4A_34/2016[1]

Judgment of April 25, 2017

First Civil Law Court

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

1. A._____ Corporation,
2. B._____ Company, both represented by Mr. Xavier Favre-Bulle and Mr. Sébastien Besson,
Appellants,

v.

1. X._____, represented by Mr. Felix Dasser and Mr. Mladen Stojiljkovic,
2. Z._____, represented by Mr. Daniel Hochstrasser, Mrs. Simone Fuchs, and Mrs. Isabelle Oehri,
Respondents.

Facts:

A.
A.a. A._____ Corporation (hereafter: A._____) and B._____ Company (hereafter: B._____), in Cairo, are two companies, owned directly or indirectly by the State of Egypt, engaged in the petroleum and natural gas business (hereafter referred to collectively as B._____). B._____ operates a gas pipeline, The Arab Gas Pipeline,[2] through which Egypt exports natural gas from the Damietta region, about sixty kilometers west of Port Said, to Jordan, Syria and Lebanon.

The first section of this pipeline, approximately 192 km long, crosses the north of the Sinai Peninsula to the Egyptian city of Al-Arish.

Egypt's private law company X._____, whose headquarters are also in Cairo, acts as an intermediary between B._____ and natural gas buyers located on the east coast of the Mediterranean, particularly in the territory of the State of Israel, that is, a dozen or so companies.
In order to be able to carry out the contracts referred to later, it began, in the summer of 2005, with the financial assistance of Banque L._____ in particular, the construction of a branch line of the aforementioned gas pipeline through which natural gas was to take a 100-km submarine pipeline from Al-Arish to the Israeli port of Ashkelon (hereinafter: the X._____ pipeline).

[1] Translator's Note: Quote as A._____ Corporation and B._____ Company *v.* X._____ and Z._____, 4A_34/2016. The original decision was issued in French. The full text is available on the website of the Federal Tribunal, www.bger.ch.
[2] Translator's Note: In English in the original text.

This section of the pipeline, owned by X._____, was commissioned in mid-June 2008.

Y._____ Corporation Ltd (hereafter: Y._____) is an Israeli company owned by the State of Israel, which produces and markets almost all the electricity used in Israel. Egyptian natural gas was to be used to produce electricity.

A.b. The parties thus identified have passed the three contracts mentioned below, whose origin goes back to the peace treaty concluded in 1979 by Egypt and Israel. A Memorandum of Understanding,[3] signed on 30 June, 2005, by the two States under the "Gas for Peace Deal",[4] framed these contracts; it made Y._____ the primary customer of X._____ and reserved the signature of a tripartite agreement between the Egyptian government (via B._____), X._____, and Y._____, in which that government would guarantee the delivery of natural gas in sufficient quantities.

A.b.a**.** A few days earlier, on June 13, 2005, B._____, and X._____ had already signed a contract entitled "Gas Supply and Purchase Agreement"[5] (hereafter: GSPA or supply contract). Under this contract, concluded subject to English law, B._____ was to deliver natural gas to X._____, at Al-Arish, up to a maximum of 7 billion cubic meters (BCM) per year. The price of the goods was fixed in a Schedule to the contract. An annual quantity of 2,125 BCM, designated "Q1", was intended to be resold to Y._____. The supply obligation was, however, limited to the daily gas orders X._____ had to make on a take or pay basis.

In the event that B._____ was unable to deliver all or part of the validly ordered gas, it undertook to pay to X._____ an amount called "Shortfall Compensation"[6] to be deducted on a monthly basis from the price of gas delivered during the month in question, the inability to deliver due to *force majeure* being reserved.

In addition, if the buyer did not fulfill its obligation to pay the sums due to the seller for four consecutive months, the seller would have the right to terminate the contract subject to a formal notice.

The supply contract and its Schedule 1 contain an arbitration clause the content of which is as follows:

> Article 9.2 - Dispute Resolution
> All Disputes or disagreements arising under this Agreement and in connection hereto will be conducted in the English language and as per the applicable procedures in Article 14 of Annex 1 and Annex 4 (Expert Provisions), respectively.
>
> Art. 14.2 [of Schedule 1] - Disputes and Arbitration
> Except as set forth in Sections 14.9 and 14.11 and Paragraph 17 of Annex 4, if any dispute between the Parties arising out of or in connection with this Agreement ("Dispute ") has not been settled within thirty (30) days of a Party notifying the other Party of the Dispute, then a Party wishing to arbitrate such Dispute may submit such Dispute to arbitration in accordance with and pursuant to the Rules of Arbitration of the Cairo Regional Centre for International Commercial Arbitration ("CRCICA "). All Disputes submitted for arbitration shall be heard and resolved by a panel of three (3) arbitrators, appointed according to the rules of the CRCICA; provided that no member of such panel of arbitrators shall be connected and/or associated with any of the Parties and/or their legal and other advisors. The seat of arbitration shall be in Cairo, Egypt. The arbitration proceedings shall be conducted in the English language, and all documentation

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

submitted for the consideration of the panel shall be translated in English at the expense of the submitting Party.

Art. 14.9 [of Schedule 1] - Arbitration Under On-Sale Agreement
Notwithstanding the foregoing provisions of this Article 14, if Buyer and Seller have a Dispute under this Agreement, and if a dispute arising from or related to the same or similar factual circumstances at issue in the Parties' disagreement is subject to dispute resolution under any On-Sale Agreement, Buyer may choose to resolve the Dispute between Buyer and Seller pursuant to the dispute resolution procedures of the relevant On-Sale Agreement; provided that (a) Buyer provides Seller with notice of the dispute under the relevant On-Sale Agreement, and Buyer's election to resolve such Dispute pursuant to the dispute resolution procedures under the relevant On-Sale Agreement ("Dispute Resolution Notice"), on or before fifteen (15) days following initiation of the applicable dispute resolution procedure under the On-Sale Agreement; and (b) Buyer shall consult with Seller in respect of such dispute resolution procedure. If Buyer delivers such Dispute Resolution Notice and Seller gave his written consent, neither Party may seek arbitration or an Expert determination regarding such dispute under this Agreement, and the outcome of such dispute resolution under the On-Sale Agreement shall be binding on the Parties hereunder.

Art. 14.10 [of Schedule 1] - Disputes Under the Tripartite Agreement
Notwithstanding the provisions of the Tripartite Agreement to the contrary, if any dispute under the Tripartite Agreement arises between A._____ and B._____ on the one hand, and X._____ on the other hand, and if the Initial On-Sale Customer is not a party to such dispute, such dispute shall be resolved pursuant to the dispute resolution provisions provided for in this Article 14.[7]

The GSPA was first amended on May 31, 2009 (hereinafter: the First Amendment[8]). On this occasion, X._____ and B._____ agreed in writing to release each other from all liability regarding claims relating to breaches of the contract that may have been committed prior to the conclusion of this amendment (the "Release of Claims"[9]).

A.b.b. X._____ resold to its customers the natural gas that B._____ had sold to it. Thus, on August 8, 2005, it entered into a sales contract with Y._____ (hereafter referred to as "On-Sale Agreement"[10] or supply sub-contract), subject to English law, whereby it was committed to providing an annual quantity of 1.2 BCM for the first year.

The "On-Sale Agreement" was modified several times. A fifth amendment, signed on September 17, 2009, increased the above quantity to 2'125 BCM.

As in the relations between B._____ and X._____, a system of Shortfall Compensation was applicable in the relations between X._____ and Y._____.
The sub-supply contract contains an arbitration clause worded as follows:

10.2 Disputes and Arbitration
Except as set forth in Section 10.9, if any dispute between the Parties arising out of or in connection with this Agreement ("Dispute "), has not been settled within (30) days of a Party notifying the other Party of the Dispute, then a Party wishing to arbitrate such Dispute may submit such Dispute to arbitration in accordance with and pursuant to the Rules of Arbitration of the International Chamber of Commerce ("ICC "). All Disputes submitted for arbitration shall be heard

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

> and resolved by a panel of three (3) arbitrators, appointed according to the ICC rules; provided that no member in such panel of arbitrators shall be a citizen or national of either Egypt or Israel, nor a citizen or national of a country which does not have diplomatic relations with either Egypt or Israel, nor will any member of such panel of arbitrators be connected and/or associated with any of the Parties and/or their legal and other advisors. The seat of arbitration shall be in Geneva, Switzerland. The arbitration proceedings shall be conducted in the English language, and all documentation submitted for the consideration of the panel shall be translated into English at the expense of the submitting Party.[11]

A.b.c. On June 13, 2005, a tripartite contract (hereafter: "Tripartite Agreement"[12]) was entered into between B._____, X._____, and Y._____ (the latter having signed it on August 28, 2005). In that contract, which was signed on the same day as the GSPA, of which it formed Schedule 6, B._____ guaranteed the supply to Y._____ through the performance of his own obligations under X._____ under the GSPA, of a quantity of natural gas up to 2.2 BCM per year for up to 20 years from the start of operations of the X ._____ pipeline.

Subject to English law, the tripartite contract was provided with an arbitration clause stating:

> 9. This Tripartite Agreement shall be governed by, and construed in accordance with, the Laws of England, but excluding (to the fullest extent) any rules or principles of English Law that would prevent adjudication upon (or accord presumptive validity to) the transactions of sovereign states, and without regard to such principles or requirements of conflicts of Laws that would require the application of Laws of any other jurisdiction to govern this Agreement or any matter arising hereunder. If any dispute between the Parties arising out of or in connection with this Agreement ("Dispute"), has not been settled within (30) Days of a Party notifying the other Party of the Dispute, then a Party wishing to arbitrate such Dispute may submit such Dispute to arbitration in accordance with and pursuant to the Rules of Arbitration of the International Chamber of Commerce ("ICC"). [The following text reproduces that of the aforementioned arbitration clause of the On-Sale Agreement from "All Disputes"[13] to "submitting Party"[14]]. For the purposes of enforcement in Egypt of any decision or award rendered pursuant to this Tripartite Agreement, the Egyptian Arbitration Law No. 27 of 1994, as amended from time to time, shall apply.[15]

A.c. Once the construction of the X._____ pipeline was completed, three years after the signing of the three contracts above, commercial operations began on June 15, 2008.

However, the quantities of gas actually supplied by B._____ to X._____ were consistently lower than those that had been agreed in the GSPA, so negotiations ensued, which led to the signing on May 31, 2009, of the first amendment to the contract combined with the abandonment of the mutual claims of both parties (see A.b.a, last §, above).

This was, however, only a temporary solution, which did not prevent subsequent deliveries of gas from still not reaching the promised quantities, a deficit that B._____ had recognized to have risen to 15% since the signing of the first amendment.

