4A_124/2014[1]

Judgment of July 7, 2014

First Civil Law Court

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

A._____ SA,
Represented by Mr. Nicolas C. Ulmer and Mr. Lionel P. Serex,
Appellant

v.

B._____ SA,
Represented by Mrs. Vanessa Liborio Garrido de Sousa,
Respondent

Facts:

A.
A.a.
B._____ SA (hereafter: the Respondent) is a French law company, specialized in road works.

A._____ SA (hereafter: the Appellant) is a state company in charge of highways and national roads of [name of country omitted].

Translator's Note: Quote as A._____ SA *v.* B._____ SA, 4A_124/2014. The original decision is in French. The full text is available on the website of the Federal Tribunal, www.bger.ch.

A.b.
On June 6, 2006, the Appellant and the Respondent entered into two contracts numbered 5R8 and 5R9, the purpose of which was for the Respondent to carry out restoration work on a 76 kilometer section of a national road in [name of country omitted]. Both contracts were governed by the law of [name of country omitted]. Among the contractual documents were the general conditions applicable to construction contracts, 1st edition 1999 (hereafter: The General Conditions) of the International Federation of Consulting Engineers (hereafter: FIDIC). FIDIC is a private law association under Swiss law seated in Meyrin.

Clause 20 of the general conditions entitled *Claim, Dispute and Arbitration*, contains eight Sub-Clauses written in English. They contain in particular the following passages:

> ***20.2 - Appointment of the Dispute Adjudication Board***
>
> *Paragraph 1:*
>
> *Disputes shall be adjudicated by a DAB in accordance with Sub-Clause 20.4 [...]*
>
> *Paragraph 5:*
>
> *The agreement between the Parties and either the sole member ("adjudicator") or each of the three members shall incorporate by reference the General Conditions of Dispute Adjudication Agreement contained in the Appendix to these General Conditions, with such amendments as are agreed between them.*
>
> *Paragraph 6:*
>
> *The terms of the remuneration of either the sole member or each of the three members, including the remuneration of any expert whom the DAB consults, shall be mutually agreed upon by the Parties rohen agreeing the terms of appointment. Each Party shall be responsible for paying one-half of this remuneration.*
>
> ***20.4 - Obtaining Dispute Adjudication Board's Decision***
>
> *"If a dispute (of any kind whatsoever) arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works, including any dispute as to any certificate, determination, instruction, opinion or valuation of the Engineer, either Party may refer the dispute in writing to the DAB for its decision, with copies to the other Party and the Engineer. Such reference shall state that it is given under this Sub-Clause.*

For a DAB of three persons, the DAB shall be deemed to have received such reference on the date when it is received by the chairman of the DAB.

Both Parties shall promptly make available to the DAB all such additional information, further access to the Site, and appropriate facilities, as the DAB may require for the purposes of making a decision on such dispute. The DAB shall be deemed to be not acting as arbitrator(s).

Within 84 days after receiving such reference, or within such other period as may be proposed by the DAB and approved by both Parties, the DAB shall give its decision, which shall be reasoned and shall state that it is given under this Sub-Clause. The decision shall be binding on both Parties, who shall promptly give effect to it unless and until it shall be revised in an amicable settlement or an arbitral award as described below. Unless the Contract has already been abandoned, repudiated or terminated, the Contractor shall continue to proceed with the Works in accordance with the Contract.

If either Party is dissatisfied with the DAB's decision, then either Party may, within 28 days after receiving the decision, give notice to the other Party of its dissatisfaction. If the DAB fails to give its decision within the period of 84 days (or as otherwise approved) after receiving such reference, then either Party may, within 28 days after this period has expired, give notice to the other Party of its dissatisfaction.

In either event, this notice of dissatisfaction shall state that it is given under this Sub-Clause, and shall set out the matter in dispute and the reason (s) for dissatisfaction. Except as stated in Sub-Clause 20.7 [Failure to Comply with Dispute Adjudication Board's Decision] and Sub-Clause 20.8 [Expiry of Dispute Adjudication Board's Appointment], neither Party shall be entitled to commence arbitration of a dispute unless a notice of dissatisfaction has been given in accordance with this Sub-Clause."

20.5 - Amicable Settlement

"Where notice of dissatisfaction has been given under Sub-Clause 20.4 above, both Parties shall attempt to settle the dispute amicably before the commencement of arbitration. However, unless both Parties agree otherwise, arbitration may be commenced on or after the fifty-sixth day after the day on which notice of dissatisfaction was given, even if no attempt at amicable settlement has been made."

20.6 - Arbitration

Paragraph 1:

"Unless settled amicably, any dispute in respect of which the DAB's decision (if any) has not become final and binding shall be finally settled by international arbitration. Unless otherwise agreed by both Parties:

a) the dispute shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce,
b) the dispute shall be settled by three arbitrators appointed in accordance with these Rules, ..."

20.8 - Expiry of Dispute Adjudication Board's Appointment

If a dispute arises between the Parties in connection with, or arising out of, the Contract or the execution of the Works and there is no DAB in place, whether by reason of the expiry of the DAB's appointment or otherwise:

a) Sub-Clause 20.4 [Obtaining Dispute Adjudication Board's Decision] and Sub-Clause 20.5 [Amicable Settlement] shall not apply, and
b) the dispute may be referred directly to arbitration under Sub-Clause 20.6 [Arbitration].[2]

A.c.
On March 10, 2011, the Respondent advised the Appellant of its intent to bring a dispute to the Dispute Adjudication Board (hereafter: the DAB) for an amount of EUR 21'086'612 by proposing four candidates as potential members of the DAB.

In a letter of March 22, 2011, the Appellant rejected the four candidates. The Respondent renewed its request twice. Finally, in a letter of April 11, 2011, the Appellant notified that it accepted the appointment of C._____ as representative of the Respondent in the DAB.

