard is, in principle, not different from that which is enshrined in constitutional law (ATF 127 III 576 at 2c; 119 II 386 at 1b; 117 II 346 at 1a, p. 347). Thus it was held, in the field of arbitration, that each party has the right to state its views on the essential facts for the judgment, to submit its legal arguments, to propose evidence on pertinent facts, and to participate in the hearings of the arbitral tribunal (ATF 127 III 576 at 2c; 116 II 639 at 4c, p. 643).

The right to be heard in contradictory proceedings, within the meaning of Art. 190(2)(d) PILA, does not in fact require an international arbitral award to be reasoned (ATF 134 III 186[10] at 6.1 and the references). However, it imposes upon the arbitrators a minimal duty to examine and handle the pertinent issues (ATF 133 III 235 at 5.2, p. 248, and the cases quoted). This duty is breached when, inadvertently or due to a misunderstanding, the arbitral tribunal does not take into consideration some statements, arguments, evidence, or offers of evidence submitted by one of the parties and important to the decision to be issued. If the award totally overlooks some issues apparently important to decide the dispute, it behooves the arbitrators or the respondent to justify the omission in their observations as to the appeal. They must demonstrate that, contrary to the appellant's claims, the items omitted were not pertinent to the decision in the case at hand, or if they were, that they were implicitly refuted by the arbitral tribunal. However, the arbitrators are not obliged to discuss all arguments invoked by the parties, so they cannot be held in violation of the right to be heard in contradictory proceedings for failing to refute an argument objectively devoid of any pertinence (ATF 133 III 235 at 5.2 and the cases quoted).

5.2. In the case at hand, the Appellant does recall these principles in its brief. However, it disregards them somewhat in its subsequent explanations, allegedly comprising "some examples" illustrating the violation of its right to be heard. Such explanations are manifestly of an appellate nature and are actually seeking to challenge the factual findings in the final award and their legal assessment by the Arbitrator, under the cloak of the procedural guarantee invoked. Irrespective of this general remark, the arguments developed in this framework appear unfounded to the extent that the matter is capable of appeal in this respect for the following reasons.

5.2.1. First, the Appellant argues that the Arbitrator failed to examine the facts and the pertinent evidence it regularly invoked. In its view, the Arbitrator did not address the issue of the delays in payment of the invoices by the Respondent, even though it developed this central argument "in its briefs" and by way of "Exhibit 40 DEF". Moreover, the Appellant emphasizes that none of the written witness statements it produced was taken into account by the Arbitrator even though they showed that no date was agreed to finish the works, that numerous additional works were specifically requested by architect D._____ and that neither the roof nor the façade showed the slightest defect.

Formulated in this manner, the argument does not appear sufficiently reasoned. The Appellant does not indicate where in its brief it developed the allegedly central issue of the Respondent's delays and it does

[10] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/right-to-be-heard-equality-between-the-parties

not explain why the exhibit it invoked would have been important to the legal issues to be handled by the Arbitrator. It does not behoove this Court to supplement *ex officio* the insufficient statement of reasons of the appeal brief in this respect. As to the short additional explanations given by the Appellant at p. 8 of its reply, they cannot be taken into consideration, in view of the case law concerning the limited scope of such a brief (see 2.1, above). Moreover, the Appellant merely questions the assessment of the evidence which led the Arbitrator to the factual findings it challenges.

5.2.2. The Appellant then argues that the Arbitrator failed to address its preliminary submissions, in particular as to an on-site visit and an expert report.

As to the on-site visit, the Arbitrator held that the *ad hoc* request was late because it was filed on June 10, 2014, when on April 11, 2014, he gave the parties until April 22, 2014, to complete a joint inventory of the construction site. The Appellant vainly seeks to challenge the time limit given at this stage in the proceedings. It cannot deduce from the right to introduce evidence as a guarantee of the right to be heard a duty for the Arbitrator to adduce evidence not presented in a timely manner. Moreover, the Arbitrator also stated two other reasons in support of his refusal to order the on-site visit opposed by the Respondent, which the Appellant does not challenge: the first was that the Appellant did not state the reasons for which an on-site visit was essential to decide the dispute; the second was that the request was contrary to the will of the parties to appoint the Arbitrator due to his complete knowledge of the file and of the work site (award n. 7.7.3.3 and 7.7.3.4).

As to the expert report, the Arbitrator held that it was contrary to the will of the parties, as when the general contractor's agreement was concluded, appointing the project's architect as Sole Arbitrator, it was with a view to avoiding such forensic reports in case of a dispute (award n. 7.8.3.3). This finding as to the concurring will of the parties as to this point prevents the admission of the argument based on a violation of the right to adduce evidence.

More broadly speaking, it goes without saying that the somewhat uncommon choice of the parties to appoint the very architect of the project as Sole Arbitrator can hardly be explained other than by a desire to limit the introduction of evidence as much as possible and to thereby avoid a long and costly procedure. That the Appellant is not happy with the outcome of the dispute is no reason to allow it to challenge this choice *a posteriori* as its consequences or risks were obvious.

5.2.3. One hardly sees where the Appellant is going when arguing that the Arbitrator failed to take into consideration its letter of November 13, 2014. It is established that the letter was sent to the Arbitrator after he took the case into consideration at the end of the October 31, 2014, hearing. The Appellant therefore no longer had the right to request the further introduction of evidence at this stage in the proceedings.

5.2.4. Furthermore, the Appellant argues that the Arbitrator should not have rejected its request to hear its own witnesses whilst allowing the Respondent to ask questions of its own witnesses, thus treating the parties unequally. It is not so.