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[11] Translator's Note: In English in the original text.
[12] Translator's Note: In English in the original text.
[13] Translator's Note: In English in the original text.
[14] Translator's Note: In English in the original text.
[15] Translator's Note: In English in the original text.

In early 2011, the third year of performance of the supply contract, an unexpected event convulsed the Middle East: the revolutionary movement, sometimes referred to as the "Arab Spring". At the end of January of that year, the regime of Egyptian President Hosni Mubarak was overthrown, opening the door to a period of confusion and violence. North of Sinai, the region crossed by the pipeline, local insurgents took advantage of this power vacuum. Thus, from February 5, 2011 to April 9, 2012, thirteen terrorist attacks targeted the pipeline, the first six targeting its facilities, the other seven targeting one or the other of the buried pipe segments. These attacks resulted in significant interruptions in the flow of gas delivered by B._____ to X._____.

From January 2011, X._____ fell behind in the payments of B._____'s invoices. On August 24, 2011, the latter put it on notice, in accordance with the pertinent GSPA provision, to pay, within 30 working days, outstanding invoices for the months of January to April 2011. In January 2012, X._____ was able to pay USD 12 million to B._____, which settled the unpaid bill of January 2011. On April 18, 2012, B._____, which had granted various extensions of the payment period to X._____, formally terminated the supply agreement and claimed a total of 55 million dollars. X._____ challenged the validity of this unilateral act, which it equated with repudiating the contract, which in turn authorized X._____ to terminate it, which it did on May 9, 2012.

According to the shared position adopted by X._____ and Y._____, the repudiation of the GSPA also implied repudiation of the tripartite contract. Therefore, on February 6, 2013, Y._____ informed B._____ that it took note of this state of affairs and therefore considered the contract as extinguished within the meaning of English law.

Since March 2012, B._____ has not delivered gas to X._____, nor the latter to Y._____; pipeline X._____ has remained at a standstill and is seemingly destined for abandonment.

However, at the same time, the gas market in this part of the Middle East underwent dramatic changes in a role reversal of exporting and importing countries: Egypt saw the amount of gas available for export decline sharply, while Israel discovered, a few tens of kilometers from its shores, off Haifa, new gas reserves (the Tamar and Leviathan fields) offering production capacity well above the domestic demand. The abundance of gas in Israel, its relative scarcity in Egypt, and the existence of a liquefaction plant in Damietta revived interest in pipeline X._____. One of the solutions discussed for the future was the possibility of using the reverse flow pipeline to allow the export of gas from Israel to Egypt.

B.

B.a. On October 6, 2011, X._____ submitted a claim for arbitration, against B._____ and Y._____, with the International Court of Arbitration of the ICC. It alleged that B._____ had violated its gas supply obligations under both the GSPA and the Tripartite Agreement and had improperly terminated both contracts.

With respect to its claims arising from the supply contract, the claimant inferred the jurisdiction of the Arbitral Tribunal from Art. 14.9 of Schedule 1 to said contract and, in the alternative, from Art. 9 of the tripartite agreement; for its claims arising from this contract, it based the arbitrators' jurisdiction on the latter provision. X._____ asked the Arbitral Tribunal to find that the responsibility for the prejudice suffered by Y._____ rested exclusively with B._____, itself not being at fault.

Assigned as defendant in this procedure, Y._____ took the opportunity to formulate counter-claims against B._____, considering that it could submit them to the Arbitral Tribunal pursuant to Art. 9 of the tripartite contract. As compensation for the prejudice suffered by them, X._____ and Y._____ claimed the payment of a sum approaching six billion dollars from B._____. In support of its submission

to reject the claim, B._____, in particular, argued from the outset that the ICC Arbitral Tribunal lacked jurisdiction to hear X._____'s claims on the basis of both the supply contract and the tripartite contract.

On April 5, 2012, the ICC International Court of Arbitration appointed three arbitrators. The seat of arbitration was fixed in Geneva. After hearing the case, the Arbitral Tribunal closed the proceedings on November 3, 2015, before returning a judgment of 469 pages on December 4, 2015. First, with respect to X._____'s claims, the Arbitral Tribunal excluded its jurisdiction to the extent that these claims arose out of the supply contract ("GSPA claims,"[16] operative part, clause 1), but accepted jurisdiction in so far as it was based on the so-called "Tripartite Agreement claims"[17] (operative part, clause 2). Declaring these claims admissible and enforceable (operative part, clause 3), then finding that B._____ had violated the Tripartite Agreement by not fulfilling its obligation to deliver the goods regularly ("Tripartite delivery breaches"[18]) and terminating this contract unjustifiably ("Tripartite repudiatory breach"[19]), the Arbitral Tribunal found that this second breach of the contract authorized X._____ to terminate the Tripartite Agreement and to claim full compensation in this respect (operative part, clause 5). On the basis of these premises, it ordered B._____ to pay X._____ the sum of USD 230'935'579 as compensation for the prejudice related to the Tripartite repudiatory breach and USD 57'357'135 as compensation for the Tripartite delivery breaches (operative part, clause 6) plus interest (operative part, clause 7). As to the financial claims of Y._____, the Arbitral Tribunal declared that it had jurisdiction to rule on them, on the basis of the Tripartite Agreement (operative part, clause 8), then found them admissible and enforceable (operative part, clause 9).

Noting the breach by B_____ of the said contract as well as the tripartite delivery breaches and the tripartite repudiatory breach attributable to this part (operative part, clause 10), as well as the validity of the consequential cancellation of the contract by Y._____ (operative part, clause 11), it ordered B._____ to pay the latter the amounts of USD 1'650'564'941 under the Tripartite repudiatory breach and USD 113'092'525 under the Tripartite delivery breaches (operative part, clause 12), all of which were increased by interest thereon (operative part, clause 13). The Arbitral Tribunal ruled on the outcome of the costs and expenses of the arbitration procedure (operative part, clauses 14 to 16). Finally, it rejected all the other submissions of the parties (operative part, clause 17). The grounds on which the Award is based will be set out below to the extent necessary to understand the grievances formulated by the Appellants.

On March 15, 2016, the Arbitral Tribunal issued a decision rejecting B._____ and Y_____'s request to rectify the Award as well as an application by X._____ regarding the allocation of costs for the proceeding.

B.b. Two other arbitral proceedings were introduced in the same context: the first, dated September 21, 2011, resulting from a claim by X._____ against Y._____ based on the sub-supply contract, was in vain, the Arbitral Tribunal having never been constituted. The second, submitted on April 30, 2012, by B._____ against X._____ in relation to the supply contract, gave rise, on November 11, 2013, to the issuance of a partial award in which the CRCICA Arbitral Tribunal, sitting in Cairo, found it had jurisdiction to hear any dispute arising from the said contract under the arbitration clause in Art. 14.2 of GSPA Schedule 1. In this parallel arbitral proceeding, X._____ submitted counter-claims against B._____ for USD 3'561'000'000.

C.
On January 19, 2016, A._____ and B._____ (hereafter: the Appellants or B._____), acting in good faith, submitted a civil appeal seeking the annulment of the Award of December 4, 2015, or, in the

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

alternative, the annulment of clauses 2 to 7 and 12 to 15 of the operative part of that Award, and the finding by the Federal Tribunal that the Arbitral Tribunal did not have jurisdiction to rule on the claims of X._____ arising from the Tripartite Agreement. The Appellants argue that the Arbitral Tribunal, on the one hand, was wrong to find that it had jurisdiction over the claims raised against them by X._____ (Art.190(2)(b) PILA[20]) and, on the other hand, had infringed their right to be heard by failing to take into consideration arguments validly invoked by them and by basing the Award on unforeseeable reasons (Article 190(2)(d) PILA).

By letter from the Presiding Judge dated March 1, 2016, the Arbitral Tribunal informed the Federal Tribunal that it had no comments to make on the appeal.

In its answer of March 11, 2016, X._____, Respondent 1, argued that the appeal should be rejected in its entirety, insofar as the matter was capable of appeal. Y._____, Respondent 2, made an identical argument at the beginning of its answer on the same day.

The Appellants maintained their arguments in a reply submitted on April 29, 2016. X._____ and Y._____ did the same in their rejoinders submitted, respectively, on June 6 and 13, 2016.

On April 19, 2017, X._____'s legal representatives again produced, as appendices to a covering letter of the same day, two international arbitral awards: the first, entitled "Partial Final Award,"[21] had been delivered in Cairo on April 7, 2017, in the CRCICA Arbitration case no. 5 829/2012 to which reference is made, above, under B.b; the second was issued on February, 21, 2017, in arbitration proceedings conducted under the aegis of the International Center for Settlement of Investment Disputes (ICSID, ICSID Case No. ARB/12/11).

Reasons:

1.

According to Art. 54(1) LTF[22] the Federal Tribunal issues its judgment in an official language[23], as a rule, in the language of the award under appeal. When the decision was issued in another language (here English), the Federal Tribunal uses the official language chosen by the parties. Before the Arbitral Tribunal, the parties used English, while, in the Appeal Briefs sent to the Federal Tribunal, they used French (the Appellants) or German (the Respondents), pursuant to the requirements of Art. 42(1) LTF in connection with Art. 70(1) Cst[24]. (ATF 142 III 521 at 1). According to its past practice, the Federal Tribunal shall resort to the language of the appeal and consequently issue its judgment in French.

2.

2.1. In the field of international arbitration, a civil appeal is admitted against the awards of arbitral tribunals pursuant to the requirements of Art.190-192 PILA (Art. 77(1) LTF). Whether as to the subject of appeal, the standing to appeal, the time limit to do so, the Appellants' submissions – including that of the Federal Tribunal itself finding the lack of jurisdiction of the Arbitral Tribunal (ATF 136 III 605[25] at 3.3.4 p.616) – or the

[20] 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

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

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

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

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

[25] Translator's Note: The English translation of this decision is available here:

grievances raised in the appeal brief, none of these admissibility requirements raises any problem in this case. The matter is therefore capable of appeal.

2.2. An appeal brief for an arbitration award must satisfy the requirement of reasoning that arises from Art. 77(3) LTF in conjunction with Art. 42(2) LTF and the case-law relating to the latter provision (ATF 140 III 86 at 2 and references). This presupposes that the Appellant discusses the reasons for the award and indicates precisely why it considers that the author of the award has infringed the law (Judgment 4A_522 /2016[26] of December 2, 2016, at 3.1). It can only do so within the limits of the admissible grievances against that award, namely with regard to the only grievances listed in Art.190(2) PILA where the arbitration is international in nature. Moreover, as this reason must be contained in the appeal, the Appellant cannot use the procedure to ask the Federal Tribunal to refer to the allegations, evidence or offers of evidence contained in documents from the arbitration file. The Appellant also may not rely on pleas that were not submitted in a timely manner, that is, before the expiry of the time-limit for bringing an action (Art.100(1) LTF in conjunction with Art. 47(1) LTF), or to supplement, beyond the deadline, insufficiently reasoned submissions (Judgment 4A_704/2015 of February 16, 2017, at 2).