On April 15, 2011, the Respondent invited the Appellant to kindly appoint its representative to the DAB and the Appellant complied some two weeks later by appointing D._____, whom the Respondent accepted in a letter of May 2, 2011.

Thereafter, the situation did not change for some two months. Whereupon the Respondent, in a letter of June 29, 2011, reminded the Appellant that the parties should consult with the two DAB members with a view to appointing the chairman. At first, the parties did not succeed in agreeing on a name to chair the DAB. They then agreed to ask the two DAB members to issue an opinion in this respect, which they did by

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

stating in an email of October 25, 2011, that they considered attorney E._____ as having the requested qualities to occupy this position. As from November 3, 2011, three drafts concerning constituting a DAB circulated among the parties at the Respondent's initiative, yet without result. On March 13, 2012, the Appellant finally confirmed its agreement as to the appointment of Mr. E._____ as chairman of the DAB. However, as a consequence of a conflict of interest disclosed by this lawyer, the Respondent advised the Appellant in a letter of March 23, 2012, that it wished to appoint another chairman, namely a Mr. F._____. The proposal was not accepted by the Appellant, which for its part, proposed the names of three individuals, including G._____. On June 14, 2012, the Respondent advised the Appellant that it accepted the latter candidate with a view to speeding up the procedure of constitution of the DAB. In a letter of July 2, 2012, the prospective chairman informed the parties that he had no conflict of interest, sent them an estimate of his fees and requested that they produce a draft agreement as to the conditions of its implementation.

B.
On July 27, 2012, the Respondent filed a request for arbitration with the Secretariat of the Court of Arbitration of the International Chamber of Commerce (ICC). The request was sent to the Appellant on August 9, 2012. A three-member arbitral tribunal was constituted with its seat set in Geneva.

Along side the ICC arbitral proceedings, the parties continued their exchanges as to the constitution of the DAB. A draft Dispute Adjudication Agreement[3] (hereafter: DAA) was sent to the parties by G._____ on September 13, 2012. The Appellant suggested some changes. On October 18, 2012, it advised the Respondent that it had not received its comments as to the draft and invited it to sign the DAA. The following day the Respondent answered that, insofar as the DAB had still not been set up after a year and a half, it had no choice but to initiate the arbitration procedure in order to protect its legitimate rights. On November 16, 2012, the Appellant contacted the FIDIC secretariat to obtain information and then the president of FIDIC on November 21, 2012, and June 6, 2013; the first time asking that he confirm the appointment of the three members of the DAB and finalise the DAA; and the second that he appoint substitute members of the DAB in accordance with the general conditions due to the parties failing to agree in this respect. On June 25, 2013, the Appellant was told that FIDIC was not permitted to intervene once an arbitration procedure had been initiated.

Upon joint request from the parties, the Arbitral Tribunal decided to issue a first decision as to the Appellant's argument based on the Respondent's failure to comply with the alternate dispute resolution mechanisms contained in the General Conditions as a prelude to the opening of the arbitral proceedings. On January 21, 2014, it handed down a majority partial award which, in the operative part, accepted jurisdiction over the Respondent's claim, declared it admissible, and rejected the jurisdictional objections raised by the Appellant.

C.

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

On February 26, 2014, the Appellant filed a civil law appeal with a view to obtaining the annulment of the partial award of January 21, 2014. It invites the Federal Tribunal to find that the Arbitral Tribunal did not have jursidiction to adjudicate the request filed by the Respondent and to declare the latter's submissions inadmissible. Moreover, the Appellant submits that all the costs of the arbitral proceedings and of the federal proceedings should be borne by the Respondent. As an alternative, it seeks a stay of the arbitral proceedings until the DAB procedure is finished with a time limit given to the parties to allow them to make up for this omission. In the more alternative, the Appellant proposes that the case should be sent back to the Arbitral Tribunal with instructions to decide the matter in conformity with the judgment of the Federal Tribunal.

In its answer of April 28, 2014, the Respondent submits that the appeal should be rejected.

The Arbitral Tribunal did not express a position as to the appeal.

Reasons:

1.
According to Art. 54(1) LTF,[4] the Federal Tribunal issues its judgment in an official language,[5] as a rule in the language of the decision under appeal. When the decision is issued in another language (here, English), the Federal Tribunal uses the official language chosen by the parties. Before the Arbitral Tribunal they used English but in the briefs submitted to the Federal Tribunal both used French. In accordance with its practice, the Federal Tribunal will consequently issue its judgment in French.

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 to 192 PILA[6] (Art. 77(1) LTF).

The seat of the arbitration is in Geneva. At least one of the parties (in this case, both) did not have its domicile, within the meaning of Art. 21(1) PILA, in Switzerland at the decisive time. The provisions of Chapter 12 PILA are accordingly applicable (Art. 176(1) PILA).

When an arbitral tribunal rejects a jurisdictional objection in a separate award, it issues an interlocutory decision (Art. 186(3) PILA). This is the case here, even though the award under appeal is improperly designated as a partial award. Pursuant to Art. 190(3) PILA, the award can be appealed to the Federal

[4] Translator's Note: LTF is the French abbreviation of the Federal Statute of June 17, 2005, organizing the Federal Tribunal, RS 173. 110.
[5] Translator's Note: The official languages of Switzerland are German, French, and Italian.
[6] 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.

Tribunal only on the grounds drawn from irregular composition (Art. 190(2)(a) PILA) or lack of jurisdiction (Art. 190(2)(b) PILA) of the arbitral tribunal. The Appellant invokes the latter ground by arguing that the Arbitral Tribunal failed to decline jurisdiction *ratione temporis*.

