4A_322/2015[1]

Judgment of June 27, 2016

First Civil Law Court

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

S._____ SA,
Represented by Mrs. Dominique Brown-Berset and Mrs. Dominique Ritter, and by Mr. Eric Haymann and Mr. Daniel Bloch,
Appellant

v.

1. Y._____,
2. Z._____ Company,
Both represented by Mr. Wolfgang Peter and Mr. Homayoon Arfazadeh,
Respondents

Facts:

A.
On February 29, 1968, the state of Israel and the Iranian Company Z._____ (hereafter: Z._____) entered into a Participation Agreement on a parity basis for the construction, maintenance, and operation of an oil pipeline on Israeli territory by which Iranian oil would be brought by tanker ships from the Iranian harbors in the Persian Gulf to the Eilat harbor on the Red Sea, to be taken to Ashkelon on the eastern Mediterranean coast. The contracting parties also decided to create a group of companies with a view to the performance of this agreement: a holding company under Canadian law named A._____ Ltd, which would hold the pipeline concession for 49 years (*i.e.* from 1968 to 2017); a sub-concessionary company named B._____ Ltd in charge of constructing, maintaining, and operating the pipeline; and a trading company named X._____ SA (hereafter: X._____ or the Appellant), governed by Panamanian law and with a commercial address in Tel Aviv (Israel). The Iranian share in these three companies was

[1] Translator's Note: Quote as X._____ SA *v.* Y._____ and Z._____ Company SA, 4A_322/2015. The decision was issued in French. The full text is available on the website of the Federal Tribunal, www.bger.ch.

effectuated through Y._____ (hereafter: Y._____), a company under Lichtenstein law entirely controlled by Z._____, whilst the Israeli share was effectuated through the Panamanian company C._____ Corporation, entirely controlled by the government of the state of Israel. On August 18, 1969, Y._____ and X._____ entered into an agreement purporting to create a joint company under Lichtenstein law, named D._____ Co Ltd (hereafter: D._____), presently in liquidation, the purpose of which was to conduct oil transactions and to transport oil (hereafter: the 1969 Agreement). At Art. 4 of the agreement, they inserted an arbitration clause fixing the seat of the arbitration in Zürich.

Once created, D._____ was involved in the delivery of Iranian crude oil produced by Z._____ and sold to X._____ on the basis of yearly renewable contracts (the Oil Contracts). On January 18, 1978, in particular – notably about a year before Shah's departure and an Islamic government took over in Iran – Z._____ and D._____ entered into a contract for the delivery throughout 1978 of some 14.75 tonnes of Iranian oil to X._____ (hereafter: the 1978 Contract).

B.

B.a. On January 13, 1989, Y._____ invoked the arbitration clause in the 1969 Agreement to file an arbitration request against X._____. It sought an order that the latter should pay to D._____, which was not a party to the arbitration, the amount of USD 445'336'076.36, corresponding to outstanding invoices for 50 deliveries of crude oil made by Z._____ from September to December 1978, pursuant to the 1978 Contract.

A three-member Arbitral Tribunal was constituted after several years of proceedings and the first phase of the arbitration lasted many more years. In an award of June 17, 2003, entitled Interim Award on Liability for Claim No. 2 and Final Award on Claim No. 3, the Arbitral Tribunal upheld Y._____'s submission, whilst reserving interest on the amount awarded and any counterclaims by X._____ which could apply for a set off of various claims of the parties against each other.

B.b. On January 30, 2004, X._____ filed a counterclaim. Its submissions were not only against Y._____ but also against Z._____ and subsidiarily, D._____. The latter raised a jurisdictional defense. As to Z._____, after challenging it at first, it finally admitted the jurisdiction of the Arbitral Tribunal concerning the counterclaims. There were three. First, X._____ sought payment of damages for the failure to deliver the balance of the oil stipulated in the 1978 Contract, namely approximately 2.9 million tonnes, due to the political events in Iran (which the award under appeal refers to as *"the 1978 shortfall claim"*). Second, X._____ sought compensation for the breach by Z._____ and Y._____ of their obligation to perform an oil delivery contract allegedly entered into for the year 1979. Third and finally, X._____ sought damages because Z._____ and Y._____ breached their obligation under the 1969 Agreement to conclude contracts for the delivery of oil until 2017.