The Federal Tribunal, it should be recalled, adjudicates on the basis of the facts found in the award under appeal (see Art. 105(1) LTF). It may not rectify or supplement on its own motion the findings of the arbitrators, even if the facts have been established in a manifestly inaccurate manner or in violation of the law (see Art. 77(2) LTF, ruling out the applicability of Art. 105(2) LTF). When seized of a civil law appeal against an international arbitral award, its mission does not consist of deciding with full power of review, like an appellate jurisdiction, but rather only to consider whether the admissible grievances raised against the award are well-founded or not. Allowing the parties to state facts other than those found by the arbitral tribunal, apart from the exceptional cases reserved by case law, would no longer be compatible with such a mission, even though those facts could be established by evidence contained in the arbitration file (Judgment 4A_386/2010[27] of January 3, 2011 at 3.2). However, as was already the case under the federal law of judicial organization (see ATF 129 III 727[28] at 5.2.2, 128 III 50 at 2a and the judgments cited), the Federal Tribunal has the power to review the facts underlying the award under appeal if one of the grievances mentioned in Art.190(2) PILA is raised against this fact, or new facts or evidence are exceptionally taken into account in the civil appeal procedure (ATF 138 III 29[29] at 2.2.1 and the judgments cited).

The findings of the arbitral tribunal as to the course of the proceedings also bind the Federal Tribunal, subject to the same reservations, whether they relate to the parties' submissions, the alleged facts or the legal explanations given by the parties, or the statements made in the course of the proceedings (Judgment 4A_322/2015[30] of June 27, 2016, at 3, and the precedent cited therein).

It is on the basis of those principles that it is at this point necessary to examine the various aspects of the Appellant's arguments.

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http://www.swissarbitrationdecisions.com/independence-and-impartiality-of-a-party-appointed-arbitrator-in

[26] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/atf-4a-522-2016

[27] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/award-allegedly-issued-by-a-truncated-tribunal-claim-that-cas-de

[28] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/extension-arbitration-clause-non-signatory

[29] 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

[30] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/alleged-unpredictability-reasons-rejected

It must be observed, however, before proceeding to this examination, that the two awards produced on April 19, 2017 by the representatives of X._____ and the accompanying letter (see above, paragraph C., last §), all elements subsequent to the award under appeal, constitute new documents and allegations. As such, they are therefore not admissible before the Federal Tribunal (Art. 99(1) and 105(1) LTF, the application of which by analogy is not excluded by Art. 77(2) LTF). Consequently, this Court will not take this into account in the analysis of the Appellants' grievances but will merely provide a copy to the other parties to the proceedings, as well as to the Arbitral Tribunal, when it notifies them of the present judgment.

3.

In a first argument based on Art. 190(2)(b) PILA, the Appellants claim that the Arbitral Tribunal wrongly assumed jurisdiction as to the claim that X._____ had submitted to it on the basis of the tripartite contract.

3.1. Seized of a jurisdictional defense, the Federal Tribunal freely reviews the legal issues, including preliminary issues, determining the jurisdiction of the arbitral tribunal or the lack thereof. However, the Court may also review the application of pertinent foreign law; it will do so with full power of review but deferring to the majority view on the issue involved and to the opinion of the Supreme Court of the country stating the applicable rule of law in case of disagreement between case law and legal writing (Judgment 4A_538/2012[31] of January 17, 2013, at 4.2). Yet the Federal Tribunal is not a court of appeal. Thus, in an award under appeal, it is not incumbent upon the Court to research which legal arguments could justify upholding the grievance based on Art.190(2)(b) PILA. Instead, the Appellant should draw the Court's attention to them in order to comply with the requirements of Art. 77(3) LTF (ATF 134 III 565[32] at 3.1 and the cases cited). Subject to this reservation, the Federal Tribunal, freely reviewing all legal aspects (*jura novit curia*), may occasionally, if need be, reject the grievance on another ground than that which is mentioned in the award under review, as long as the facts found by the arbitral tribunal are sufficient to justify the substitution of new reasons. Conversely, and subject to the same reservation, it may admit the grievance of lack of jurisdiction on the basis of a new legal argument developed before it by the Appellant on the basis of facts found in the award under appeal (ATF 142 III 239[33] at 3.1).

On the other hand, the Federal Tribunal reviews the factual findings only within the usual limits (*see* 2.2, 2nd §, above), even when ruling on the lack of jurisdiction of the Arbitral Tribunal (last cited judgment, *ibid*.).

3.2. Having excluded its jurisdiction to the extent that X._____ brought the GSPA claims before it (Award, pp. 107-117) – a matter which is no longer contentious at this stage of the proceedings – the Arbitral Tribunal, on the other hand, found jurisdiction in relation to the Tripartite Agreement claims raised by both X._____ and Y._____. To do this, it reasoned as follows (Award, pp. 118 ff).

3.2.1. X._____ argues that whether Art. 1 of the Tripartite Agreement confers on it or not a substantive claim does not concern the jurisdiction of the Arbitral Tribunal nor the admissibility of its conclusions on this account, but the merits of the request made on this basis. The Arbitral Tribunal agrees with this opinion (Award, n. 363). For the sake of efficiency, however, it will examine this question in the section on jurisdiction,

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[31] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/alleged-lack-authority-representatives-creates-jurisdictional-issu

[32] 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

[33] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/unsigned-arbitration-clause-upheld

because, if it were to be answered in the negative, all of X._____'s requests inferred from this contractual clause would, from the outset, be doomed to failure.

According to the criteria proposed by M._____, the expert of B._____, and accepted by X._____, it is necessary to determine, by a literal interpretation of Art.1 of the Tripartite Agreement, if this contractual clause also makes X._____ the beneficiary of the promise made by B._____ (see 3.2.2 below), and if so, whether analysis of this clause from a commercial point of view (see 3.2.3 below) or in the context of the tripartite contract (see 3.2.4 below) reinforces or invalidates this preliminary conclusion.

3.2.2. The provision examined states the following:

> B._____ and A._____ hereby guarantee the commencement and continuation of supply of up to 2.2. BCM annually of Natural Gas to Y._____ through fulfilling their obligations to X._____ under the Source Contract [i.e. le GSPA]...[34].

It is undisputed that the term "guarantee"[35] should be replaced by "promised"[36] from the perspective of English law. The expression "to Y._____"[37] might suggest that the promise is made only for that company. However, given its position in the body of the sentence, the Arbitral Tribunal is rather of the opinion that it refers, not to the beneficiary of the promise, as it would have been if that expression had been placed directly after the verb "guarantee", but to the beneficiary of the natural gas. If this interpretation were adopted, it would then be necessary to note the silence of the clause in question as to the beneficiary or beneficiaries of the promise made by B._____. However, the fact that X._____ signed the Tripartite Agreement strongly suggests that, in so doing, it had to acquire, respectively assume, a part of the rights and obligations set out therein, a conclusion that appears to confirm Art. 10 of the same contract, which prohibits X._____ (and Y._____) from disposing of the rights and obligations in question without the consent of the other signatories.

3.2.3. In arguing against X._____ being considered as the beneficiary of the promise made by B._____ in Art.1 of the Tripartite Agreement, Mrs. M._____ submits two arguments.

The first is to question, from a commercial point of view, the meaning of B._____'s promise to supply natural gas to X._____, since such a commitment was already the result of the GSPA binding the same parties. To this one can say, first and more generally, that "repeat obligations"[38] – that is, the simultaneous conclusion by two parties of two agreements each creating a body of rights and identical or nearly identical obligations – are a common legal mechanism in commercial transactions where negotiable securities (promissory notes, bills of exchange, etc.) often duplicate the principal contract (for example, a sales contract) to ensure execution, a mechanism which can, moreover, take on a trilateral form (bill of lading, accreditation, etc.).

In a second argument, the expert M._____ points out that Y._____ is the only party interested in the performance of the promise made by B._____ in Art.1 of the Tripartite Agreement, because it has no other way of acting directly against that company, unlike X._____ which can utilize the GSPA to motivate such a claim. The Arbitral Tribunal finds such reasoning unpersuasive. It should be noted that, from the outset, The Gas for Peace Deal was a project with serious political and economic risks, with regard to the States – Egypt and Israel – concerned and the length of time it should have run for (15 to 20 years).

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[34] Translator's Note: In English in the original text.
[35] Translator's Note: In English in the original text.
[36] Translator's Note: In English in the original text.
[37] Translator's Note: In English in the original text.
[38] Translator's Note: In English in the original text.

Conscious of these risks and the disputes that might one day arise between them, the parties formalized this project into three separate contracts: the GSPA, linking B._____ and X._____; the On-Sale Agreement, uniting X._____ and Y._____; and finally, the Tripartite Agreement, creating a unique link between these three parties. In constructing this trilateral structure, they identified three types of potential conflicts: *first*, bilateral disputes involving X._____ and B._____ (two Egyptian companies), but not affecting Y._____ (for example, disputes over price of natural gas delivered by B._____ to X._____); *second*, bilateral disputes involving X._____ (an Egyptian company) and Y._____ (the Israeli company), excluding B._____ (for example, pipeline X._____ maintenance disputes); *third*, trilateral disputes affecting the three parties, the origin of which may be the total or partial refusal of B._____ to honor its promise to deliver natural gas to Israel, rendering X._____ unable to honor its obligations towards Y._____ or, vice versa, the failure of the Israeli company to pay the debt of X._____ preventing it from paying the bills of B._____. For bilateral disputes, the parties have inserted arbitration clauses in the GSPA (Article 14.2 providing for domestic arbitration in Cairo) and the On-Sale Agreement (Article 10.2 providing for ICC arbitration in Geneva). The real problem was the treatment of trilateral disputes, which, because of its position as intermediary between the original seller (B._____) and the ultimate purchaser (Y._____), presented increased dangers for X._____, which ran the risk of having to indemnify its co-contracting party without being assured of being able to fully or simultaneously recover its claim against the third contracting party. To solve this problem, the parties devised the solution of a tripartite contract. The purpose of this agreement was not only to give Y._____ the right to act directly against B._____ (for this, a bipartite agreement would have been sufficient), but also to create a neutral arbitral forum where all disputes affecting the three parties could be liquidated in an efficient manner. And this goal was materialized by the insertion, in the Tripartite Agreement, of Art. 9 which required B._____, X._____ and Y._____ to submit all trilateral disputes to ICC arbitration seated in Geneva. If it were necessary to agree with Mrs. M._____ that the Tripartite Agreement did not create any substantive rights in favor of X._____, that company would not be entitled to submit a dispute of this kind to such arbitration. In such a case, the resolution of a triangular dispute would require the implementation of three parallel arbitration procedures: one in Cairo (between X ._____ and B._____ for violation of the GSPA); the other two in Geneva (between X._____ and Y._____, for breach of the On-Sale Agreement, as well as between Y._____ and B._____, for breach of the Tripartite Agreement). It would make no sense, commercially speaking, such that the parties could not reasonably agree to adopt such a complicated solution. Therefore, if one takes into consideration their true intention, which was to create a unique forum for litigation involving all three, then it is necessary to interpret Art. 1 of the Tripartite Agreement in the sense that the promise made by B._____ to supply gas under the GSPA is addressed to both X._____ and Y._____, so that X._____ has been given the choice, in case B._____ breached its obligation to provide the amount of gas stipulated, to claim against this Egyptian company on the basis of the supply contract or under the tripartite contract.