As the Arbitral Tribunal rejected the jurisdictional objection it raised, the Appellant is particularly affected by the award under appeal and therefore has an interest worthy of protection to seek its annulment, which gives it standing to appeal (Art. 76(1) LTF).

Filed in a timely manner (Art. 100(1) LTF, in connection with Art. 45(1) LTF), in the legally prescribed format (Art. 42(1) LTF), the appeal is admissible.

2.2.
An appeal concerning international arbitration may only seek the annulment of the award (see Art. 77(2) LTF, ruling out the applicability of Art. 107(2) LTF). However, when the dispute concerns the jurisdiction of an arbitral tribunal, the Federal Tribunal may itself find the jurisdiction or the lack of jurisdiction (ATF 136 III 605[7] at 3.3.4, p. 616; 128 III 50 at 1b).

The Appellant's submission seeking a finding from the Federal Tribunal itself that the Arbitral Tribunal lacks jurisdiction to adjudicate the dispute with the Respondent is therefore admissible. The same applies, *a maiore minus*, to the alternative submission in which the Appellant asks the Federal Tribunal to order a stay of the arbitration proceedings until the DAB proceedings are concluded, and the setting of a deadline to allow them to repair the omission of this preliminary step.

2.3.
The Federal Tribunal issues its judgment on the basis of the facts found in the award under appeal (see Art. 105(1) LTF). This Court may not rectify or supplement *ex officio* the factual findings of the arbitrators, even if the facts were established in a blatantly inaccurate manner or in violation of the law (see Art. 77(2) LTF, ruling out the application 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 ability to review the factual findings 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_54/2012[8] of June 27, 2012, at 1.6).

3.

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[7] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/independence-and-impartiality-of-a-party-appointed-arbitrator-in

[8] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/federal-tribunal-recalls-that-procedural-mistakes-or-a-decision-

The Appellant argues that the Arbitral Tribunal accepted jurisdiction whilst disregarding the compulsory mechanism of prior recourse to a DAB, contained at Clause 20 of the General Conditions inserted into the two contracts binding the parties. Before analyzing this argument based on Art. 190(2)(b) PILA, it is necessary to summarize the reasons of the award (see 3.1.1) and the arguments that the parties raised to criticize it (see 3.1.2) or to support it (see 3.1.3).

3.1.
3.1.1. As a rule, the Arbitral Tribunal decides on its own jurisdiction in a preliminary award (Art. 186(3) PILA; RS 291). Nothing justifies deferring the decision as to jurisdiction in this case until the end of the arbitral proceedings. The Appellant also complied with the requirements of Art. 186(2) PILA by raising the jurisdictional objection before any defense on the merits.

Sub-Clause 20.6 of the General Conditions is a valid arbitration agreement. According to Art. 178(2) PILA, the Arbitral Tribunal shall apply Swiss law to determine the purpose and the effects of the arbitration agreement. Hence, it would not examine any further the legal opinion of Professor H._____, which is based on the application of Art. 341 of the Code of Civil Procedure [name of country omitted].

The issue is whether the pre-arbitration phase set forth in the General Conditions is mandatory and, if so, what are the legal consequences of the failure to comply with this procedural requirement. The concept of DAB is relatively recent in this respect because it was introduced into the FIDIC *Red Book* in 1999. There are two types of DAB: the *Standing* DAB, which is the rule, appointed at the outset of the contractual relationship and remaining in place until the end of the work; or the *ad hoc* DAB, which is an exception, and is constituted only when a dispute arises between the parties. The second type of DAB comes into consideration in the case at hand.

The majority of the Arbitral Tribunal held that the dispute resolution procedure by the DAB as contemplated at Art. 20 of the General Conditions is not mandatory in that it would be a pre-condition to the right of a party to initiate arbitration or that failure to observe it would lead to inadmissibility. Indeed, the word *shall* used at §1 of Sub-Clause 20.2 of the General Conditions must not be read in isolation but in the broader context of the dispute resolution mechanism instituted by Art. 20 of the General Conditions. Yet, §1 of Sub-Clause 20.4, to which §1 of Sub-Clause 20.2 refers and which is a *lex specialis* suggests that, as a consequence of the use of the verb "*may,*" the DAB procedure is simply an option available to each party to submit the case to the DAB. This interpretation is supported by Sub-Clause 20.4, §6, 2nd sentence of the General Conditions, which mentions two exceptions to the principle that no party can introduce an arbitration request without tendering a *notice of dissatisfaction* to the other after receiving the DAB decision. One of the two exceptions – the only one invoked by the Respondent – is stated at Clause 20.8 of the General Conditions. Duly interpreted, the latter allows direct recourse to arbitration without resorting to the DAB procedure when its requirements are met. Five reasons support this conclusion. *First*, no matter what the Appellant says when it argues that the title of Sub-Clause 20.8 (*Expiry of Dispute Adjudication Board's Appointment*), presupposes that a DAB was already implemented – a necessary condition for its mission to be able to expire – this textual argument is not decisive because Sub-Clause 1.2 of the General Conditions

states that the titles and the marginal notes do not have to be taken into consideration in the interpretation of the General Conditions; *Second*, the words "*or otherwise*" – used at the end of the first paragraph of Sub-Clause 20.8 – would be meaningless if the Appellant's opinion were followed, which also lead legal writers to take the view that it is possible for a party attempting to submit the case to a DAB without success to initiate arbitral proceedings; *Third*, a recent decision issued on October 11, 2013, by the High Court of England and Wales in the case of *Doosan Babcock Ltd v. Comercializadora de Equipos y Materiales Mabe Limitada* ([2013] EWHC 3010/TCC), confirms this doctrinal opinion; *Fourth*, a partial arbitral award issued in an ICC arbitration which was added to the file of the case by the Appellant qualifies the Sub-Clause in dispute as a "*general exception*" to the DAB prior procedure; and *Finally*, according to the very text of the *ad hoc* commentary (*The FIDIC Contracts Guide*), the fact that there is no DAB at hand may result from the intransigence of the parties, which clearly indicates that there is no general obligation to set up such a body.