It must be recalled at the outset that, according to case law, Art. 182(3) PILA does not confer upon the parties a right to ask or to have questions put orally to the authors of written witness statements (judgment 4A_199/2014 of October 8, 2014, at 6.2.3 and the case quoted). Therefore, the Appellant cannot argue that its right to be heard was violated because the Arbitrator refused to grant its request to hear its own witnesses who had submitted written witness statements. From the point of view of equal treatment, it criticizes the Arbitrator for granting to the Respondent the right to interrogate its own witnesses. In reality, the Arbitrator, in accordance with a procedure used in international arbitration, allowed the Appellant as the party seeking cross-examination of the witnesses of the other party, who had submitted written witness statements, to interrogate them at the hearing on October 31, 2014; then, he authorized the Respondent to ask questions to the same witnesses, namely to its own, in connection with the answers they had just given to the Appellant's questions, specifically with a view to safeguarding its right to be heard. Unequal treatment of the Appellant therefore could only have occurred if the Respondent had asked for cross-examination of the witnesses of its opponent who had submitted written statements and the Arbitrator had refused to grant the Appellant the opportunity to put additional questions to these witnesses, namely to its own witnesses. Yet, this did not happen in the case at hand, as the Respondent did not request the right to cross-examine the Appellant's witnesses having submitted witness statements.

Moreover, and as was already mentioned above, the Appellant challenges the assessment of the evidence, which it is not entitled to do, when it argues that the Arbitrator did not take into account its written statements in the final award.

5.2.5. According to the Appellant, the Arbitrator based his award on some arbitrary findings concerning the state of the works performed without giving the parties an opportunity to state their views in this respect.

Once again, the Appellant challenges the assessment of the evidence when it argues that the factual findings in the award under appeal as to the state of the works performed are arbitrary, which is not admissible in an appeal against an international arbitral award. Moreover, it is not apparent from the arbitration file that the parties did not have the opportunity to submit their arguments to the Arbitrator in the briefs they exchanged and at the October 31, 2014, hearing.

Finally, the Appellant departs from the factual findings in the award under appeal when it states that the Arbitrator, as architect of the project, had commissioned to himself the additional works.

5.2.6. Finally, the Appellant complains about the "unbridled procedural rhythm" to which the Arbitrator would have committed the parties, by giving them short time limits to file their briefs and by imposing upon them a hearing date that they had not proposed. This prevented it from submitting its arguments in a satisfactory manner, in particular "*soliciting the witness statements of the Macedonian contractors who intervened in one way or the other on the work site*."

As submitted, the argument is doomed. First, it does not at all show that the parties were treated unequally as to the time limits they were given to submit their briefs. Furthermore, as the Respondent rightly points out, the twenty-day time limit set for the Appellant to file its answer was not extraordinary in comparison to at time limit in a state court proceeding. Finally, one may wonder with the Respondent as to why the Appellant was hard pressed to comply with the time limits set for it when its opponent could abide by them without problem.

This being so, the argument of a violation of the right to be heard appears totally unfounded.

6.
In a final argument, the Appellant submits that the award under appeal violates substantive and procedural public policy within the meaning of Art. 190(2)(e) PILA.

6.1. An award is incompatible with public policy if it disregards the essential and broadly acknowledged values which, according to prevailing concepts in Switzerland, should be the basis of any legal order (ATF 132 III 389 at 2.2.3). Procedural public policy must be distinguished from substantive public policy.

An award is contrary to substantive public policy when it violates some fundamental principles of substantive law to the point that it is no longer consistent with the determining legal order and system of values; among such principles are, in particular, the sanctity of contracts, the requirement to act in good faith, the prohibition of abuse of rights, the prohibition of discriminatory or confiscatory measures, and the protection of incapables (same judgment, at 2.2.1).

Procedural public policy within the meaning of Art. 190(2)(e) PILA, which is only a subsidiary guarantee (ATF 138 III 270[11] at 2.3), grants the parties the right to an independent judgment as to the submissions and the facts submitted to the arbitral tribunal, in accordance with applicable procedural rules; procedural public policy is violated when some fundamental and generally recognized principles are violated, the disregard of which contradicts the sense of justice in an intolerable way, so that the decision appears incompatible with the values recognized in a state ruled by law (ATF 132 III 389 at 2.2.1).

6.2. Totally ignoring these definitions in the case at hand, although it quotes them in its brief, the Appellant seeks to demonstrate that the Arbitrator would have shown "complete bad faith" in handling the factual and legal issues of the case at hand, in particular as to the cost of the works and the alleged defects, as to the claim for loss of profit and as to the costs of the arbitration. From the explanations given in this respect as to the various items, it appears that the Appellant clearly mistakes the Federal Tribunal for a court of appeal, or in the view most favorable to the Appellant, with a court able to sanction the arbitrariness of factual findings or of the application of the law. The confusion appears even more clearly in the reply in

[11] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/an-international-arbitral-tribunal-seating-in-switzerland-is-gen

which the Appellant submits a new demonstration – inadmissible for this very reason (see 2.1, above) – purporting to demonstrate item by item that the Arbitrator's reasons were untenable.

This last argument is therefore totally inadmissible.

7.
The appeal has to be rejected insofar as the matter is capable of appeal and the request for the stay of enforcement becomes moot.

8.
The Appellant loses and shall pay the judicial costs (Art 66(1) LTF) and compensate the Respondent (Art. 68(1) and (2) LTF).

Therefore the Federal Tribunal pronounces:

1.
The appeal is rejected insofar as 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 an amount of CHF 17'000 to the Respondent for the federal judicial proceedings.

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

Lausanne, May 21, 2015

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

Presiding Judge:	Clerk:
Klett (Mrs.)	Carruzzo