4A_98/2017[1]

Judgment of July 20, 2017

First Civil Law Court

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

Federation X._____,
Represented by Mr. Elliott Geisinger and Mrs. Nathalie Voser,
Appellant

v.

Z._____ Sàrl,
Represented by Mr. Matthias Scherer, Mr. Pierre-Olivier Allaz, and Mrs. Domitille Baizeau,
Respondent

Facts:

A.
On February 15, 2013, Z._____ Sàrl (hereafter: Z._____), a company of [name of country omitted] law, relying on Art. 26(4)(b) of the December 17, 1994, Energy Charter Treaty (ECT: RS 0.730.0), initiated arbitration proceedings against X._____ Federation with a view to obtaining payment of a little more than USD 30 billion in damages in connection with an alleged illegal expropriation of its investments in [name of country omitted]. A three-member arbitral tribunal was constituted pursuant to the UNCITRAL Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) under the aegis of the Permanent Court of Arbitration (PCA), and had its seat set in Geneva. English was designated as the language of the arbitration.

In a letter of April 11, 2014, X._____ Federation invoked Art. 21(4) of the UNCITRAL Arbitration Rules, 1976 edition, and raised a jurisdictional defense that it based upon the five following alternate grounds:

[1] Translator's Note: Quote as X._____ Federation *v.* Z._____ Sàrl, 4A_98/2017.
The decision was issued in French. The original text is available on the website of the Federal Tribunal, www.bger.ch.

1. X._____ Federation never ratified the ECT, which it only applied provisionally in accordance with Art. 45(1) ECT until October 18, 2009, insofar as this provisional application was not incompatible with its constitution or its laws and regulations;

2. The loans made by Z._____ to company A._____ cannot be considered as "investments" within the meaning of Art. 1(6) ECT;

3. The Dispute is of a fiscal nature and therefore outside the scope of the treaty pursuant to Art. 21 ECT;

4. Z._____ is a company that has no substantial commercial activity in [name of country omitted] and which is controlled by nationals of a third state, so that X._____ Federation may deny it the benefit of Part III of the treaty ("Promotion and protection of investments") on the basis of Art. 17 ECT;

5. The alleged investments were made illegally so that they are not protected by the ECT.

After consulting the parties, the Arbitral Tribunal issued Procedural Order No. 1 on April 24, 2014, in which it decided, in particular, to bifurcate the proceedings and to examine, as a preliminary matter, arguments (1), (2), and (4) in support of the jurisdictional defense; with other objections, including arguments (3) and (5) to be dealt with in the merits phase of the case.

The parties, having submitted their arguments on the three jurisdictional defenses the subject of the preliminary review, the Arbitral Tribunal issued an interlocutory award on jurisdiction (Interim Award on Jurisdiction) on January 18, 2017, in the operational part of which it rejected the three arguments (by a majority decision with regard to the first two) and said that any other objections concerning jurisdiction and admissibility shall be dealt with in the merits phase, in accordance with Procedural Order No. 1, and ordered the proceedings to resume 28 days after the notification of the Interim Award.

B.

On February 17, 2017, X._____ Federation (hereafter: the Appellant) filed a civil law appeal for violation of Art. 190(2)(b) PILA.[2] It notes that it will defer to the Federal Tribunal's view as to the admissibility of the appeal; a stay of enforcement should be issued and the arbitration proceedings stayed until the appeal is decided by way of provisional measures; as to the merits, should the Federal Tribunal consider the matter capable of appeal, the award under appeal should be annulled, and the Arbitral Tribunal held lacking jurisdiction to address the claims raised by Z._____ (hereafter: the Respondent).

The arbitration proceedings were stayed by decision of the presiding judge of February 23, 2017, until a decision on the request for a stay of enforcement and for provisional measures.

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

On March 16, 2017, counsel for the Respondent sent a letter to the presiding judge of the First Civil Law Court (hereinafter: the President), countersigned by counsel for the Appellant, in which they stated that the parties had agreed on conditions accompanying the stay of the arbitral proceedings until the case is decided. On that basis, the President, finding that the applications for a stay of enforcement and for provisional measures had become moot, annulled her decision of February 23, 2017, on March 20, 2017.

In answer to a request for information sent by counsel for the Respondent on May 4, 2017, the President informed the parties in a letter of May 9, 2017, that the First Civil Law Court intended to decide immediately as to the admissibility of the appeal to ensure procedural economy and to take into account that the Appellant itself expressed some serious doubts in this regard. She added that should the Court consider the matter capable of appeal or hold that it could not decide the issue one way or the other for the time being, the proceedings would continue and an exchange of briefs would be ordered.