3.2.4. Still according to the Arbitral Tribunal, this literal interpretation is further reinforced by taking into account other elements forming the context in which the tripartite contract was concluded. Thus, the third expected (recital) of the said preamble uses the expression “to X._____” and “to Y._____” twice to signify in both cases the recipient of the delivery of natural gas, and not the beneficiary of the promise, it being specified that this preamble is an integral part of the contract in question.

Moreover, the position taken by B._____ in the interpretation of the Tripartite Agreement is not consistent. Indeed, to argue that Art.1 of this contract does not confer substantive rights on X._____, she points out that since the GSPA already contained similar rights, the parties did not intend to create a repeat obligation. On the other hand, when it comes to finding a reason, with practical effect, for the signing of the tripartite contract by X._____, she asserts that the only reason for the company's participation in that contract is to assume the auxiliary obligation of Art. 5 of the agreement to do its utmost to facilitate

B._____'s performance of its obligation to deliver natural gas to it. Such a secondary obligation already appears in Art. 13.10 of the GSPA, making it a "repeat obligation."

Art. 14.10, supra, of Schedule 1 to the GSPA singularly strengthens the Arbitral Tribunal in its interpretation of the clause at issue. It settles, in fact, the situation where a dispute arose between B._____ and X._____ under the Tripartite Agreement.

In order for such a dispute to arise, one of these two parties must have breached its obligations under the contract.

However, these obligations can only be repeat obligations as their origin is to be found in the GSPA. Therefore, this provision clearly demonstrates that the parties intended to make such repeat obligations binding. The same provision, however, contains an anti-abuse clause. Indeed, given the existence of repeated obligations, X._____ would normally have had the opportunity to claim against B._____ on the basis of either the GSPA arbitration clause (that is, in Cairo) or the arbitration clause of the Tripartite Agreement (that is, in Geneva, before an Arbitral Tribunal which does not include any Egyptian national). To avoid abuses, meaning the artificial transformation of a domestic arbitration into an ICC arbitration, Art. 14.10 makes it accordingly mandatory to submit the dispute to an arbitral tribunal sitting in Cairo under the aegis of CRCICA if Y._____ is not a party to this proceeding. On the other hand, any dispute between the two Egyptian companies arising from the tripartite contract and also involving Y. _____ would have to be settled by an ICC arbitral tribunal sitting in Geneva, in accordance with Art. 9 of this contract.

3.3. On the basis of the considerations thus summarized, the Arbitral Tribunal found that two-thirds of the claims made by X._____ were outside its jurisdiction, as the claims referred from the GSPA, which it could not have known, related to a promise, made by B._____ to the claimant, to deliver 7 BCM of natural gas, whereas the claims based on the Tripartite Agreement corresponded to a quantity of only 2.2 BCM of natural gas that B._____ had promised to supply to X._____ so that it could resell them to Y._____ in execution of the supply subcontract binding it to the Israeli company.

3.4.
3.4.1. Drawing on the parenthetical remark made on this point by the Arbitral Tribunal under n. 363 of its Award (see 3.2.1, §1, above), the Respondents maintain that the question of the existence in Art. 1 of the tripartite contract, a claim of X._____ corresponding to a repeated obligation subscribed by B._____ in favor of this company falls under the substantive rights, so that it does not concern the jurisdiction of the Arbitral Tribunal. According to them, it would be sufficient, in order to establish that jurisdiction, that X._____ submitted a claim for damages arising from the Tripartite Agreement, regardless of whether that claim was substantively grounded or not.

This is not the case. The Respondents' objection would certainly be admissible in the event of an ordinary dispute between the two parties to a contract for the sale of raw materials with a clause submitting to arbitration all disputes arising from said contract. In such a case, to say whether or not the buyer holds the claim it alleges against the seller for failure to perform or for improper performance of the contract of sale does not amount to a determination of jurisdiction *ratione materiae* of the arbitral tribunal seized but simply establishes whether the elements constituting the claim invoked are made relative to the plaintiff, and, if so, to settle any exceptions or objections of the seller before deciding, *in fine*, on the amount of the disputed claim.

In the present case, the situation is quite different, as it concerns a complex commercial operation involving three parties (B._____, X._____ and Y._____), who undeniably concluded a contract together that included an arbitration agreement (the Tripartite Agreement, Art. 9) but who also have concluded two

separate, bilateral agreements each also containing a specific arbitration clause (the GSPA Art. 9.2, binding B._____ and X._____, as well as, by reference, the special provisions of Schedule 1, the On-Sale Agreement, between X._____ and Y._____, Art. 10.2). That the legal ties from these three contracts were intertwined is undeniable. To be convinced of this, it suffices to highlight, among other features, the fact that the tripartite contract attached to the supply contract as Schedule 6 and was elevated to the rank of an integral part of the latter by the Art.1 GSPA. However, in the case of disputes between B._____ and X._____ in connection with the implementation of the Tripartite Agreement, the latter contract contains an arbitration agreement establishing the jurisdiction of an ICC arbitral tribunal, with its seat in Geneva, while the GSPA refers the two Egyptian companies to a CRCICA Arbitral Tribunal, with its seat in Cairo, for the settlement of disputes arising therefrom. The two arbitration clauses are incompatible, the issue of the seat of the arbitral tribunal aside, as the first excludes the presence of solely Egyptian or Israeli nationals in the arbitration. It follows that the existence, in favor of X._____, of a claim against B._____ having its basis in the tripartite contract, was a condition *sine qua non* for an ICC Arbitral Tribunal seized to exercise jurisdiction in the present dispute, because if that were not the case, then X._____ would have been obliged to take action against B._____ before a CRCICA arbitral tribunal, on the basis of the GSPA, to assert its claim for damages relating to the failure to deliver the quantities of natural gas promised.

The issue in dispute thus effectively involved the jurisdiction of the Arbitral Tribunal, even though it also concerned the title to the substantive claim submitted to arbitration (*i.e.*, standing). This was a doubly relevant issue – the existence of a claim of X._____ against B._____, under the tripartite contract, being a preliminary question in relation to the main issue of deciding on the jurisdiction of the arbitral tribunal seized – such that the Arbitral Tribunal was obliged to reach a decision on it either in a preliminary award or, as it did, in its final award (*see* ATF 141 III 495[39] at 3.5.3.2) before proceeding to the examination of the other conditions on which the recognition of the validity of the contested claim depended.

3.4.2. According to Art.178(2) PILA, the arbitration agreement is valid, as far as the merits are concerned, if it satisfies the conditions laid down either by the law chosen by the parties or by the law governing the subject-matter of the dispute and in particular the law applicable to the main contract, or under Swiss law. The provision cited devotes three alternatives *in favorem validitatis*, without any hierarchy between them, namely the law chosen by the parties, the law governing the subject of the dispute (*lex causae*), and Swiss law as the law of the seat of the arbitration (ATF 142 III 239[40] at 5.1). It also regulates the question of the law applicable to the interpretation of the arbitration agreement (Kaufmann-Kohler/Rigozzi, *International Arbitration, Law and Practice in Switzerland*, 2015, n. 3.79).

On the basis of this provision, the Appellants claim that the interpretation of the arbitration agreements in question is governed either by English law or by Swiss law. They are undoubtedly right, as long as it is not established that the parties agreed to make these arbitration agreements subject to a law other than that of the *lex causae* (English law) or the *lex fori* (Swiss law).

However, given the atypical nature of the dispute in question, it is not so much the interpretation of the arbitration clause in Art. 9 of the tripartite contract which is problematic in the present case, as the disputes relating to the claims raised by X._____ in respect of the breach and the unjustified termination of the said contract are certainly covered by the following sentence:

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[39] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/swiss-supreme-court-addresses-difference-between-treaty-claims-and-contract-claims

[40] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/unsigned-arbitration-clause-upheld

[i]f any dispute between the Parties *arising out or in connection* with this Agreement ..."[41]

What is decisive in resolving the question of jurisdiction which arises *in casu* is, in the first place, the proper interpretation of the topical clause of the Tripartite Agreement, namely Art. 1, cited above (see 3.2.2). Now, Art. 9 of that contract expressly makes it subject to English law. It goes without saying that this choice of jurisdiction, applicable to all of the substantive clauses of the tripartite contract, is not covered by Art. 178(2) PILA, relating only to the arbitration agreement, so that the alternative application of Swiss law to the interpretation of the first clause of the tripartite contract is not relevant in this respect, contrary to what B._____ seems to argue (Appeal, n. 103-104).

3.5.
3.5.1. To substantiate their complaint based on Art. 190(2)(b) PILA, the Appellants advance six separate arguments that they present in the form of a list with comments. The method is in itself open to criticism because it neglects the fact that the answer to the question asked implies an overall assessment of the legal situation. In other words, that any of these six arguments may appear well-founded, if any, will not necessarily be sufficient to alter the result of such an assessment. In the first place, the Appellants argue, in blatant contradiction to the facts, that the text of Art.1 of the tripartite contract is clear that the natural gas delivery guarantee given by the seller B._____ is intended for the final purchaser, that is, Y._____, and not for the reseller X._____ (Appeal, n. 110 and 111). Their explanation stops there. It is all the less convincing given that, in support of this argument of text for a clause drafted in English, the appellants merely reproduce their own French translation of the said clause, by highlighting certain elements of it, and singularly the term Y._____, by means of bold type and underlining, that does not appear in the original version. No doubt the interested parties sought to complete this ethical argument under n. 12 of their reply, but they did not have the right to do so (*see* 2.2, § 1, above).