The Arbitral Tribunal furthermore points out, as *obiter dictum*, that the General Conditions do not set a time limit to constitute a DAB, which would argue against the mandatory nature of the prior procedure of dispute settlement established by FIDIC. This is a deficiency pointed out by commentators and explains the inherent difficulties in an *ad hoc* DAB procedure when there is no time limit within which the DAB must be constituted. The approximately fifteen months (March 2011 to July 2012) it took for the parties to succeed in constituting such a body in the case at hand – without either party being entirely responsible for the delay – are irrefutable evidence of that.

In the case at hand, the Appellant cannot be followed when it argues that a DAB was appointed as of July 2, 2012, after the parties agreed on its chairman. The parties did not sign any DAA including the terms of compensation of the three members of the DAB as required by Sub-Clause 20.2, paragraph 6, of the General Conditions. It is not sufficient for a DAB to exist to be able to say that it is "*in place*" within the meaning of Clause 20.8 of the General Conditions. It must be operational, which supposes that there is a DAA. The latter requirement is not met in the case at hand and one does not see how to blame the Respondent for this from the point of view of the rules of good faith. Indeed, neither the contracts signed by the parties nor the General Conditions contain a clause from which one could infer a duty for the Respondent to sign the DAA. As to the argument that the Respondent remained silent during the three months between its acceptance of the appointment of G._____ as president of the DAB in July 2012 and the letter of October 19, 2012, in which it blamed the Appellant for failing to inform it that the request for arbitration was filed, is unpersuasive because it is established that the Appellant became aware of the Respondent's request for arbitration on August 9, 2012.

In conclusion, the jurisdiction of the Arbitral Tribunal to adjudicate the dispute between the parties cannot be disputed, even in the absence of a decision of the DAB.

3.1.2. At the outset, the Appellant argues that the Arbitral Tribunal wrongly applied Swiss law according to Art. 178(2) PILA to decide the issue as to the voluntary or mandatory nature of the pre-arbitration mediation phase. In its view, the issue is not governed by the provision quoted but falls under the law of [name of

country omitted], which governs both contracts. According to that law, the issue in dispute concerns the very emergence of the right based on them. Be this as it may, according to the Appellant, the choice of Swiss law turns out to be arbitrary in the case at hand, even in the light of Art. 178(2) PILA, because the location of the seat of the arbitration in Switzerland is not the consequence of an agreement of the parties but a decision by the ICC. Yet, as appears from the legal opinion of Professor H._____, which the Arbitrators disregarded, Art. 341(2) of the Code of Civil Procedure of [name of country omitted] prescribes compliance with a possible procedure of prior conciliation and is a mandatory provision, the violation of which results in the inadmissibility of the request for arbitration.

Moreover, even from the point of view of Swiss law, the interpretation of the pertinent provisions of Clause 20 of the General Conditions, as done by the majority of the Arbitral Tribunal, is open to criticism in many respects in the Appellant's eyes. It disregarded the following elements of the dispute resolution mechanism at hand: *First*, the recourse to arbitration stated at Clause 20.6 of the General Conditions can take place only when a party not only has given notice of dissatisfaction to the other within 28 days from receipt of the decision of the DAB, or at the end of the 84 days during which the DAB should have issued its decision (Sub-Clause 20.4), but also attempted to reach an amicable settlement with the other party upon receipt of the notice or, failing that, let 56 days go from then (Sub-Clause 20.5). Furthermore, the word "*shall*" used in Sub-Clause 20.2 of the General Conditions certainly reveals the mandatory nature of the multi-tiered dispute resolution mechanism adopted by FIDIC, while the verb "*may*" at the first paragraph of Sub-Clause 20.4 does not contradict it because the Sub-Clause in which it appears presupposes that a DAB has already been implemented. Systematic analysis suggests, moreover, that the word "*shall*" has more weight in pertinent provisions of Clause 20 than the word *may*. Finally, as to Sub-Clause 20.8, the Appellant deduces from its title that it applies only if the powers of an operational DAB have expired. As to the wording "*or otherwise*" at the end of the first paragraph of this Sub-Clause, the Appellant sees a reference there to some circumstances of an objective nature, independent of the will of the parties. In any event, it disputes that Sub-Clause 20.8 could be interpreted as meaning that a party would be entitled to introduce a request for arbitration of its own initiative and without regard to the agreement entered into with the other party as to the appointment of a DAB, in particular if this body could not function as a consequence of a breach by this party.

3.1.3. The Respondent seeks to demonstrate in its answer *first* that the choice of Swiss law made by the Arbitral Tribunal is indisputable. In its view, the option to choose that law derives directly from Art. 178(2) PILA, which allows the alternate choice *in favorem validitatis* including Swiss law as the law of the seat of arbitration. As to the law of [name of country omitted], the Respondent points out that the Arbitral Tribunal specifically rejected its application at §108 of the award under appeal, so the Appellant argues in vain that it did not rule as to its contents. Moreover, it considers artificial and legally groundless the Appellant's desire to exclude from the scope of Art. 178(2) PILA the effects of the arbitration clause and to limit it to the issue of the validity of the arbitration agreement.

Second, the Respondent seeks to refute the Appellant's argument that the DAB procedure is mandatory. In this argument, it agrees with the reasons of the majority arbitrators. In this respect, it insists that, should the

bad faith of a party play any role in the application of Sub-Clause 20.8 of the General Conditions – which the Respondent disputes – the responsibility should be on the Appellant as it never stopped obstructing the constitution of the DAB over the 461 days, using questionable methods and obvious delaying tactics. Finally, the Respondent refers to federal case law to infer that the absence of a time limit for the constitution of a DAB in the case at hand confirms the voluntary character of the *ad hoc* procedure and moreover, that any attempt at reaching a settlement in this case would be in vain and recourse to arbitration inevitable. In summary, in its view, denying the Respondent the opportunity to go to arbitration at this time would be tantamount to a denial of justice and to condoning the Appellant's delaying tactics.