Reasons:

1.
According to Art. 54(1) LTF,[3] the Federal Tribunal issues its judgment in an official language,[4] 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. In the arbitration, they used English, and in the appeal brief sent to the Federal Tribunal, the Appellant used French, thus complying Art. 42(1) LTF in connection with Art. 70(1) CST[5] (ATF 142 III 521 at 1). In accordance with its practice, the Federal Tribunal shall adopt the language of the appeal brief and consequently issue its judgment in French.

2.
2.1. A civil law appeal, pursuant to Art. 77(1)(a) LTF, in connection with Art. 190-192 PILA, is admissible only against an *award.* The decision under appeal may be a *final* award, putting an end to the proceedings on meritorious or procedural grounds, a *partial* award dealing with part of a claim in dispute or with one of the various claims at hand or putting an end to the proceedings with regard to some of the joint defendants (judgment 4A_222/2015[6] of January 28, 2016, at 3.1.1 with reference to ATF 116 II 80 at 2b, p. 83), or an *interlocutory* award addressing one or several preliminary issues as to the merits or as to the procedure (as to these concepts, see ATF 130 III 755 at 1.2.1, p. 757). However, a mere procedural order, which can be modified or rescinded during the proceedings, may not be appealed (ATF 136 III 200[7] at 2.3.1, p. 203, 597

[3] Translator's Note: LTF is the French abbreviation of the Federal Statute of June 17, 2005, organizing the Federal Tribunal, RS 173. 110.
[4] Translator's Note: The official languages of Switzerland are German, French, and Italian.
[5] Translator's Note: CST is the French abbreviation for the Swiss Federal Constitution.
[6] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/provisional-determination-jurisdiction-not-capable-appeal
[7] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/decision-on-provisional-measures-characterized-as-interlocutory-

at 4.2; judgment 4A_596/2012[8] of April 15, 2013, at 3.3). The same applies to a decision concerning provisional measures according to Art. 183 PILA (ATF 136 III 200[9] at 2.3 and references).

To decide whether or not the matter is capable of appeal, it is not the name given to the decision but rather its content that is decisive (ATF 142 III 284 at 1.1.1; aforesaid judgment 4A_222/2015,[10] at 3.1.1).

2.2. When an arbitral tribunal rejects a jurisdictional defense in a separate award, it issues an interlocutory decision (Art. 186(3) PILA), irrespective of the name it is given (Judgment 4A_414/2012[11] of December 11, 2012, at 1.1). Pursuant to Art. 190(3) PILA, such a decision – which the Respondent must appeal immediately (ATF 130 III 66 at 4.3) – may be appealed to the Federal Tribunal only on the grounds of improper constitution of the arbitral tribunal (Art. 190(2)(a) PILA) or lack of jurisdiction of the arbitral tribunal (Art. 190(2)(b) PILA). In two judgments issued in 2014, the First Civil Law Court indicated that the grievances of Art. 190(2)(c)-(e) PILA may also be raised against interlocutory decisions within the meaning of Art. 190(3) PILA, yet only insofar as they are strictly limited to the points directly concerning the composition or the jurisdiction of the arbitral tribunal (ATF 140 III 477[12] at 1, 520 at 2.2.3), a requirement not met in the last decision quoted (*ibid*.).

Art. 186(3) PILA states that, as a rule, the arbitral tribunal decides as to its own jurisdiction in an interlocutory decision. The provision does state a rule, however not a mandatory or absolute one and its violation remains without sanction (aforesaid Judgment 4A_222/2015,[13] at 3.1.2 and references). The arbitral tribunal may derogate therefrom if it considers that the jurisdictional defense is too closely connected to the facts of the case and cannot be adjudicated separately from the merits (ATF 121 III 495 at 6d, p. 503). Indeed, as it must address all the issues determining its jurisdiction without reservation when it is challenged, it cannot apply the theory of double relevance because a party cannot be asked to see such a tribunal adjudicating any rights or obligations in dispute that would not be covered by a valid arbitration agreement (ATF 141 III 294 at 5.3 and the cases quoted).