Secondly, the Appellants deny that what they call "the theory of incorporation" (by which they mean the idea that "repeated obligations" duplicate pre-existing contractual obligations) has any meaning – at least in the relationship between B._____ and X._____ – as it was already formalized in another contract, the GSPA (Appeal, n. 112). This single negation is obviously not sufficient to invalidate the reasons given under n. 390 to 395 of the Award for such obligations, and the attempt to remedy this deficiency in the Reply (n. 13) was doomed to failure.

In a third argument, the Appellants assert that the pure and simple repetition in the tripartite contract of obligations assumed in the supply contract was not intended by them, on the ground that such a repetition is not valid in English law, "as it would leave these repeated obligations *'without consideration'*[42]" (Appeal, n. 113) and quotes a short passage, translated by them, of the legal opinion that Mrs. M._____, had written, who is today a Justice of the High Court of England (*ibid*.).

This argument, formulated in a categorical fashion by the Appellants in the passage in quotation marks, is not such as to demonstrate to the Federal Tribunal what the theory of a "*lack of consideration*"[43] under English law really consists of and the ten lines taken from the French translation of a private appraisal established for the purposes of the case by an English lawyer, even if deemed reputable, does not fill this gap, especially as the Arbitral Tribunal, which devoted an entire subsection to the question in dispute (Award, n. 463 et seq.), not only had an understanding of the legal opinion reproduced in the appeal as an interpretation contrary to that of the Appellants, but, moreover, expressly mentioned the circumstance which

[41] Translator's Note: In English in the original text. Emphasis original.
[42] Translator's Note: In English in the original text.
[43] Translator's Note: In English in the original text.

would, in its view, constitute 'sufficient consideration,'[44] in order to explain why X._____ signed the tripartite contract (Award, n. 469).

The fourth argument put forward in the Appeal Brief is to label as "a mere question of principle" the remark made by the Arbitral Tribunal under n. 406 of its Award that the rejection of the doctrine of incorporation would prevent X._____ from acting against B._____ in an ICC arbitral tribunal, as part of a tripartite arbitration based on Art. 9 of the Tripartite Agreement, such that the purpose of that agreement – to create a single forum for the settlement of tripartite disputes – would not be achieved. For the Appellants, the objective of the tripartite contract, which is to ensure the commencement and continuity of the delivery of natural gas to Y._____, is perfectly understood even if it does not create an optional jurisdictional choice in favor of X._____ (Appeal, n. 114). What constitutes the question of principle alleged by them, the appellants do not say. Their attempt to remedy the situation, made in n. 15 of their reply where they state that they wish to emphasize that the Arbitral Tribunal has established the existence of substantive rights in favor of X._____ in order to justify its jurisdiction, is yet again inadmissible.

In a fifth argument, the Appellants note that "the option of jurisdiction" which X._____ would have, according to the Arbitral Tribunal (Award, n. 408: "... X._____ has the option to sue B._____ for failure to deliver gas either under the GSPA or under the Trilateral Agreement"[45]), which would allow it to escape the exclusive jurisdiction of a CRCICA arbitral tribunal provided for in the supply contract, is inconsistent with the terms of the arbitration clauses in the supply contract (Article 9.2 with reference to Art. 14 of Schedule 1) and the tripartite contract (Art. 9), neither of which sanction such an option, which would moreover be excluded by the provisions governing the coordination between the compromissory clauses of the three contracts examined (Art. 14.9 and 14.10 of Schedule 1 to the GSPA). It would therefore be unreasonable to claim that B._____ and X._____ had intended to offer the latter the possibility of excluding the CRCICA arbitration clause in favor of the ICC arbitration clause (Appeal, n. 115 to 118; Reply, n. 16).

The theory of double competence, as the Appellants have developed it from the aforementioned passage of the Award appears most artificial. Even if the content of the passage in question lacks clarity, the other considerations put forward by the Arbitral Tribunal on the question of its jurisdiction, as summarized above (see 3.2), do not in any way confirm that this theory would indeed correspond to what the Arbitral Tribunal meant. This is evidenced by the fact that it has completely excluded itself from having jurisdiction *ratione materiae* with respect to the GSPA Claims and the fact that it has admitted jurisdiction with regard to the Tripartite Agreement claims only insofar as Y._____ was also a party to the dispute, in accordance the anti-abuse clause of Art. 14.10 of Schedule 1 to the GSPA. It is not clear, therefore, what choice of jurisdiction was allegedly granted to X._____. The inferences drawn by the petitioners are thus erroneous.

This last finding may be contrasted with the sixth argument that the so-called choice of jurisdiction would, in reality, lead to several possible jurisdictions (Appeal, n. 119 to 124; Reply, No. 17). In support of this argument, the Appellants argue that X._____, after having initiated the ICC arbitration in question against them, then submitted the same claims to a CRCICA tribunal set up under the supply contract, without the ICC Court of Arbitration having sanctioned such conduct – which, in their view, is a waiver on the part of X._____ of the choice it had made to bring an action before it – which should have led it to relinquish its jurisdiction for the benefit of the CRCIC Tribunal seized second. What the Appellants forget to point out however, and which removes any credit from their explanation, is that it was in fact *them* who took the initiative of subsequently opening the second arbitration proceedings against X._____. The latter merely made counter-claims, thereby taking a cautious approach that could well be explained, as the eminently

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

complex question of the respective jurisdiction of the two types of arbitral tribunal had still not been decided by the ICC Arbitral Tribunal seized first; the CRCICA Arbitral Tribunal had also pre-empted it by noting its own jurisdiction in an incidental award (*see* B.b, *supra*).

Under n. 18 to 25 of their rejoinder, the Appellants supplement this argument by relying on a passage of the Award of March 15, 2016 issued by the Arbitral Tribunal following the submission by B._____ and Y._____ of claims seeking the rectification of its award of December 4, 2015. This way of proceeding is doubly inadmissible: on the one hand, it is based on new evidence – the aforesaid award – which is not admissible before the Federal Tribunal (Art. 99 (1)LTF, the application of which by analogy is not excluded by Art. 77 (2) LTF); on the other hand, the passage in the Award on the application for rectification referred to by them (n. 88) merely repeated an opinion already expressed in the Award (n. 1258), so that they could have argued against the Award in their appeal brief, knowing that they would be deprived of the right to do so in a possible reply.

3.5.2. In the alternative, the Appellants argue that the claims made by X._____, assuming that they did not constitute genuine Tripartite Agreement Claims falling within the scope of the arbitration clause of the Tripartite Contract, should nevertheless have been submitted to the Arbitral Tribunal provided for by the supply contract pursuant to Art. 14.10 of Schedule 1 to that contract, cited above (see A.b.a, *in fine*), as Y._____ was not a party to such a dispute (Appeal, n. 125 to 132).

The Respondents challenged the admissibility of this argument on the ground that it had been raised for the first time before the Federal Tribunal. There is no need to further examine this question because the Appellants demonstrate credibly, under ch. 28 to 30 of their Reply, that they did in fact submit it to the Arbitral Tribunal even though they did not attach great importance to it in the arbitral proceedings.

It is clear from the text of Art. 14.10 of Schedule 1 to the GSPA that the ICC Arbitral Tribunal would not have had jurisdiction to decide on the claims made by X._____ against B._____ for the breach of the tripartite contract, if Y._____ had not been a party to such a dispute ("... if the Initial On-Sale Customer is not a party to such dispute..."[46]). That this is the case is unquestionable, no matter what the Appellants say, again inadmissibly supplementing the argumentation of their appeal in their Reply (n. 36 to 42). Requiring, like the Appellants, that Y._____ make submissions against X._____ or X._____ against Y._____ for this condition to be fulfilled, is to go beyond the actual text of the provision cited. Moreover, the rationale for this is to allow the settlement of claims in a single procedure based on the tripartite contract and likely, by definition, claims that interest (more or less) the three signatories of this contract, without it always being possible to assess whether the submissions made by one of them against one of the other two will affect the legal position of the third, and vice versa. The passage of the sentence quoted by the Appellants (n. 1261/1262) relates to a particular situation that cannot be generalized and the opinion expressed therein should be rejected if it were really necessary to give it the meaning that the Appellants give. In any event, it is undisputed that, at first, Y._____ had made a submission against X._____ which it subsequently abandoned (see Rejoinder of Y._____, n. 25/26). Moreover, in keeping with the formal, if not formalistic, test of the submissions made between these two parties, it could still be observed that, in the appeal briefs mentioned in footnote 45 of the statement of reasons, in particular in the findings of its "Post-Hearing Submission" of April 8, 2014, Y._____ requested that B._____ "*and / or* X._____"[47] be recognized as being liable for the payment of his costs (n. 294, (l)).

3.6. In summary, the main conclusion to be drawn from a comparison of the arguments of the parties with the relevant documents in the arbitration file is that of the firm intention of all the protagonists to evade the jurisdiction of an arbitral tribunal having its headquarters in Cairo with respect to all bipartite or tripartite

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

disputes likely to affect the legal position of Y._____, to take into account the politically sensitive nature of the agreements concluded between the three Egyptian companies and the Israeli company parties to this dispute in the context of the Gas for Peace Deal.

Accordingly, the Arbitral Tribunal has rightly found itself to have jurisdiction to decide on the Tripartite Agreement claims submitted to it by both X._____ and Y._____. The Appellants therefore argue wrongly and without good reason for its having breached Art.190(2)(b) PILA.

4.
In a second plea divided into two branches, the Appellants, invoking Art. 190(2)(d) PILA argue that the Arbitral Tribunal was erred by not addressing relevant issues and by basing its award on legal grounds that the parties could not have foreseen.

4.1.
4.1.1. According to case-law, the right to be heard, as protected by the provisions cited, imposes upon the arbitrators a minimum duty to examine and dispose of the pertinent issues. This duty is breached when, inadvertently or due to a misunderstanding, the arbitral tribunal does not take into consideration allegations, arguments, evidence submitted or tendered by one of the parties and important to the award to be issued (ATF 142 III 360 at 4.1.1 p. 361 and the award cited). In a recent decision, the Federal Tribunal stated that it was out of the question for it to broaden its control over the scope of this minimum duty, especially as it is confronted with a trend, which continues to grow, consisting of many appellants invoking this aspect of the guarantee of the right to be heard in the hope of indirectly obtaining a review of the merits of the award under appeal. However, the Federal Tribunal is not an appellate court and the legislature consciously and intentionally limited its power of examination when it assigned it to adjudicate on international arbitration proceedings (Judgment 4A_520/2015[48] of December 16, 2015 at 3.3.1).

It is incumbent upon the alleged wronged party to demonstrate, in its appeal against the award, how an oversight of the arbitrators prevented it from being heard on an important issue. It is for it to establish, on the one hand, that the arbitral tribunal did not examine some of the factual, probative, or legal evidence that it had consistently advanced in support of its findings and, on the other hand, that those factors were such as to affect the outcome of the dispute. Such a demonstration will be made on the grounds set out in the award under appeal (ATF 142 III 360[49] at 4.1.3 and the judgment cited). If the award completely ignores what appears to be important to the resolution of the dispute, it is for the arbitrators or the respondent to justify such omission in their submissions on the appeal.