After hearing the case, the Arbitral Tribunal issued Procedural Order No. 37 on July 4, 2006, in which it closed the case as to the counterclaim, with the exception of some limited items. The parties then filed two post-hearing briefs each simultaneously on November 29, 2006, and June 29, 2007, and presented oral

arguments on November 8 and 9, 2007, in a Closing Hearing during which they answered 43 questions that the Arbitral Tribunal had sent them on October 11, 2007. In a letter of August 15, 2008, the Arbitral Tribunal asked them some more questions in connection with one of the claims by X._____. While the parties awaited the final award, the Chairman of the Arbitral Tribunal died in November 2012. In a letter of February 3, 2013, the other two Arbitrators substituted him. In its new composition, the Arbitral Tribunal held an organizational meeting on September 11, 2013. On this occasion and whilst agreeing not to reopen the evidentiary phase *ab initio*, X._____ suggested a new hearing to enable the parties to present again to the newly composed Arbitral Tribunal the essential points of the case and the peculiar circumstances in which the disagreement arose. Z._____ and Y._____ opposed the request and the Arbitral Tribunal unanimously rejected it in Procedural Order No. 49 of September 26, 2013.

In a letter of July 22, 2014, the Chairman of the Arbitral Tribunal informed the parties that the drafting of the Award was taking more time than initially expected, particularly in light of the complexity of the matter and asked them to excuse the delay. X._____ answered the letter to remind him that this was precisely the reason for which it had suggested to hold a short hearing during the organizational meeting of September 11, 2013, adding that it remained available to answer any questions. However, the Arbitral Tribunal did not set a new hearing or ask questions of the parties except a specific question concerning set off. Finally, in a last letter sent to the parties on January 13, 2015, the Chairman of the Arbitral Tribunal apologized again and conceded that he had seriously underestimated the difficulties of his task because he joined the Panel at a very advanced stage of a complex arbitration.

On May 12, 2015, the Arbitral Tribunal issued its majority Final Award. In substance, after denying jurisdiction as to D._____ and accepting it as to Z._____, it held that X._____ should pay to Z._____ and Y._____ as joint creditors an amount of USD 445'336'076 with interest as payment for the 50 deliveries of oil made in 1978 left unpaid and held Z._____ and Y._____ to be jointly answerable to X._____ up to USD 99'455'767 with interest for the 1978 shortfall (n. 4 of the operative part). This being done, after setting off the two claims, it ordered X._____ to pay to Z._____ the amount of USD 1'123'709'315 with interest from January 1, 2015, on the amount of USD 362'054'085 at the Libor rate (n. 6 of the operative part of the Award). The reasons on which the Award relied will be indicated hereafter insofar as necessary to understand the Appellant's grievances.

The Chairman of the Arbitral Tribunal notified the Award to the parties by way of a letter of May 13, 2015, to which he also attached the dissenting opinion of the Arbitrator appointed by X._____.

C.

On June 15, 2015, X._____ filed a civil law appeal with a request for provisional remedies. Arguing that the Arbitrator violated its right to be heard, the Appellant submits that nn. 4 and 6 of the operative part of the Award should be annulled.

On September 9, 2015, the Arbitral Tribunal issued an Addendum to Final Award, which rendered moot the request for provisional measures.

Pursuant to the decision of the Presiding Judge on November 24, 2015, the Appellant was invited to deposit an amount of CHF 250'000 with the Treasurer of the Federal Tribunal as a guarantee for the costs of Respondents Y._____ and Z._____. It did so within the additional time limit it was granted for this purpose.

On March 9, 2015, the Chairman of the Arbitral Tribunal filed an answer in his own name. He implicitly submits that the appeal should be rejected.

Pursuant to the joint answer of March 10, 2016, the Respondents mainly submitted that the matter is not capable of appeal and in the alternative, that it should be rejected. Moreover, they sought the payment of the amount deposited by the Appellant as security for costs.