3.2.
The Federal Tribunal reviewed the argument that the contractual mechanism constituting a prerequisite to arbitration was breached (attempt at conciliation, involvement of an expert, mediation, *etc*.) from the point of view of Art. 190(2)(b) PILA concerning the jurisdiction of the Arbitral Tribunal. This is somewhat of a default choice due to the impossibility of connecting the argument to another ground for appeal in this provision, granting implicitly that the breach is certainly not serious enough to fall within procedural public policy as contemplated at Art. 190(2)(e) PILA (on this notion, see ATF 132 III 389 at 2.2.1), but must nonetheless be sanctioned one way or the other. Yet, the Court does not necessarily consider that this would dictate the solution to adopt in sanctioning the fact that a request for arbitration was filed without accomplishing the mandatory preliminary step agreed upon by the parties (judgment 4A_46/2011[9] of May 16, 2011, at 3.4; judgment 4A_18/2007 of June 6, 2007, at 4.2).

Seized of a jurisdictional defense, the Federal Tribunal freely reviews the legal issues which determine the jurisdiction or the lack of jurisdiction of the Arbitral Tribunal. As necessary, it will also review the application of pertinent foreign law; it will do that with full power of review but defer to the majority view as to the issue at hand and should legal writing and case law defer, to the opinion of the Supreme Court of the country that enacted the applicable rule of law (judgment 4A_538/2012[10] of January 17, 2013, at 4.2).

3.3.
It is not questioned and it is not questionable that Sub-Clause 20.6 of the General Conditions, as inserted into the two contracts binding the parties, is a valid arbitration agreement as to its form (Art. 178(1) PILA).

Pursuant to Art. 178(2) PILA, the arbitration agreement is materially valid if it meets the requirements set by the law chosen by the parties or by the law governing the dispute and in particular the law applicable to the main contract or, moreover, by Swiss law. The provision quoted contains three alternate links *in favorem validitatis*, with no hierarchy between them, namely the law chosen by the parties, the law governing the

[9] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/no-breach-of-pre-arbitral-procedures-failure-to-deal-with-an-arg

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

dispute (*lex causae*), and Swiss law as the law of the seat of the arbitration (ATF 129 III 727 at 5.3.2, p. 736). No matter what the Appellant says, it makes no difference with regard to the latter law that the seat of the arbitration be chosen by the parties themselves, by an arbitration institution or by the Arbitral Tribunal (Dieter Gränicher, *Commentaire Bâlois, Internationales Privatrecht,* 3rd ed., 2013, n. 29, ad Art. 178 PILA). Neither is it decisive that the case should have a sufficient nexus with Switzerland as to the parties involved or the object of the dispute. This is not the criterion the legislature chose to determine the applicability of the provisions of Chapter 12 PILA. Moreover, in the vast majority of cases, international commercial arbitrations divide parties that are not domiciled in Switzerland and concern contracts with no connection with this country.

In the case at hand, the Arbitral Tribunal decided in its discretion to apply Swiss law to the arbitration agreement, thus ruling out the *lex causae*, namely the law of [name of country omitted]. The only open issue is the applicability of Art. 178(2) PILA to the alternate dispute resolution mechanisms at hand and in particular to the DAB instituted by FIDIC. Despite the Appellant's objections, the question must be resolved in the affirmative. It would indeed be artificial to distinguish from that point of view the actual arbitral procedure on the one hand and the mediation *lato sensu* preceding it on the other hand, in particular when it must be decided whether the latter is a mandatory precondition to the former. Moreover, case law and legal writing draw no distinction between these two procedures as to the applicability of the provision quoted (see the cases quoted at 3.2; also see among others: Gränicher, *op. cit.*, n. 44 ad Art. 178 PILA). The same applies to the FIDIC general conditions included in the two contracts in dispute, which include in the same Clause 20 the DAB procedure (at Sub-Clauses 20.2 to 20.4), the conciliation procedure (at Sub-Clause 20.5) and the arbitration procedure (at Sub-Clause 20.6). Submitting the pre-arbitration phase and the subsequent arbitration to two different laws would doubtlessly be inappropriate and could unnecessarily complicate the resolution of the dispute between the parties insofar as the Arbitral Tribunal would lose the benefit of the choice at Art. 178(2) PILA if it were forced to take into account the mandatory provisions of the *lex causae* concerning the preliminary mediation phase when deciding on its own jurisdiction. Doing so would be particularly questionable when, as is the case here, the Arbitral Tribunal is forced to apply a provision in the Code of Civil Procedure of the country the law of which governs the subject of the dispute – the country in which, moreover, one of the parties has its seat – to decide whether an alternate all-encompassing dispute resolution mechanism established by an international federation is mandatory or voluntary. This will consequently be dispensed with.

3.4.

3.4.1. The interpretation of an arbitration agreement in Swiss law takes place according to the general rules on the interpretation of contracts. The Court must first learn the real and common intent of the parties, empirically as the case may be, on the basis of clues without stopping at the inaccurate names or words they may have used. Failing this, it will apply the principle of reliance and determine the meaning that, according to the rules of good faith, the parties could and should give to their mutual statements of will in each circumstance. Even if it is apparently clear, the meaning of a text signed by the parties is not

necessarily decisive, as purely literal interpretation is prohibited (Art. 18(1) CO[11]). When the wording of a contract clause appears crystal clear at first sight there may still be some other conditions of the contract, the goal sought by the parties, or some other circumstance causing the text of the clause to fail to express the exact meaning of the agreement concluded. However, there is no reason to depart from the literal meaning of the text adopted by the parties to the contract if there is no serious reason to doubt that it does not correspond to their intent (ATF 140 III 134 at 3.2; 135 III 295 at 5.2, p. 302 and the cases quoted).