It is incumbent upon them to show that, contrary to the appellant's assertions, the omitted elements were not relevant to the case in point or, if they were, that they were implicitly refuted by the arbitral tribunal. However, the arbitrators are not obliged to discuss all the arguments relied on by the parties, so that they cannot be criticized for breaching the right to be heard in an adversarial procedure, for not having refuted, even implicitly, an objectively irrelevant argument (ATF 133 III 235 at 5.2 and the judgments cited).

4.1.2. In Switzerland, the right to be heard mainly concerns the findings of fact. The right of the parties to be asked for their views as to legal issues is recognized in a restrictive manner only. As a rule, pursuant to the adage *jura novit curia*, state courts or arbitral tribunals freely assess the legal bearing of the facts and may decide on bases of law other than those invoked by the parties. Consequently, as long as the arbitration agreement does not limit the mission of the arbitral tribunal to the legal means invoked by the parties only,

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[48] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/federal-tribunal-refuses-extend-scope-its-review

[49] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/agreed-upon-rules-procedure-do-bind-parties

they do not have to be heard specifically as to the scope to be given to the rules of law. As an exception, they need to be asked for their views when the judge or the arbitral tribunal considers basing a decision on a norm or a legal consideration which was not invoked in the proceedings and the pertinence of which the parties could not anticipate (ATF 130 III 35 at 5 and the references). Moreover, determining what is unforeseeable is a matter of appreciation. Therefore, the Federal Tribunal shows restraint in applying the aforesaid rule for this reason and because the specificities of this type of procedure must be taken into account by avoiding the use of an argument of surprise with a view to obtaining substantive review of the award by this Court (Judgment 4A_322/2015[50] of June 27, 2013, at 4.1 and the judgments cited).

4.1.3. For each of the two elements constituting the guarantee of the right to be heard invoked by them, the Appellants cite two breaches allegedly committed by the Arbitral Tribunal. It is appropriate to successively consider the four alleged cases of breach, starting with those relating to the minimum duty to examine the relevant issues (4.2 and 4.3), and then to those which bring into question the issue of the foreseeability of the rules of law applied by the Arbitral Tribunal (at 4.4 and 4.5).

4.2. In order to partially exclude their liability in respect of X._____, the Appellants argued the defense of *force majeure* that, in their view, was established by the terrorist attacks which targeted the pipeline and its facilities between February 5, 2011 and April 9, 2012, and which prevented B._____ from providing X._____ with a portion of the gas that it had committed to deliver. The Arbitral Tribunal devoted some 80 pages of its award to the consideration of this question (Award, nn.186-189, 592-941 and 930-941). It is appropriate to begin by summarizing the arguments it develops before considering the issues raised by the Appellants on this point.

4.2.1. In an introductory remark, the Arbitral Tribunal states that, even if its jurisdiction is lacking in relation to the GSPA, the Appellants are nonetheless free to rely on the provisions of the said *force majeure* contract, which are more detailed than the corresponding provisions of the Tripartite Agreement, as the rights and obligations set out in the latter agreement are merely a repetition of those already provided for in the bilateral agreement referred to above. The arbitrators then set out, in detail, the arguments put forward by B._____, X._____, and Y._____ on the question of *force majeure*, and proceed to the finding of the relevant facts in this respect; after which, they reproduce in the award the topical clause of the contract of supply, namely Art. 16, divided into 11 points, from Schedule 1 to the GSPA.

Having analyzed this clause, the Arbitral Tribunal infers that B._____'s right to invoke *force majeure* in this case presupposed that it had acted as an RPPO (an acronym for "Reasonable and Prudent Pipeline Operator"[51]), that is, in accordance with a standard of care defined elsewhere (the so-called "RPPO Requirement"[52]), and that this action would have prevented the terrorist attacks or, at least, mitigated the effects thereof ("the Avoidance Requirement"[53]). Placing the burden of proof on B._____ concerning the fulfillment of this dual condition, it ultimately proceeds by legal reasoning to the conclusion that B._____ has not demonstrated that it acted as an RPPO but if it had done so, the attacks targeting the pipeline and its facilities could have been avoided or perhaps had less damaging consequences.

Under Section 12 of Chapter IX, entitled "Alleged waiver of right to challenge *Force Majeure*" (Award, n. 930-935), the Arbitral Tribunal reproduces the text of Art. 12.8 of the On-Sale Agreement binding X._____ and Y._____. Art. 12.8 is a provision concerning *force majeure* in the case of a third party and likely to

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[50] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/alleged-unpredictability-reasons-rejected

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

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

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

be relied on under certain conditions by the parties to the supply sub-contract ("Third Party *force majeure*"[54]). On the basis of that clause, X._____ sent to Y._____ a third-party *force majeure* declaration under the supply sub-contract. On the basis of this declaration, B._____ intended to deny X._____ the right to question the validity of its own declaration of *force majeure* made under the supply contract. However, the Arbitral Tribunal was disinclined to follow it on this issue. It found, indeed, that the GSPA does not provide that X._____'s decision to declare the force majeure of a third party in accordance with the specific clause of the On-Sale Agreement would prevent that company from challenging the declaration of *force majeure* that B._____ had sent to it under the GSPA. Therefore, for it, in the absence of any contractual clause providing otherwise, the declaration of *force majeure* of a third party made under the supply sub-contract ("in the downstream contract"[55]) cannot be interpreted as an implicit waiver by X._____ of its right to challenge the declaration of *force majeure* made in the supply agreement ("the upstream declaration"[56]). Such a statement cannot, moreover, be regarded as a *venire contra factum proprium*, in the opinion of the Arbitral Tribunal as in doing so X ._____ applied a coherent strategy of preserving its rights *vis-à-vis* Y._____ for the case where the arbitrators decide that B ._____ had validly taken advantage of a situation of force majeure from the standpoint of the GSPA.

Upon which, the Arbitral Tribunal concludes by rejecting the argument of force majeure for the reasons given above, adding: "[t]he Tribunal also dismisses all additional arguments and defenses raised by B._____ relating to this issue."[57] (Award, n. 940).

4.2.2. In the part of their appeal brief devoted to the problem of force majeure (appeal, nn. 144-158), the Appellants argue that the Arbitral Tribunal failed to examine their argument that X._____ and Y._____ agreed to treat the terrorist attack that occurred on February 5, 2011 on the B._____ pipeline as a case of *force majeure* justifying the interruption of the supply of gas from that date until March 20, 2011. Explaining that said agreement had the effect of releasing X._____ from its obligation to indemnify Y._____ for non-delivery of the quantities of gas ordered by the Israeli company ("Shortfall Compensation"[58]) and adding that this had also been the case in the relationship between B._____ and X._____ *("Similarly, B._____ would also have been released from its obligations under the Supply Contract*"[59]), the Appellants quote the following passage, taken from one of their documents:

> X._____ and Y. _____ agreed to treat the 5 February 2011 terrorist attack as a force majeure event under Y._____ - X _____ Contract. X._____ and Y._____ "recognised that this force majeure event excused any delivery shortages until 19 March 2011.[60] (Award, n. 145).

They then list some documents that are supposed to prove the existence of the alleged agreement. Recognizing, moreover, that the Arbitral Tribunal has indeed considered the argument based on the declarations of *force majeure* issued by X._____ to Y._____ (*see* 4.2.1, *supra*, penultimate §), the Appellants argue that it did not, however, take into consideration their separate argument relating to the aforesaid agreement between X._____ and Y._____, argument which, if they are to be believed, could have been used to challenge claims made against them by these two parties, as would be clear from a clarification provided by the Arbitral Tribunal itself under n. 449 of its Award:

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[54] Translator's Note: In English in the original text.
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[56] Translator's Note: In English in the original text.
[57] Translator's Note: In English in the original text.
[58] Translator's Note: In English in the original text.
[59] Translator's Note: In English in the original text.
[60] Translator's Note: In English in the original text.

> [...] all the defenses available to B ._____ under the GSPA [e.g. *force majeure*, exclusion clauses or statute limitations] and to X._____ under the On-Sale Agreement are also available to B._____ when X._____ and Y._____ claim under the Tripartite Agreement."[61]

Finally, they explain what the financial implications of the omitted argument would have been for the outcome of the litigation.

4.2.3. This Court has sought in vain, both in the Award under appeal generally and in the part reserved for the consideration of the position adopted by B._____ on the question of *force majeure* particularly (nn. 607-631), the wording (even reduced to its simplest expression) of the argument supposed to have escaped the knowledge of the Arbitral Tribunal. It is self-evident that pointing to the mere allegation, supported by evidence, of the existence of an alleged agreement between X._____ and Y._____ concerned with how to deal with the terrorist attack of February 5, 2011, cannot be considered equivalent to the presentation of such an argument in its correct form. It was incumbent on the Appellants to indicate to the Arbitrators how they considered that the alleged agreement between X._____ and Y._____ was likely to affect their own obligations with respect to X._____ and Y._____ arising from the GSPA and the Tripartite Agreement, in other words, why this *res inter alios acta* should have been taken into account with regard to a third party, with the exception of the principle of the relativity of contracts. If they did not do so, they can only blame themselves if this virtual argument was not dealt with by the Arbitral Tribunal. Moreover, the explanations they provide for the first time on this point in their reply, in addition to the fact that they do not appear to be more explicit, are in any event inadmissible (see 2.2, § 1).

In any event, it must be agreed, with the Respondents, that the reasons given in the Award are inconsistent with the Appellants' contention, such that they would include an implicit rejection of this argument by the Arbitral Tribunal, insofar as it was validly submitted to it. Indeed, under n. 931 of their Award, the arbitrators, after having mentioned the declaration of *force majeure* sent by X._____ to Y._____ in accordance with Art. 12.8 of the supply sub-contract, continue as follows:

> Y._____ has confirmed that it did not accept X._____'s *force majeure* declaration.[62]

On the basis of this finding, it is hard to imagine that these same arbitrators, after having held that the Israeli company had not accepted the declaration of *force majeure* that its Egyptian contracting party had communicated to it, nevertheless could have supported an argument, without contradicting itself, as to the existence of an agreement whereby these two companies would have agreed to consider the circumstances forming the subject of the refused declaration as cases of *force majeure*. Moreover, taking into account the agreement at issue and the binding nature of that agreement on X._____, with a discharge effect for the Appellants in the context of the GSPA, would defeat all the arguments developed by the Arbitral Tribunal in its Award in order to deny B._____ the right to avail itself of the argument of *force majeure*, it having failed to act as an RPPO. Therefore, one of two things happened: either and most likely, the Appellants, then represented by other lawyers, did not sufficiently explain to the arbitrators how the alleged agreement concluded by X ._____ and Y ._____ about *force majeure* was likely to result in their release from this provision, even if they failed to exercise due diligence in the monitoring of their pipeline and facilities; or they did explain, but failed to convince the Arbitral Tribunal, which is implicit in the reasons set out in the Award under appeal. In either case, the Appellants have no compelling reasoning to demonstrate a breach of their right to be heard.