In its reply of April 1, 2016, the Appellant reiterated its previous submissions and invited the Federal Tribunal to declare the answer filed by the Chairman of the Arbitral Tribunal inadmissible. Moreover, it applied for an order that all orders issued in the arbitral proceedings be made available to the Federal Tribunal.

The Respondents waived the opportunity to develop their arguments further in their rejoinder of April 18, 2016. Moreover, they dispute the alleged inadmissibility of the observations submitted by the Chairman of the Arbitral Tribunal.

Reasons:

1.
According to Art. 54(1) LTF,[2] the Federal Tribunal issues its judgment in an official language,[3] as a rule in the language of the decision under appeal. When the decision is in another language (here English) the Federal Tribunal resorts to the official language chosen by the parties. Before this Court they both used French. Therefore, this judgment shall be issued in that language.

2.
2.1. In the field of international arbitration, a civil law appeal is admissible against the decisions of arbitral tribunals pursuant to the requirements of Art. 190-192 PILA[4] (Art. 77(1) LTF). Whether as to the subject of the appeal, the standing to appeal, the time limit to appeal, the Appellant's submissions, or the grounds of

[2] Translator's Note: LTF is the French abbreviation of the Federal Statute of June 17, 2005, organizing the Federal Tribunal, RS 173. 110.
[3] Translator's Note: The official languages of Switzerland are German, French, and Italian.
[4] 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.

appeal invoked, none of these admissibility requirements raises any problem in the case at hand. The merits of the appeal may therefore be addressed.

2.2.

2.2.1. The Appellant states several times that it shares the views of the minority Arbitrator and refers the Federal Tribunal to a specific passage of the dissenting opinion issued by the Arbitrator it appointed. In so doing, it overlooks that a dissenting opinion is not part of the Award, whether it was formally integrated into it or not, so that it remains an independent opinion with no specific legal scope (4A_319/2015 of January 5, 2016, at 4.2.2 and the cases quoted). Therefore, such an opinion does not have to be taken into consideration by the appeal body (Berger and Kellerhals, *International and Domestic Arbitration in Switzerland*, 3rd ed. 2015, n. 1501).

2.2.2. As a header to his observation of March 9, 2015, the Chairman of the Arbitral Tribunal made the following remark:

> The observations reflect my views as Chairman of the Arbitral Tribunal and they are not made in the name of the entire Arbitral Tribunal. I feel obliged to submit observations because the Appellant argues an alleged procedural violation by the Arbitral Tribunal.[5]

In its reply, the Appellant submits that the Federal Tribunal should hold these observations inadmissible because on the one hand, their author wrote them in his personal capacity and not in the name of the Arbitral Tribunal or of its majority and on the other hand, because these detailed observations contain a "veritable indictment" of the Appellant. The Respondents submit in their rejoinder that the Appellant's preliminary submission should be rejected. Denying that the impartiality of the aforesaid observations could be doubted, they emphasize moreover that the Chairman of the Arbitral Tribunal made them in his own capacity, namely, in full independence from the parties. They add that this is not surprising at all because the appeal relates to issues that were the object of a dissenting opinion by one of the arbitrators and "*on which the opinions of the members of the Arbitral Tribunal have been divergent*."

From the aforesaid introductory remark, it is far from sure that the Chairman of the Arbitral Tribunal wrote on behalf of the majority of the Tribunal. He may not have done so in his personal name, namely as a private individual, but indeed as Chairman of the Arbitral Tribunal. However, since he stated that he was not acting on behalf of the latter, it appears difficult to assume that he did so also on behalf of the arbitrator who agreed with him as to the solution adopted in the operative part of the Award under appeal. The conclusion must be that he stated his own views, albeit as Chairman of the Arbitral Tribunal, as his co-arbitrators could have done if they had been given an opportunity. These observations are therefore not decisive because their authorship cannot be attributed to the majority of the arbitrators. Consequently, this appeal will be examined apart from these observations, regardless of their alleged lack of objectivity. The

[5] Translator's Note: In German in the original text.

logical consequence of this conclusion is that all remarks in the reply as to the observations of the Chairman of the Arbitral Tribunal shall not be taken into consideration in the framework of this review.