This case law can be applied *mutatis mutandis* to decide whether or not the DAB procedure instituted by FIDIC is mandatory. The General Conditions established by this body are admittedly akin to rules of law, which may sometimes justify objective interpretation and taking into consideration the opinion of their author as to the meaning of the words they contain. However, they were established by a private law organization and the court in charge of applying them will have the last word and provide individualized interpretation appropriate to the circumstances of the case at hand to the extent possible. In this way, they are comparable to the SIA-118 developed in domestic law by the Swiss Society of Engineers and Architects (see Peter Gauch, *Der Werkvertrag, 5th ed.*, 2011, n. 291 f.).

3.4.2. Under the influence of American and English economic and legal circles, Alternative Dispute Resolution or ADR has met with considerable success in Europe and particularly in Switzerland in the last few years. Conciliation and mediation are such methods (judgment 4A_18/2007, quoted above, at 4.3.1 and the writers quoted; see also: Liatowitsch and Menz, *Alternative Dispute Resolution,* in *International Arbitration in Switzerland*, Geisinger and Voser [ed.], 2nd ed., 2013, p. 311 ff).

Construction is one of the areas most prone to disputes. In the context of the globalization of this field, methods to deal with these disputes have been developed. They are an alternative to judicial or arbitral means, particularly internationally, and they are supposed to empower the parties to manage disputes that arise along the path of performance of their respective obligations in an efficient, economical, and swift manner without jeopardizing the continuation of their contractual relationship (Brown-Berset and Scherer, *Les modes alternatifs de règlement des différends dans le domaine de la construction,* in *Journées suisses du droit de la construction*, Fribourg, 2007, p. 265 ff, 266).

FIDIC has a long-standing system of alternate resolution of pre-arbitration disputes. In the versions before 1999, the General Conditions required the parties wishing to seize an arbitral tribunal to call upon the engineer first, the arbitral tribunal being only a sort of second instance. This model failed to prevail in international practice because it put the engineer – a paid representative of the principal – in the double role of judge and party (Brown-Berset and Scherer, *op. cit.*, p. 277; Fouchard, Gaillard and Goldman, *Traité de l'arbitrage commercial international*, 1996, n. 22 to 24; Roger Philippe Budin, *Guide pratique de l'exécution des contrats internationaux de construction*, 1998, p. 27 ff). In order to address this criticism, FIDIC adopted the new General Conditions in 1999, known as the *Red Book*, which it has supplemented and changed (for a historical description of the General Conditions, see among others: Baker, Mellors,

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

Chalmers and Lavers, *FIDIC Contracts: Law and Practice*, 2009, p. 19 ff; on the subject of the *Red Book*, see in particular: Glover and Hughes QC, *Understanding the FIDIC Red Book,* 2nd ed., 2011, *passim*; Nael G. Bunni, *The FIDIC Forms of Contract,* 3rd ed., 2005, *passim*). In doing so, it created a multi-tiered system of dispute resolution ("*multi-tiered proceedings"*; as to this system, see Jan-Michel Ahrens, *Escalation Clauses – Stairway to Heaven or Highway to Hell?,* in *New Developments in International Commercial Arbitration*, Müller and Rigozzi [ed.], 2010, p. 173 ff), which must be described briefly and broadly.

Disputes between parties in connection with the contract or the performance of the work are submitted by the claimant to a permanent or *ad hoc* DAB composed of one or three qualified individual(s), namely a specialist or a panel of specialists, whose conditions of engagement are set in a DAA. Within 84 days after it is seized, the DAB must issue a reasoned decision binding the parties unless and, as the case may be, until its decision is reviewed by way of an amicable settlement or pursuant to an arbitral award. During this time, the contractor must continue the work as though the contract has not been terminated. If one of the parties is not satisfied with the decision of the DAB it must send a notice of dissatisfaction to the other within 20 days of receipt of the decision or after the 84 days within which the DAB should have issued its decision. When such notice was given, the parties must seek an amicable settlement before resorting to arbitration. However, the arbitral procedure may be started 56 days after receiving the aforesaid notice even in the absence of any attempt to settle. It is governed by the rules of arbitration of the ICC. The arbitral tribunal has the power to adjudicate the matter *de novo* without being bound by any previous decision, whether emanating from the engineer or the DAB. The initiation of arbitration proceedings during the performance of the work does not alter the contractual obligations of the parties. Such proceedings may also be initiated directly if a party does not comply with an enforceable decision of the DAB. Finally, if a dispute arises between the parties in connection with the contract or the performance of the work when no DAB is in place because its mission expired or for another reason, it may be submitted to arbitration directly without the need of a prior decision by the DAB or an attempt at amicable settlement.

3.4.3. In light of the criticism advanced by the Appellant (see 3.1.2, second part), the reasons by which a majority of the Arbitral Tribunal rejected the argument that the DAB pre-arbitration procedure was mandatory (see 3.1.1, above) call for the following remarks.