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[8] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/order-produce-document-not-appealable-award

[9] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/decision-on-provisional-measures-characterized-as-interlocutory-

[10] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/provisional-determination-jurisdiction-not-capable-appeal

[11] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/alleged-inexistence-other-party-justifies-plea-lack-jurisdiction

[12] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/arbitration-clause-not-rescinded-subsequent-"showpiece"-contract

[13] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/provisional-determination-jurisdiction-not-capable-appeal

2.3. Pursuant to Art. 186(2) PILA, the jurisdictional defense must be raised before any defense on the merits. This is pursuant to the principle of good faith, embodied at Art. 2(1) CC,[14] which applies to the entire realm of the law, including civil procedure (see Art. 52 of the Code of Civil Procedure [CPC] of December 19, 2008; RS 272). To put it differently, the rule of Art. 186(2) PILA, like the more general one of Art. 6 of the same law, implies that an arbitral tribunal in which the defendant proceeds on the merits without reservation has jurisdiction from this very fact. Therefore, whoever addresses the merits without reservation (*vorbehaltlose Einlassung*) in contradictory arbitral proceedings concerning an arbitrable matter, thereby acknowledges the jurisdiction of the arbitral tribunal and definitively loses the right to challenge the jurisdiction of the aforesaid tribunal. However, the defendant may proceed to the merits without prejudice should a raised jurisdictional defense be rejected, without thereby tacitly accepting the jurisdiction of the arbitral tribunal (ATF 128 III 50 at 2c/aa and references).

3.
3.1. Pursuant to Art. 190(2)(b) PILA, an arbitral award issued in an international arbitration may be appealed "if the arbitral tribunal wrongly accepted or declined jurisdiction." Read in parallel with Art. 190(3) PILA and considered in the light of the principles of case law recalled above, the following inferences can be drawn from the wording of this provision.

If the arbitral tribunal examines jurisdiction as a preliminary matter and declines jurisdiction, which puts an end to the proceedings, its award is *final* (Kaufmann-Kohler and Rigozzi, *International Arbitration, Law and Practice in Switzerland*, 2015, n. 8.20; Berger and Kellerhals, *International and Domestic Arbitration in Switzerland*, 3rd ed. 2015, n. 704; as to a case involving investment arbitration, see Judgment 4A_616/2015 of September 20, 2016). Thus the words "*decide on its jurisdiction*" at Art. 186(3) PILA are too broad, insofar as they appear to accept the possibility that an arbitral tribunal may deny jurisdiction by way of an interlocutory award. Thus, the language can only refer to an interlocutory decision by which the arbitral tribunal accepts jurisdiction (Berger and Kellerhals, *ibid*.). The partial award mentioned at Art. 188 PILA, strictly speaking, may be appealed immediately under the same conditions as a final award. The lack of jurisdiction of the arbitral tribunal is therefore one of the grounds on which it may be appealed (Art. 190(2)(b) PILA). In reality, the award must, not only may, be appealed within 30 days after its communication under penalty of foreclosure (Judgment 4A_370/2007[15] of February 21, 2008, at 2.3.1, and references).

The decision by which an arbitral tribunal expressly accepts jurisdiction during the proceedings, which means that the arbitration will continue, is an interlocutory decision within the meaning of Art. 190(3) PILA, against which an appeal must be made immediately under the same sanction (Kaufmann-Kohler and Rigozzi, *ibid*.). The same applies to an interlocutory decision in which the arbitral tribunal, without deciding its jurisdiction directly, nonetheless implicitly accepts jurisdiction in a recognizable manner by the very fact

[14] Translator's Note: CC is the French abbreviation for the Swiss Civil Code.
[15] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/appeal-against-interlocutory-and-partial-awards-violation-of-pub

that it deals with one or several procedural or meritorious issues (ATF 130 III 76 at 3.2.1, p. 80, bullet 2, and the case quoted; Judgment 4A_370/2007[16], at 2.3.1, and references).

As to a mere procedural order, which can be modified or rescinded during the proceedings, it is not capable of appeal except under exceptional circumstances (aforesaid judgment 4A_596/2012[17] at 3.3 – 3.7). Indeed, the *ratio legis* of the rules concerning interlocutory decisions is not to force the defending party to challenge a mere procedural order of the arbitral tribunal in order to challenge its jurisdiction (with regard to decisions issues by state courts, see Judgment 4A_697/2016 of March 14, 2017, at 1.6 and references).

3.2. The common denominator of such decisions, except for the ones in the last category quoted, is that they settle once and for all the issue of the jurisdiction of the arbitral tribunal in one way or the other. In other words, in each of them, whether a final award, a partial award, or an interlocutory award, the arbitral tribunal decides the issue definitively, by admitting or rejecting its jurisdiction in an explicit decision or by way of a procedural action, the definitive character of which will bind it and the parties. Such character is therefore inherent to all these decisions, irrespective of their object and form. Hence, as the Federal Tribunal already emphasized with regard to Art. 92 LTF in criminal proceedings, when dealing with international jurisdiction it required a separate decision settling the matter definitively in order to be appealed as provided by this article (ATF 133 IV 288 at 2.2), it is not possible to appeal a decision which settles the jurisdiction of an international arbitral tribunal only provisionally (aforesaid judgment 4A_222/2015[18] at 3.4).