2.2.3. The Appellant may not use the reply to invoke factual or legal arguments it did not submit in a timely manner, namely before the non-extendible time limit to appeal expired (Art. 100 LTF in connection with Art. 47(1) LTF), or to supplement insufficient arguments beyond the time limit (judgment 4A_34/2015[6] of October 6, 2015, at 2.2).

In reading the reply, one may doubt that the Appellant complied with this jurisprudential limitation by simply answering the arguments raised in the Respondents' answer, in particular in Chapter IV of its brief entitled "[*a*]*s to the practice of the Arbitral Tribunal during the arbitration*."

2.2.4. Finally, on the basis of the exhibits submitted, this Court considers it is fully able to decide the case on the basis of its own file. Therefore, it will not grant the Appellant's request – insufficiently reasoned, for that matter – seeking that all procedural orders issued in this arbitration should be submitted to the Federal Tribunal by the Arbitral Tribunal.

3.
The Federal Tribunal issues its decision on the basis of the factual findings of the award under appeal (Art. 105(1) LTF). This Court may not rectify or supplement *ex officio* the factual findings of the arbitrators, even if the facts were established in a blatantly inaccurate manner or in violation of the law (see Art. 77(2) LTF, ruling out the applicability of Art. 105(2) LTF). However, as was already the case under the aegis of the law organizing the federal courts (see ATF 129 III 727 at 5.2.2; 128 III 50 at 2a and the cases quoted), the Federal Tribunal retains the right to review the facts on which the award under appeal is based if one of the grievances mentioned at Art. 190(2) PILA is raised against such factual findings or when some new facts or evidence are exceptionally taken into account in the framework of the civil law appeal (judgment 4A_42/2016 of May 3, 3016, at 3).

It must be pointed out that the findings of the Arbitral Tribunal as to the unfolding of the proceedings also bind the Federal Tribunal with the same reservations, whether they concern the submissions of the parties, the facts stated or the legal explanations they gave, the statements made during the proceedings, the submissions of evidence or even the contents of testimony or an expert report or information gathered during an on-site visit (judgment 4A_54/2015[7] of August 17, 2015, at 2.3, citing ATF 140 III 16 at 1.3.1).

4.

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[6] 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

[7] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/no-duty-arbitral-tribunal-expressly-address-any-and-all-points-raised

In a single argument divided into two branches, the Appellant invokes Art. 190(2)(d) PILA and argues that the Arbitral Tribunal dealt with two issues concerning the computation of the damage it underwent as a consequence of the failure to deliver the residual quantities of the 1978 Contract (the 1978 Shortfall) without engaging the parties beforehand as to some legal and factual issues they had never pleaded before, which led it to base its Awards on reasons that could not have been foreseen by the parties and which violate its right to be heard accordingly.

4.1. In Switzerland, the right to be heard relates primarily to the finding of fact. The right of the parties to be asked about legal issues is only recognized restrictively. As a rule, according to the adage *jura novit curia*, state courts or arbitral tribunals freely assess the legal scope of the facts and they may also decide on the basis of rules of law other than those invoked by the parties. Consequently, as long as the arbitration agreement does not restrict the mission of the arbitral tribunal to only the legal arguments raised by the 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 when the judge or the arbitral tribunal considers basing the decision on a norm or a legal consideration not invoked during the proceedings and the pertinence of which the parties could not anticipate (ATF 130 III 35 at 5 and references). Furthermore, knowing what is unforeseeable is a matter of appreciation. Therefore, the Federal Tribunal follows a restrictive line in applying the aforesaid rule for this reason and because the specificities of this type of procedure must be taken into account with a view to avoiding the argument of surprise simply being used to obtain substantive review of the award by the appeal body (judgment 4A_634/2014[8] of May 21, 2015, at 4.1 and the cases quoted).