3.4.3.1. As to terminology, there is no doubt that the English verb "*shall*" – translated into French as *devra* – at the first paragraph of Sub-Clause 20.2 of the General Conditions, corresponds to an obligation, a duty, as opposed to the verb "*may*" – translated into French as *peut* – which is tantamount to an approval, a permission, at least in a deliberately simplistic approach to the two verbs (for a more nuanced approach see Le Robert & Collins *super senior, 2nd ed.*, 2003, p. 579 and 867; *Black's Law Dictionary,* 8th ed., 2004, p. 1000 and 1407). Legal writing also considers that the use of the word "*shall*" means that the action or the step to which the verb applies is not left to the goodwill of the parties but must be undertaken (see for instance: Ahrens, *op. cit.*, p. 190 f.; Glover and Hughes QC, *op. cit.*, p. 15; Didem Kayali, *Enforceability of Multi-Tired Dispute Resolution Clauses, Journal of International Arbitration*, 2010, p. 551 ff, 572 i.f.). Moreover, FIDIC itself added the definition of the two words in dispute to the list of its definitions in a document published in 2008 entitled *Conditions of Contract for Design, Build and Operate Projects* (also

called the *Gold Book*): thus, according to Sub-Clause 1.2(e) and (f) of the *Gold Book*, "'*shall' means that the Party or person referred to has an obligation under the Contract to perform the duty referred to,"*[12] whilst "'*may*' *means that the Party or person referred to has the choice of whether to act or not in the matter referred to*."[13]

3.4.3.2. Contrary to the view of the majority arbitrators, systematic interpretation of the provisions using the words "*shall*" and "*may*" does not lead to a different result. In this respect, one does not see why the first paragraph of Sub-Clause 20.4 would be a *lex specialis* to the first paragraph of Sub-Clause 20.2 just because the former gives a less detailed definition of the word "*dispute*" than the latter, or for what reason the wording "*either Party may* (emphasis added by the Federal Tribunal) *refer the dispute in writing to the DAB for its decision*, which is contained there," would turn the implementation of the DAB into a mere option. Indeed, once replaced in its context, namely in the situation in which a DAB is already constituted, the aforesaid wording simply means that when a dispute arises between the parties, each may seize the DAB; it says nothing else and certainly not that seizing the DAB is optional. Moreover, the text of the first paragraph of Sub-Clause 20.6 clearly establishes that the existence of a decision by the DAB is a *sine qua non* condition to the initiation of arbitral proceedings, except in the specific case of paragraph 5 of Sub-Clause 20.4, *i.e.*, the absence of a decision of the DAB within 84 days after its implementation. This is indirectly confirmed by the second sentence of paragraph 6 of Sub-Clause 20.4, which reserves direct access to arbitration in two exceptional cases considered by Sub-Clauses 20.7 (failure to comply with an enforceable decision of the DAB) and 20.8 (expiry of the DAB mission).

3.4.3.3. The broad interpretation of Sub-Clause 20.8 of the General Conditions by the majority of Arbitral Tribunal is not more convincing. According to it and insofar as it actually has such a meaning, it would be sufficient for a DAB not to be operational at the time arbitration proceedings are initiated, no matter for what reason, for a decision of this body to become optional. Such a conclusion would ultimately turn the alternate dispute resolution mechanism devised by FIDIC into an empty shell. Moreover, the reasons advanced in support are of little weight.

First, while it is true that pursuant to Art. 1.2 of the General Conditions the titles do not have to be taken into consideration when interpreting the aforesaid conditions, comparing their text with that of the Sub-Clause they are a title to is still of some interest to understand it properly. As to Sub-Clause 20.8, it appears that what is contemplated here is primarily the exceptional situation in which the mission of a *standing DAB* expires at the end of the time limit it was given before a dispute arises between the parties. As to the reason for this Sub-Clause, some *Red Book* commentators emphasize that in its absence there would be uncertainty as to whether the dispute could nonetheless be submitted to arbitration or instead to the competent state court (Baker, Mellors, Chalmers and Lavers, *op. cit.*, p. 552, n. 9.222), whilst other commentators even go as far as excluding any legal recourse other than an amicable settlement in such a case (Glover and Hughes QC, *op. cit.*, p. 409, n. 20-080).

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

Furthermore, the majority arbitrators give great weight to the wording *"or otherwise*" at the first paragraph of Sub-Clause 20.8. This very vague expression doubtlessly does not facilitate understanding the Sub-Clause in question. Yet, interpreting it literally and extensively would short-circuit the multi-tiered alternative dispute resolution system imagined by FIDIC when it came to a DAB *ad hoc* procedure because, by definition, a dispute always arises before the *ad hoc* DAB has been set up, in other words, at a time when "*there is no DAB in place,"*[14] however, such interpretation would clearly be contrary to the goal the drafters of the system had in mind (Baker, Mellors, Chalmers, and Lavers, *op. cit.*, p. 553, n. 9.224). The expression "*or otherwise*" must, in reality, permit taking into consideration other occurrences than the mere expiry of the mission of the DAB without limiting them to any objective circumstances independent of the will of the parties, as the Appellant would like – without substantiating its opinion in this respect on the text of Sub-Clause 20.8. According to the guide published by FIDIC and quoted in the award under appeal, these other occurrences could include the inability to constitute a DAB due to the intransigence of one of the parties (The FIDIC Contracts Guide, 2000, p. 317 *i.f.*). The finality of the Sub-Clause in question is ultimately to preserve the capacity of the parties in any circumstance to avail themselves of one of the dispute resolution mechanisms they agreed upon and in particular of the most important one, namely arbitration (Baker, Mellors, Chalmers, and Lavers, *op. cit.*, p. 553, n. 9.223).

The excerpt of the aforesaid English case (see 3.1.1., paragraph 4, *i.f.*, above) does not help the argument of a voluntary recourse to the DAB, no matter what the majority arbitrators think. As can be seen easily when reading § 11 of the decision, the parties agreed in an amendment to the General Conditions that the DAB should be constituted within 42 days from the starting date of the Contract, a condition which was not met, so that Sub-Clause 20.8 was effectively applicable.

The extrapolation in which the majority of the Arbitral Tribunal indulges on the basis of the words *general exception* in a short passage of an ICC arbitral award reproduced in the award under appeal, which would allegedly qualify Sub-Clause 20.8, is not more decisive.