3.2.1. The duty incumbent upon the defendant under Art. 186(1) PILA to appeal the decision by which the arbitral tribunal decides on its own jurisdiction and rejects the jurisdictional defense as soon as possible is unquestionably justified on the ground of procedural economy, as this is an issue that – insofar as is possible – must be dealt with without waiting for a decision on the merits. From a more general point of view, however, the rules concerning appeals to the Federal Tribunal against interlocutory decisions of cantonal authorities of final instance also seek the same role: as the supreme judicial body of the confederation (Art. 1(1) LTF), the Federal Tribunal should, in principle, only address a case once it has exhausted all avenues, except in a case where the law exceptionally authorizes an immediate appeal against such decisions, specifically on the ground of procedural economy (ATF 133 III 629 at 2.1, p. 631). It cannot be denied that despite the similarity, there may be some opposition between, on the one hand, the interests of the parties and/or of the arbitral tribunal to not continue investigating a case which the appeal body could dispose of indefinitely by accepting the appeal against an interlocutory decision, even if the decision under appeal does not settle the issue of the jurisdiction of the arbitral tribunal definitely and, on the other hand, the interest of the appeal body not to have to address a case several times as a function of

[16] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/appeal-against-interlocutory-and-partial-awards-violation-of-pub

[17] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/order-produce-document-not-appealable-award

[18] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/provisional-determination-jurisdiction-not-capable-appeal

the multiple jurisdictional issues that may end up being submitted to the arbitral tribunal successively. To mediate this conflict of interest, one must first note, from a purely factual point of view, that addressing interlocutory decisions that do not settle the issue of jurisdiction definitively would carry a risk of abuse because in international arbitrations with considerable financial interest at stake, such as the one at hand, the defending parties would be greatly tempted to practice 'salami slicing' (*Salamitaktik*), in order to block the normal progress of the arbitral proceedings by maneuvers consisting of successive invocation of multiple jurisdictional objections before any defense on the merits is brought in order to obtain separate decisions in this respect, only to challenge each decision before the Federal Tribunal. It must also be pointed out that the ground of procedural economy will often be mitigated by the delays arising from immediate appeals (see already, *mutatis mutandis*: ATF 117 IA 88 at 3b, p. 90), as in this field the federal appeal proceedings will often have to be stayed as a consequence of the opposing party filing a request for security for costs, particularly when the appellant has no domicile in Switzerland and cannot invoke a bilateral or multilateral treaty preventing its opponent from applying for security for costs (Art. 62(2) LTF). Moreover, in appeal proceedings concerning international arbitral awards, a double exchange of briefs (Art. 102(3) LTF) takes place as a matter of practice if not of law and it is often interrupted by the judicial holidays (Art. 46 LTF). The foregoing observations show that the benefit expected by the parties and/or the arbitral tribunal from a loosening of the case law as to when the Federal Tribunal may be seized in connection with decisions on jurisdiction which do not settle the matter once and for all, still needs to be demonstrated.

3.2.2. Without prejudice to the foregoing considerations of opportunity, some legal grounds prevent the adoption of such a solution anyway, which, as hardly needs to be recalled, was apparently not the subject of debate among legal writers.

First, and above all, the text of the pertinent provision, *i.e.* Art. 190(2)(b) PILA is an unavoidable argument insofar as it conditions the right to file a civil law appeal to the Federal Tribunal upon the existence of a (specific or implicit) decision, by which the arbitral tribunal not only dealt with one or several issues concerning its jurisdiction, but, "accepted or declined jurisdiction". Yet, an arbitral tribunal stating its position as to one or the other of the arguments invoked by the defending party in support of its jurisdictional defense by postponing the examination of the others until a later stage of the arbitration, issues no decision – positive or negative – as to its jurisdiction to decide the claims submitted by the claimant. That it preliminarily rejects all grounds it reviewed does not change this position because at this stage in the proceedings it is impossible to say if, at the end of the day, it will address the merits or if the future analysis of some of these arguments not yet addressed will convince it to deny jurisdiction.