This case law does not concern factual findings. In this area, the right to be heard does enable each party to state its views on the essential facts for the award to be issued, to submit its evidence on pertinent facts, and to participate in the hearings of the arbitral tribunal. Yet, it does not require the arbitrators to ask for the views of the parties on the scope of each document produced and neither does it empower one of the parties to limit the autonomy of the arbitral tribunal in its assessment of a specific exhibit as a function of the meaning given to the evidence by the party. Indeed, if each party could decide in advance, for each exhibit, what the evidentiary consequence that the arbitral tribunal would be authorized to draw would be, the principle of free assessment of the evidence, which is a pillar of international arbitration, would be deprived of any substance (judgment 4A_538/2012[9] of January 17, 2013, at 5.1 and references).

4.2. Before addressing the merits of the Appellant's double argument and to grasp is scope and as a preliminary issue, the reasons set forth by the Arbitral Tribunal in the passage of its Award dealing with the issues in dispute must be summarized, namely Chapter XI entitled "*Counterclaim for the shortfall under the*

[8] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/domestic-public-policy-not-pertinent-international-arbitration

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

1978 oil contract" (Award n. 145 to 224), and Chapter XI entitled "*Quantum of the 1978 shortfall claim*" (Award n. 374 to 542).

4.2.1. Applying Iranian law, the Arbitral Tribunal found first, that in a meeting held in Tehran on December 4, 1978, Z._____ and X._____ agreed to amend the 1978 Contract in such a way that any residual quantity of oil involved, which had not been delivered in December 1978, would be delivered in 1979 under the requirements of the aforesaid Contract.

The Arbitral Tribunal then examined the issue of the impact of *force majeure* – namely the impossibility of Z._____ honoring its contractual commitments of November 1, 1978, as of March 4, 1979, due to the events that occurred in Iran during the Islamic Revolution – as to the obligation to deliver the residual quantity under the 1978 Contract. It reached the conclusion that Z._____ was bound in principle to fulfill this commitment when the *force majeure* situation disappeared, namely as from March 5, 1979.

In the next step of its reasoning, the Arbitral Tribunal speculated on the impact on the aforesaid obligation of X._____'s failure to pay the 50 deliveries of oil which took place from September to December 1978, pursuant to the same contract. It pointed out in this respect that each party invoked the defense of *exceptio non adimpleti contractus* to refuse to perform: Z._____ in order to postpone the delivery of the residual quantity until payment of the oil delivered; X._____ to withhold payment because the Prime Minister of Iran, Chapour Bakhtiar, stated on January 11, 1979, four days before the payment of the first of the 50 oil deliveries was due, that his country would no longer deliver oil to Israel, a statement that X._____ likened to an early termination of the Contract. The Arbitral Tribunal started by reviewing the latter argument. It rejected it after analyzing the opinions of the experts of both parties as to Iranian law, because in its view it was not certain that Chapour Bakhtiar's statements also covered existing delivery obligations. Therefore in its view, X._____ could not withhold payment of the unpaid invoices that came due during the *force majeure* period so Z._____, in turn, was entitled to refuse to deliver the residual quantity of the 1978 Contract. That being said, the Arbitral Tribunal pointed out that a decision as to the reciprocal obligations of the parties had to take into consideration the events after the *force majeure* period ended. In this respect, it referred specifically to a passage of the post-hearing brief of X._____ in which that party submitted that shortly after the *force majeure* period and on June 28, 1979, at the latest, it became evident that Z._____ would no longer deliver any oil, even if it had paid for the 50 deliveries already made. The Arbitral Tribunal then reviewed the communications exchanged by the parties from March 6, 1979, to June 28, 1979, when their representatives met in London, in order to determine if X._____'s statement was accurate, which led it to admit in the following terms that such reciprocal communications reached the level of an unconditional repudiation by Z._____ of its obligation to deliver the residual quantity due pursuant to the 1978 Contract, so that X._____ became entitled to claim damages in this respect on June 28, 1979, at the latest (Award n. 203):

> In the Arbitral Tribunal's view, Z._____'s communications had by the end of the meeting of June 28, 1979, reached the level of an unconditional repudiation of its obligation to deliver the balance of the 1978 Contract. As such they amounted, in the Arbitral Tribunal's view, to a