4.3.

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

4.3.1. Under Section 4 of Chapter XIV, entitled: "Compensation for the Tripartite Repudiatory Breach"[63] (Award, nn. 1323-1423), the Arbitral Tribunal examines X._____'s claim against B._____ for the unjustified termination ("repudiation") of the tripartite contract of April 30, 2012. In its view, the calculation of this element of the injury, which must be distinguished from the one that it applied to the finding of injury caused by the tripartite delivery breaches, presupposes that the alleged diminution of value suffered by X._____ is established by deducting from the hypothetical value that would have been the value of this undertaking if B._____ had respected its contractual obligations to it (a "But For Scenario") from the actual value that the company currently represents, due to the fact that the GSPA and the Tripartite Agreement terminated prematurely ("Actual Scenario").

To fix the first element involved in this subtraction operation, the Arbitral Tribunal applies the usual "Discounted Cash Flow" (DCF) method, based on the information provided by the experts of both parties. It results in a hypothetical value of USD 280'935'579 reported as of April 30, 2012. This part of the calculation is not contested by the Appellants.

Secondly, the Arbitral Tribunal seeks to determine the actual value of the plaintiff company (Award, nn. 1371-1408). The point is controversial between the parties. X._____ argues that this value equals the liquidation value of its pipeline estimated at USD 50 million. B._____, on the other hand, would like to include an amount of USD 752 million in this regard. In its view, this much higher value results from the possibility of using the X._____ pipeline in the opposite direction to import Israeli gas from the Tamar and Leviathan reserves into Egypt ("reverse flow,"[64] *see* A.c, last §, *supra*). In its introductory remarks, the Arbitral Tribunal considers the existence of such reserves as important, as well as the significant decrease in gas extracted from the Egyptian sub-soil, a situation that led the Government of Egypt to enact, in 2012, a decree allowing private companies to import gas and sell it on the domestic market. The Award also mentions two press releases from N._____ Group, the owner of the aforementioned gas reserves: the first, dated October 19, 2014, reveals the existence of a letter of intent by which the group in question and the Egyptian company O._____ Holding Limited (hereafter: O._____) undertake to negotiate an agreement for the supply of natural gas to Egypt from the Tamar reserves; in the second, published on March 18, 2015, N._____ Group indicates that it has entered into a firm agreement with O._____ for the sale of Israeli gas for resale in Egypt, stating that the gas will be transported via the pipeline operated by X._____.

After these preliminary remarks have been made, the Arbitral Tribunal underlines that the problem to be solved is to investigate whether the facts noted establish or not the probability of the use of the X._____ pipeline in "reverse flow". In this respect, it begins by presenting the arguments of the parties.

The arguments of B._____ are that there is no reason why X._____ does not want or is unable to participate in the proposed transaction and, furthermore, that if that company does not seize this opportunity to obtain a substantial income, it would contravene the duty of English law for any party injured to do everything in their power to mitigate their financial losses, under penalty of forfeiture. X._____'s arguments, as summarized by the Arbitral Tribunal, go in the opposite direction. To it, the realization of the "reverse flow"[65] appeared highly implausible at the crucial date for the calculation of the effective value of the company, that is, that of the end of the tripartite contract. It its view, at that time it was nothing more than an uncertain project reliant on third-party decisions. X._____ added that, from the point of view of English law, it could not be obliged to invest large sums of money and to embark upon a risky venture solely for the purpose of attempting to reduce the prejudice suffered, especially as it had had no income for more than three years and was heavily indebted. The Arbitral Tribunal alleges the existence of an offer made by

[63] Translator's Note: In English in the original text.
[64] Translator's Note: In English in the original text.
[65] Translator's Note: In English in the original text.

X._____ to B._____ (which denied it) to transfer its rights on the pipeline and ancillary facilities against a payment of USD 50 million within 90 days from the date of the Award, in addition to the other amounts that would be allocated by it. Then it explains the reasons for its decision. In its opinion, the evidence provided by B._____ is not sufficient to make the likelihood of the "reverse flow"[66] plausible (Award, n. 1388: "The Tribunal is of the opinion that the evidence marshalled by B._____ is insufficient to prove that the probability of reverse flow is likely"[67]): on the one hand, the existence, to date, of a binding and enforceable agreement concerning the export of gas from Israel to Egypt has not been sufficiently established; on the other hand, it is also not proven that an agreement was made with X._____ for the use of its gas pipeline, nothing being able to be inferred in this respect from the letters addressed on April 22 and May 21, 2015 to X._____ by O._____. Having assessed this evidence, the Arbitral Tribunal draws the following conclusions:

> "1401. The Tribunal concludes that there is evidence of O._____ approaching X._____ to commence negotiations regarding the use of the pipeline, but there is no proof that X._____ is receptive and that negotiations are indeed taking place, let alone that a binding transportation agreement has been concluded.
>
> 1402. In conclusion, B._____'s case that X._____'s value be increased by the value of its pipeline being used in Reverse Flow mode is not substantiated. No evidence has been marshalled to show that there is a reasonable probability that X._____'s pipeline can and will be used in Reverse Flow to export gas from Israel to Egypt."[68]

Having rejected the "reverse flow" scenario, the Arbitral Tribunal finds, on the evidence before it, the value of X._____ in the "Actual Scenario" to be USD 50 million. Once this value is deducted from that obtained in the "But-For Scenario" (USD 280'935'579), this results in an amount of USD 230'935'579, which corresponds to the indemnity X._____ is entitled to claim from B._____, with interest thereon, under the tripartite repudiatory breach.

4.3.2. In support of their grievance, the Appellants claim to have presented two independent arguments concerning the reverse flow. In the first, referred to as the "Argument of Probability", they claim to have argued, with respect to the Actual Scenario, that given the possible use of the X._____ pipeline in the opposite direction to import Israeli gas into Egypt, it was no longer possible to estimate the present value of the company by basing the calculation the scrap value of its pipeline, starting from the premise that it had become useless. In the second argument, dubbed the "Argument of Minimization," they argued that under English law a party injured as a consequence of the breach of contract has the duty to take all reasonable steps to minimize its prejudice. Thus, to fulfill this duty, again according to the Appellants, X._____ should have, for example, tried to import gas from Israel to Egypt as a buyer and/or enter into negotiations with O._____ for the use of its pipeline in the opposite direction for the transport of Israeli gas, all steps that it had failed to perform, thereby violating its duty to reduce the prejudice that had been caused by B._____. However, if one believes the latter, the Arbitral Tribunal considered only the first argument, leaving the second unaddressed. Indeed, as regards the first argument, it found that there was evidence of interest and contact from O._____ to X._____ for the purpose of using the pipeline in the opposite direction, while noting that X._____ did not show itself receptive. As for the second argument, the arbitrators completely ignored it by refraining from considering whether X._____ had fulfilled its duty to minimize its prejudice by performing the "reverse flow". However, the answer to that question was essential for the outcome of the case, since in the event of a breach of the duty to minimize its prejudice, the injured party should see the prejudice aggravated by its fault deducted from it claims.

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[66] Translator's Note: In English in the original text.
[67] Translator's Note: In English in the original text.
[68] Translator's Note: In English in the original text.

4.3.3. Although they denied it in their reply, the Appellants use a most objectionable method in presenting their grievance in this way. This method consists of reformulating the thesis they had argued before the Arbitral Tribunal and giving a different color to the arguments which supported it, so as to enable them to artificially classify these arguments in two new and distinct categories, moreover highlighted by capital letters – "the Argument of Probability" and the "Argument of Minimization" – so as to be able to maintain that the Arbitral Tribunal would have examined only one of the two parts of this two-headed argumentation. Such a procedure is nothing more than a simplistic categorization of one of the defenses submitted to the arbitrators, with the aim of showing that the latter had not grasped the obvious scope and, as a result, failed to examine it, in breach of the right to be heard from the party who had raised it before them. In doing so, the Appellants seek if not to change, to at least *clarify* the much less explicit argument they developed in their submission of May 18, 2015, entitled "Submission of Respondents 1 and 2 on Reverse Flow"[69] (Exhibit 17 attached to the appeal) on the issue in dispute. Moreover, they essentially do the same in their Reply, where they do not confine themselves to answering the objections raised in the Respondents' replies, but attempt to supplement, in an inadmissible manner (*see* 2.2. §1, *supra*), the deficiencies in their initial explanations.

Contrary to the Appellants' argument in endnote 78 of their appeal brief, the duality of their argument is not evident from the structure itself of their submission of May 18, 2015. If what they said were true, it is impossible to see what would have prevented them from dividing it into two parts, which they would have titled as they do in the topical chapter of their appeal, and in which they would have separately developed the argument of probability and the argument of minimization. Instead, leaving aside the introduction and the conclusion contained in their brief, they have divided it into two parts entitled, respectively, "I. The evidence concerning reverse flow"[70] and "The impact of reverse flow on X._____'s case on damages"[71]. Thus, they laid out the argument of probability in the first chapter and demonstrated its consequences in section C. of the second chapter. As for the minimization argument, they inserted it in section B. of the second chapter – in other words, between the two passages devoted to the probability argument. In addition to looking in vain for the French counterpart of the French headings given to these two arguments, the appeal brief that contains them does not emphasize them in the same way as the statement of reasons and the reply do. It is undeniable that the argument relating to the injured party's duty to reduce his actual prejudice (*Schadensminderungspflicht*[72]) was indeed raised in the submission of May 18, 2015, which the Arbitral Tribunal acknowledges (Award, n. 1380), but it was not as specific as the Appellants would like to believe, nor on the same footing as the so-called argument of probability. It must be admitted, in fact, with Respondent Y._____ (Answer, 76/77) that the Minimization Argument, as presented to the Arbitrators, represents only one link in the logical chain of unitary reasoning that the Appellants sought to use against the argument supported by X._____. This reasoning can be formulated and summarized in the following way: the future use of the pipeline in reverse flow is possible and probable; X._____ was therefore required to make every effort to enable this use, as part of its duty to minimize the prejudice caused to it by B._____. As it did not do so, its present value cannot be calculated on the basis of the scrap value of the pipeline but must be estimated on the basis of the income X._____ might derive from the use of the pipeline in the opposite direction for the importation of Israeli gas into Egypt.