Moreover, if one wished to try to compare, such a decision would instead be interlocutory within the meaning of Art. 93(1)(b) LTF and not jurisdictional as provided by Art. 92(1) LTF because if the decision does not directly address the jurisdiction of the arbitral tribunal, admitting an appeal could immediately lead to a final decision on jurisdiction, provided each of the alternate arguments in support of the jurisdictional defense rejected by the arbitral tribunal would lead to that result and, as the case may be, prevent a long and costly evidentiary procedure. However, the opportunity to appeal an interlocutory award does not

depend upon the conditions set at Art. 93(1) LTF because the text of Art. 77(2) LTF, modified when the CPC came into force on January 1, 2011, rules out the applicability of Art. 90-98 LTF in appeals concerning arbitration (international or domestic) (Bernard Corboz, *Commentaire de la LTF*, 2nd ed. 2014, nn. 56/57 ad Art. 77 LTF).

Moreover, from the point of view of certainty as to the law and, more generally, with a view to the task entrusted to a supreme court, the parties and/or the arbitral tribunal may not be given the opportunity to require the Federal Tribunal address the same case several times over merely for tactical reasons, due to the simple fact that the arbitral procedure may be conducted in one way or another. Finally, as to the principle of procedural economy, it would be contrary to the purpose assigned to the judiciary by the legislature to privilege the application of the aforesaid principle in arbitral proceedings as opposed to federal appeal proceedings and to tolerate that such a private method of settling international disputes would interfere with the primary mission of the Federal Tribunal, which is to ensure uniform application of federal law and to guarantee compliance with fundamental rights, when it would concern, moreover, only a limited number of specialists in Switzerland (Alain Wurzburger, *Commentaire de la LTF*, 2nd ed. 2014, n. 13 ad Art. 1 LTF).

3.3. In the case at hand, the Arbitral Tribunal did, in its Interim Award on Jurisdiction of January 18, 2017, definitively reject three of the five alternate arguments submitted by the Appellant in support of its jurisdictional defense. However, it did not decide the other two, which it decided to address with the merits (n. 5 of the operative part of the interlocutory decision on jurisdiction). Therefore, it must be found that it did not yet accept or deny jurisdiction within the meaning of Art. 190(2)(b) PILA. As of this writing, therefore, it cannot be excluded that despite the interlocutory award in the Respondent's favor as to the issues it examined, the Arbitral Tribunal may finally deny jurisdiction after analyzing the last two arguments in support of the jurisdictional defense and consequently would refuse to address the merits. In that case, and provided the final decision denying jurisdiction would not be mistaken, this Court, if it held the matter capable of appeal at this stage and rejected the appeal, would have fruitlessly carried out a large amount of work, consisting of reviewing the delicate questions raised by the arguments submitted by the Appellant against the rejection of three of its five jurisdictional defenses. The matter is therefore not capable of appeal.

The Appellant incidentally raises the possibility of a stay of the appeal proceedings until the Arbitral Tribunal definitively decides on its jurisdiction. However, the precedent it quotes in this respect – a decision of the presiding judge of November 29, 2007, in case 4A_306/2007 is not pertinent and the one that is – a decision of the First Civil Law Court of July 23, 2014, in case 4A_118/2014[19] – refers to a very different situation in which the jurisdiction of the arbitral tribunal depended on the answer given to a preliminary issue of foreign law raised in a case pending before the foreign court competent to apply that law. There is

[19] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/proceedings-federal-tribunal-stayed-when-there-preliminary-issue-be-determined-foreign-court

therefore no reason to justify a stay of the federal appeal proceedings, such a decision being only exceptional in any event in order to avoid leaving a case open before the Federal Tribunal for a long time.

It goes without saying that when the Arbitral Tribunal does decide its own jurisdiction definitively, its decision will be open to an appeal by the Appellant, including with regard to the three jurisdictional defenses rejected in the interlocutory Award on Jurisdiction of January 18, 2017, without opening the Appellant to criticism for violating the rules of good faith (see 2.3, above).

4.
The Appellant fails and shall pay the costs of the federal proceedings (Art. 66(1) LTF). In order to assess the judicial costs, the Federal Tribunal shall take into account on the one hand the considerable financial interests at stake, but also, on the other hand, the fact that the award under appeal is merely an interlocutory decision which does not put an end to the dispute on the merits and the jurisdictional issue addressed here had not yet been examined by the Federal Tribunal to this day.

The Respondent was not asked for its views and is not entitled to costs.

Therefore, the Federal Tribunal pronounces:

1.
The matter is not capable of appeal.

2.
The judicial costs set at CHF 100'000 shall be borne by the Appellant.

3.
This judgment shall be communicated to the representatives of the parties and to the President of the Arbitral Tribunal.

Lausanne, July 20, 2017

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

Presiding Judge:	Clerk:
Kiss (Mrs.)	Carruzzo