> breach of the 1978 Oil Contract. As a result, X._____ acquired at latest by June 28, 1979, a claim for damages for non-delivery of the 1978 shortfall…[10]

Holding that the excuses raised by Z._____ to abandon its obligation to deliver the residual quantity were not valid, the Arbitral Tribunal rejected the defense of *non adimpleti contractus* as to both parties, held that both breached the 1978 Contract and stated that the breach of their reciprocal obligations gave rise to two competing claims: that of Z._____ based on the payment of the 50 deliveries and that of X._____ for the undelivered residual quantity of the 1978 Contract. Noting that the amount of the first claim, namely USD 445'336'076.36 had already been decided in the June 17, 2003, Award, it reserved the subsequent assessment of the claim of X._____ (Award n. 223 *ff.*).

4.2.2. As to the quantum of the claim concerning the failure to deliver the residual quantity of oil that Z._____ should have delivered to X._____, the Arbitral Tribunal began with a summary of the arguments of the parties. It pointed out in this respect that none of them had drawn a distinction between the residual quantity and the deliveries which should have taken place pursuant to the alleged 1979 Contract, the existence of which it did not admit. Then, it held on the basis of the statements of both parties that the entire residual quantity of the aforesaid contract, namely 2'884'000 tonnes, should have been delivered in 1979 and that deliveries would have started on March 5, 1979, (Award, n. 425 to 436).

The Arbitral Tribunal then examined when the deliveries starting on that date would have been completed. Seeking to determine the hypothetical will of the contracting parties in this respect, it first noted that if the parties agreed at the meeting of December 4, 1978, that the deliveries would be made under the terms and conditions of the 1978 Contract, they did not enter into a specific agreement pursuant to which the residual quantity of oil to be delivered would be spread evenly throughout the year 1979, according to one of the stipulations of this contract. Their reasoning was based on the assumption that the quantity corresponding to the deliveries to be made on the basis of the alleged 1979 Contract would have been added to the residual quantity. This preliminary remark made, the Arbitral Tribunal explained why, in its view, a uniform distribution over the rest of the year 1979 (*i.e.* the 10 months from March to December 1979) of the relatively small quantity to deliver that year, pursuant to the 1978 Contract (2'884 million tonnes) would not have been a reasonable solution; whilst the contract foresaw a delivery rate of 3.9 million tonnes in each quarter. This is why it chose to rely on the calendar that the parties anticipated at the December 4, 1978, meeting. In so doing, it relied on a telex from E._____, a representative of X._____, dated December 6, 1978, referring to an agreement of the parties during that meeting, according to which five ships of X._____ would take delivery of part of the residual quantity – namely 1'030'000 tonnes – in December 1978. The Arbitral Tribunal then further examined the testimony given by this individual, heard as a witness of X._____, that it considered convincing. It reasoned that the balance of the residual quantity (about 1.9 million tonnes) would have been delivered in January 1979. Considering that the parties applied a similar schedule at the end of the *force majeure* period, it decided that 1'030'000 would have already been delivered in March 1979 and the balance of 1'854'000 tonnes would have been delivered in

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

the following month, *i.e.* in April 1979. The Arbitral Tribunal also stated a number of reasons, such as the transport capacity of the ships of X._____, the level of production of Z._____, and the prices on the oil market at the time to justify its decision. It reached the conclusion that the damages to be awarded to X._____ corresponded to the loss the company suffered because it did not receive the residual quantity of oil to which it was entitled pursuant to the 1978 Contract in the period between March 5, and the end of April, 1979, whilst pointing out that X._____ had the burden of proof of the alleged loss and could not claim compensation in excess of that which could be determined from the statements of its own witness (Award n. 425 to 454).

Working from these premises, the Arbitral Tribunal proceeded to calculate X._____'s claim which it set at USD 99'455'767 with interest added (Award n. 455 to 542). Whereupon, it calculated the interest on Z._____'s claim (Award n. 543 to 598) before setting off the reciprocal claims against each other, which enabled it to set the residual claim of Z._____ against X._____ to the amount of USD 1'123'709'315 including interest due up to December 31, 2014, (Award n. 599 to 628).