Asked to rule on the merits of this reasoning, the Arbitral Tribunal, after taking into account the factual, evidentiary and legal arguments raised by each of the parties, arrived at the above-mentioned conclusion (see 4.3.1), that no evidence had been presented to it to demonstrate the existence of a reasonable likelihood that the X._____ pipeline could be and would be used in "reverse flow" to export gas from Israel to Egypt. And since, in its view, it was for B._____ to provide sufficient evidence in this respect, it rejected

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[69] Translator's Note: In English in the original text.
[70] Translator's Note: In English in the original text.
[71] Translator's Note: In English in the original text.
[72] Translator's Note: In German in the original text.

the argument that this party intended to obtain a significant increase in the value of X._____ in the context of the "Actual Scenario". It goes without saying that the way in which it applied the relevant provisions of English law, assessed the evidence in the arbitration file and allocated the burden of proof of the possibility of a "reverse flow" is beyond the Federal Tribunal's powers of review, being a procedure of appeal in international arbitration. The Appellants make much of the aforementioned passage of the award where the Arbitral Tribunal states that there is no evidence that X._____ was receptive to the approaches attempted by O._____ in order to begin negotiations concerning the use of its pipeline. From there to infer, as they do, that the "Argument of Minimization" completely escaped the scrutiny of the arbitrators, is a step that cannot be taken, if one takes account of the way in which they actually presented it in their submission of May 18, 2015, and ignore their new version, as it appears in the appeal brief. The Appellants can therefore only blame themselves if the Arbitral Tribunal has not grasped the exact scope of the argument they presented to it concerning the reverse flow.

4.4. Still in the context of the breach of their right to be heard, but this time, because of the unpredictability of part of the legal basis upon which the Award was rendered, the Appellants raise two more arguments.

The first relates to the claims made by Y._____ in relation to the breach of the tripartite contract attributable to B._____. These breaches, as we have seen, consisted, on the one hand, in the non-performance, by the Appellants, of their obligation, already provided for in the supply contract (the GSPA), to regularly deliver the goods to X._____ ("tripartite delivery breaches"), so that the latter could supply natural gas to Y._____ as well as to other buyers via its pipeline, pursuant to the supply sub-contracts with them ("On-Sale Agreements"), and, on the other hand, in the unjustified repudiation of this contract (the "tripartite repudiatory breach") and the GSPA. The issue in dispute was whether the mechanism called "Shortfall Compensation" (that is, a "liquidated damages"[73] mechanism) was designed to offset the buyer's failure to deliver the gas ordered by the buyer – which would have the effect of limiting the amount of the compensation due by the seller (as provided for in the sub-supply contract) – was applicable or not to the tripartite contract, which did not mention it. The Arbitral Tribunal answered in the affirmative, agreeing with B._____ on this point. Continuing its analysis, it highlighted the fact that the mechanism of the shortfall compensation, more complex than the description given above, had the essential characteristic of granting the buyer only temporary financial compensation, by allowing it to withhold a portion of the purchase price of the natural gas invoiced, because that buyer could normally obtain, within six months, the supply of the missing gas ("Redelivery Gas"[74]), for which it would have to pay.

Taking into account this feature, the Arbitral Tribunal held that the application of this system should be terminated once the delivery of this alternative gas had become impossible, a term that it fixed at the date of the repudiation of the supply contract, that is, April 19, 2012, (date extended to April 30, 2012, for the sake of simplification), after having noted that, for all the parties, the repudiation of the GSPA implied *ipso facto* the repudiation of the Tripartite Agreement. That is why it calculated the damages to be awarded to Y._____ as of April 30, 2012, for the tripartite repudiatory breaches according to other criteria, disregarding the Shortfall Compensation mechanism.

The Appellants argue that it was wrong to have thus raised an "additional and surprising legal question," without consulting the parties, asking "whether it is appropriate that the flat-rate clause should cease to apply on a date prior to that of the end of the contract which provided for it." They argue that it was wrong of the Arbitral Tribunal, in concrete terms, to have used the date of April 30, 2012, when Y._____ terminated the tripartite contract later, by letter of February 6, 2013. According to them, the Arbitrators, in so doing, may have misunderstood that according to the English law applicable in this case, when repudiation is followed by termination, the repudiated contract continues to exist until its repudiation has been accepted by the other

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

party. Therefore, in the Appellants' view, the Shortfall Compensation system should have been applied from May 1, 2012, to February 6, 2013, which would have saved them more than USD 1 million.

The mere statement of the grievance in dispute, which in fact covers several pages and which was also inadmissible in the Reply, shows that the Appellants totally disregard the nature of the argument of breach of the right to be heard, as referred to above (see 4.1.2). The Appellants also wrongly denounce such a breach, as the Arbitral Tribunal merely interpreted the applicable contractual clauses and confined itself to drawing only the conclusions it considered necessary. In fact, under the cover of this grievance, the Appellants – although they deny it – indeed only call into question the factual findings of the Arbitral Tribunal and the way in which it interpreted the clauses of the various contracts in dispute or even its application of the relevant provisions of English law. They are obviously seeking a bias to force the Federal Tribunal to enter into the merits. However, the case in point is the opposite of those in which federal case law has accepted the argument of surprise and annulled the award or part of it on this count. The Court declines to follow the Appellants in this direction.

4.5. The second argument raised in the same way relates to the damages awarded by the Arbitral Tribunal to Y._____.

4.5.1. Relying, here too, on a breach of their right to be heard, the Appellants argue that the Arbitral Tribunal admitted the claims raised by Y._____ despite the fact that the latter, who bore the burden of proof of the prejudice alleged by it, had failed to establish the existence of this prejudice, that is, the amount of additional expenses (the "Additional Fuel Costs"[75]) which it had caused and would cause by the purchase of fuel to replace the natural gas which B._____ had ceased the deliver it, via X._____, by repudiating the tripartite contract before its expiry. According to the Appellants, Y._____ had produced, as its sole means of proof of this prejudice, the data extracted from a software called UCOD, used for its own needs. However, like them, the Arbitral Tribunal had decided that this software was a "black box,"[76] not allowing the calculation of these additional costs in a sufficiently reliable way. Therefore, the parties could expect that the Arbitral Tribunal would reject Y._____'s claim on this point, in application of the general English law rule on the burden of proof.

Instead, the Arbitral Tribunal nevertheless allowed it based on two decisions of the Public Utilities Authority of Israel (PUA)[77] – the supervisory authority of the Israeli electricity market – relating to the approval tariffs applied by Y._____ for the supply of electricity to Israeli consumers, decisions which ratified the tariff item represented by the additional expenditure related to the acquisition of the alternative fuel. For the Appellants, this reasoning would be surprising in more than one way, to such an extent that the parties could not have foreseen it and, consequently, formulate any useful objections against its adoption. First, Y._____ did not argue that PUA's rulings were sufficient to establish prejudice. Second, they did not make it possible to identify the share of the prejudice resulting from interruptions in the supply of natural gas from Egypt. Lastly, the Arbitral Tribunal did not hesitate to use them in order to be able to calculate the damages owed by them to Y._____ for the year 2013, whereas they concerned the years 2011 and 2012 and that for the next year, none of the parties had produced a PUA decision. In these circumstances, the Appellants conclude, the parties could not have foreseen that the Arbitral Tribunal would apply legal reasoning as far removed from the arguments that they had each submitted on the point in dispute.

4.5.2. The above-mentioned precedent concerning the particular aspect of the right to be heard examined here (see 4.1.2), does not extend to factual findings. In this area, the right to be heard certainly allows each party to state its views on the essential facts of the award to be issued, to submit its evidence on the pertinent

[75] Translator's Note: In English in the original text.
[76] Translator's Note: In English in the original text.
[77] Translator's Note: In English in the original text.

facts and participate in the hearings of the arbitral tribunal. However, it does not oblige the arbitrators to ask the parties to state their position as to the significance of each exhibit produced and neither does it entitle one of the parties to limit the autonomy of the arbitral tribunal in the assessment of a specific exhibit only to the purpose it wants to give for this piece of evidence. Indeed, if each party could decide in advance what evidentiary weight the arbitral tribunal would be authorized to give to each exhibit, the principle of the free assessment of the evidence, which is a pillar of international arbitration, would be undermined (Judgment 4A_214/2013[78] of August 5, 2013, at 4.1 and the cases cited).

In this case, the Arbitral Tribunal assessed the evidence in its file to calculate the amount of the prejudice claimed by Y._____. The Appellants' attempt to liken such an approach to a legal assessment of the facts is, from the outset, doomed to failure. Determining the evidentiary weight of a piece of evidence (the PUA's decisions), either intrinsically or in relation to another piece of evidence (the UCOD software), lies in the realm of the assessment of the evidence and the ascertainment of the facts, which has nothing to do with the law. Wanting to prohibit the Arbitral Tribunal from taking into account evidence regularly before it. solely on the ground that it was not taken into account by the party to whom it benefits, is totally contrary to the case-law just referred to. For the rest, the findings reached by the Arbitrators on the basis of the evidence at their disposal cannot be reviewed by the Federal Tribunal when deciding on an appeal against an international arbitral award, any more than how the burden of proof of the prejudice was apportioned by them.

In any case, the detailed explanations provided by Y._____, with supporting documents, under n. 118 of its answer to the appeal (pp. 42-48) clearly demonstrate that the fact that the decisions of the PUA were taken into account by the Arbitral Tribunal to assess the prejudice suffered by this Respondent clearly did not surprise the parties to the proceedings. Thus, the affirmation to the contrary of the Appellants, on which their last grievance rests, verges on foolhardiness.

5.
The appeal should thus be rejected insofar as the matter is capable of appeal. The Appellants, who are unsuccessful, will be ordered jointly and severally to pay the costs of the federal proceedings (Art. 66(1) and (5) of the LTF) and to pay costs to each of the two Respondents (Art. 68(1) and (4) of the LTF).

For these reasons, the Federal Tribunal pronounces:

1.
The appeal is rejected insofar as the matter is capable of appeal.

2.
The judicial costs, set at CHF 200'000, shall be borne by the Appellants, jointly and severally.

3.
The Appellants are jointly and severally ordered to pay an indemnity of CHF 250'000 in costs to each of the two Respondents.

4.
This judgment shall be notified to the parties' representatives and to the Presiding Judge of the ICC Arbitral Tribunal.

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[78] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/irreconcilable-contradiction-domestic-award-leads-annulment

Lausanne, April 25, 2017

On behalf of the First Civil Law Court of the Swiss Federal Tribunal

The Presiding Judge: Kiss	The Clerk of the Court: Carruzzo