4.3. The Appellant submits first that the Arbitral Tribunal calculated the loss from the failure to deliver the residual quantity pursuant to the 1978 Contract from March 5, 1979, when the deliveries of oil could have resumed at the end of the *force majeure* period, whilst setting at June 28, 1979, the date when Z._____ repudiated the 1978 Contract in breach of its obligations. In its view, the argument would entail an irreducible contradiction, impossible for the parties to foresee. Thus the Arbitral Tribunal should have asked for its opinion so it could submit a calculation of the damage based on the assumption of a delivery date (June 28, 1979) after the contractual breach (March 5, 1979), which would have shown a loss twice as high as that which the majority Arbitrators upheld.

In spite of its denials and as the Respondents rightly emphasize, the Appellant oversimplifies, if not distorts, the reasons of the Arbitral Tribunal when claiming that it held that Z._____ should have already delivered the residual quantity under the 1978 Contract in March and April 1979, whilst stating elsewhere that it had no obligation to do so before it breached – by repudiation – the aforesaid contract on June 28, 1979. It is sufficient to read the summary of the Award here above to be convinced. Moreover, the Appellant disregards the wording, "at the latest" before the date of June 28, 1979, is stated in the aforesaid passage at n. 203 of the Award.

Be this as it may, it hardly matters from the point of view of the right to be heard whether the Arbitral Tribunal contradicted itself or not in the reasons it upheld, which, incidentally would also not suffice to base a grievance of breach of public policy within the meaning of Art. 190(2)(e) PILA, had it been invoked (judgment 4A_150/2012[11] of July 12, 2012, at 5.2.1). Even if unsupportable, the reasons of the Award in this respect would also be beyond any sanction. Its potentially unpredictable character is therefore the only deciding factor in the restricted meaning given to this word by the federal case law mentioned above. Yet,

[11] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/federal-tribunal-reiterates-principle-pacta-sunt-servanda-violated-only-when-arbitral-tribunal

without being seriously contradicted by the Appellant, the Respondents convincingly demonstrate at nn. 66-74 of their answer that the reasoning of the Arbitral Tribunal relies on the Appellant's own statements. This demonstration shows in particular that the Appellant itself saw June 28, 1979, as the date at which Z._____'s refusal to deliver the residual quantity of the 1978 Contract was definitively established. In any event, it argues in vain that it was surprised in this respect. That the Arbitral Tribunal would uphold one or the other of the various dates that could be taken into consideration in the case at hand was not at all unusual, moreover, it was especially so in such a complex matter of uncommon duration, which required the parties to examine all possible scenarios. One is very far indeed from the situations in which case law has upheld an argument based on unpredictability (see for instance ATF 130 III 35 at 6.2 and judgment 4A_400/2008[12] of February 9, 2009, at 3.2).

4.4. In its second part, the argument concerns the schedule of the deliveries of the residual quantity of oil pursuant to the 1978 Contract. The Appellant argues that the Arbitral Tribunal failed to ask the parties as to their real and common will in respect to this schedule after finding that they failed to address this question and therefore determined, in a totally unexpected manner, their hypothetical will on an essential point to compute the loss.

The Appellant's criticism in this respect is totally unfounded as the reasons of the Arbitral Tribunal in this respect, as summarized here above (see 4.2.2) do not contain anything unpredictable for the parties and particularly not for the Appellant, irrespective of its pertinence. Assuming the Appellant could not anticipate it as it argues today, it must blame its own lack of imagination *pendente lite* instead of seeking to transfer its effects upon the Arbitral Tribunal and consequently on the Respondents. It is established that the parties stated their views as to the issue of the hypothetical schedule of the deliveries of oil to be made by Z._____ in 1979. In doing so, however, they did not distinguish between the residual quantity of the 1978 Contract (about 2.9 million tonnes) and the quantity that should have been delivered pursuant to the alleged 1979 Contract (about 15 million tonnes). This assumption only – *i.e.* deliveries throughout the year 1979 pursuant to both the 1978 Contract (residual quantity) and the alleged 1979 Contract – led them to accept the principle of uniform spread of the deliveries for all that would take place in 1979. Yet Z._____ immediately challenged the existence claimed by X._____ of the 1979 Contract and the Arbitral Tribunal upheld its view in this respect (Award n. 293). Therefore the Appellant should immediately consider the possibility that the existence of the aforesaid Contract would not be upheld and consequently wonder what impact this could have on the delivery schedule of the residual quantity of the 1978 Contract. Analyzing this specific case, it could not exclude that the Arbitral Tribunal would be inclined to consider that the former quantity, relatively minor compared to the total quantity anticipated by the Contract at issue, should have been delivered as a priority within the shortest possible time once the *force majeure* period was over, namely after March 5, 1979. Moreover, the idea of speedy delivery in two installments of the residual quantities corresponded to the expectation of the parties as of December 4, 1978, as stated by its own witness Mr. E._____, on whose statement it was possible, if not assured, that the Arbitral Tribunal

[12] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/annulment-of-an-award-by-the-federal-tribunal-because-of-the-use

would rely on setting the delivery schedule; this being an item on which X._____ had the burden of proof. It is therefore pointless for the Appellant to plead surprise in this respect.

5.
Furthermore, the Appellant refers to an alleged practice initiated by a former Chairman of the Arbitral Tribunal and consisting of asking questions to the parties. Thus, it argues that the Arbitral Tribunal, presided over by a new arbitrator, failed to comply with this practice as to the two issues it argues from the point of view of the violation of the right to be heard, particularly because, by his own admission, the new Chairman of the Arbitral Tribunal had to take on a great challenge considering the volume of the file and the complexity of the case.

The Appellant's arguments in this respect are essentially in its reply brief and are obviously appellate in nature, such that their admissibility in and of themselves is doubtful (see 2.2.3, above). Be this as it may, they are not sufficient to establish the existence of a real practice going well beyond the questions that any arbitral tribunal is led to put to the parties in the normal progression of a long and complex procedure, such as the one concluded with the Award under appeal. Moreover, even if the alleged usage had evolved into a real rule of procedure, disregarding it would not necessarily fall within the scope of Art. 190(2)(d) PILA. Indeed, the provision does not sanction the violation of any procedural rule; in order to apply it, a violation of the right to be heard must have taken place in one of the ways permitted by case law (Bernard Corboz, *Commentaire de la LTF*, 2nd ed. 2014, n. 147, ad Art. 77 LTF and the cases quoted). That requirement is not met in the case at hand because it has been shown above that the Arbitral Tribunal could waive asking the parties before deciding the two issues in dispute.

6.
Pursuant to this review, the appeal must be rejected. The Appellant loses and it shall pay the costs of the federal proceedings (Art. 66(1) LTF) and compensate the Respondents (Art. 68(1) and (2) LTF), which will be joint creditors. The costs awarded to the latter shall be taken from the security furnished by the Appellant.

7.
The attention of the parties is drawn to the fact that the joint claim of the Respondents against the Appellant, at least insofar as Z._____ is a joint holder, could fall within the scope of one or the other of the provisions of the decree of the Swiss Federal Council of November 11, 2015, instituting measures against the Islamic Republic of Iran (RO 2016 59 *ff.*). Therefore, a copy of this judgment shall be communicated to the Secretariat of State for Economy (SECO) for information purposes.

Therefore the Federal Tribunal pronounces:

1.
The appeal is rejected.

2.
The judicial costs set at CHF 200'000 shall be borne by the Appellant.

3.
The Appellant shall pay to the Respondents as joint creditors an amount of CHF 250'000 for the federal judicial proceedings; this amount shall be taken from the security deposit with the Treasurer of the Federal Tribunal.

4.
This judgment shall be communicated to the representatives of the parties and to the President of the Arbitral Tribunal. It shall also be communicated to the Secretariat of State for Economy (SECO) as information.

Lausanne, June 27, 2016

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

Presiding Judge:	Clerk:
Kiss (Mrs.)	Carruzzo