Finally, the same applies to the aforesaid passage of the FIDIC guide in which the intransigence of a party is given as an example of a situation in which the implementation of the DAB may be omitted. That the mandatory recourse to the DAB may suffer certain exceptions does not suggest that resorting to this body would allegedly be voluntary but rather confirms the general rule making the recourse to this alternate dispute resolution mechanism compulsory before introducing a request for arbitration.

3.4.3.4. In judgment 4A_18/2007 of June 6, 2007, the Federal Tribunal confirmed the interpretation by the Arbitral Tribunal that the contractual clause in dispute did not require mandatory pre-arbitration conciliation and added the following (at 4.3.2, 3rd §):

> *This impression is reinforced by the absence of any indication of a time limit within which the mediation procedure should be introduced or even reach a conclusion while*

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

the mention of such a time limit is usual in international contracts according to a finding of the Arbitral Tribunal in its discretion.

Relying on this precedent, the majority arbitrators find that while the General Conditions give a strict time limit of 84 days to the DAB to issue its decision, they do not contain a time limit for setting up a DAB *ad hoc*. And they deduce that the pre-arbitration phase would not be mandatory when the parties did not agree a time limit to implement the DAB process.

While being presented as mere *obiter dictum*, the reasoning does not appear decisive either. The comparison on which it rests must be put in perspective. The aforesaid federal case concerned a far less binding procedure of conciliation/mediation than the duly codified procedure of the DAB. Moreover, the absence of a time limit to seize the DAB is certainly a deficiency of the system but it does not imply that the pre-arbitration proceeding entrusted to this body would become a mere opportunity left to the discretion of the parties.

3.4.4. The writers who addressed the issue consider that the DAB dispute resolution proceeding foreseen by Art. 20 of the General Conditions is mandatory insofar as it must be finished for an arbitration procedure to begin (Ahrens, *op. cit.*, p. 192 f.; Brown-Berset and Scherer, *op. cit.*, p. 283; Baker, Mellors, Chalmers and Lavers, *op. cit.*, p. 552 f., n. 9.222 and 9.224 *i.f.*; Glover and Hughes QC, *op. cit.*, p. 388, n.20-026, p. 394, n. 20-041, p. 399, n. 20-053 and p. 405, n. 20-068). They must be followed for the reasons mentioned above.

However, that the rule permits some exceptions is clear from the text of Sub-Clause 20.8. Special circumstances, whether objective or not, must be reserved in which resorting to the pre-arbitration DAB procedure could not be imposed upon the party wishing to submit the dispute with its contractual counterpart to arbitration. Considered from the opposite perspective, the exception is a case in point of the principle of good faith, which governs the procedural behaviour of the parties as well. Depending upon the circumstances, the principle will therefore prevent one of them from objecting on the basis of the absence of a DAB decision. Yet, saying in advance and once and for all when it may be applied is impossible because the answer to the question depends upon the facts germane to the case at hand.

3.5.
Applied to the specific circumstances of the case at hand, the aforesaid principles lead this Court to confirm – in its results if not in all its underlying reasons – the decision of the Arbitral Tribunal to accept jurisdiction *ratione temporis* to address the request filed by the Respondent.

From a general point of view, it must be emphasized at the outset that the DAB system established by FIDIC was conceived above all with a view to constituting a permanent DAB and not an *ad hoc* DAB, the idea being to facilitate speedy disposition of the disputes arising during the performance of the project without jeopardizing its continuation and having disputes decided by specialists appointed at the beginning of the contract and able to follow its implementation from the beginning to the end. Yet in the case at hand,

the benefit expected from such a procedure was never on the agenda. There is an *ad hoc* DAB for the constitution of which no time limit had been agreed and the implementation of which started on March 10, 2011, namely after the completion of the work encompassed in Contracts 5R8 and 5R9, if one considers that the pertinent acceptance certificates were issued on June 23, and December 15, 2010, respectively. The DAB contemplated was more similar to an arbitral tribunal of first instance rather than an actual DAB, considering that it would intervene so late in the development of the contractual relationships and even after they were extinguished, when the respective positions of the parties were already fixed and the opponents doubtlessly irreconcilable. Therefore, even though it was proscribed by the General Conditions in principle, its implementation may no longer have been absolutely necessary in view of the economy of the system because it was unlikely that it would avoid the initiation of the arbitral procedure reserved by Sub-Clause 20.6 of the General Conditions. Seen in this perspective, the Appellant's will to obtain a DAB decision no matter what appears questionable at the very least.

Moreover, it must be pointed out that the procedure to constitute the DAB had started 15 months before the Respondent filed its request for arbitration (March 10, 2011, to July 27, 2012) which is a long time in the context of a dispute resolution mechanism supposed to be expeditious. Furthermore, the Arbitral Tribunal points out with regard to this time period that it is five times longer than the 84 days within which the DAB procedure must normally be conducted. While refusing to place responsibility upon one of the two parties, its factual findings in the award under appeal as to the way the process leading to the constitution of the *ad hoc* DAB was conducted – as they were summarized above (*see* let. A.c and let. B, paragraph 2), certainly do not permit blame to be placed on the Respondent for such procrastination. It appears instead that, after initiating the process, the Respondent tried several times to restart it, despite the Appellant's passivity, the latter only having played a more active role after the filing of the question for arbitration. Moreover, one hardly sees what interest the Respondent could have had in delaying the procedure for the constitution of the DAB it initiated when it is seeking the payment of some EUR 21 Million from the Appellant.

It must be noted finally that paragraph 5 of Sub-Clause 20.2 of the General Conditions requires the parties to enter into a DAA incorporating by reference the *General Conditions of Dispute Adjudication Agreement* contained in the annex to the aforesaid General Conditions with the three members of the DAB individually. According to clause 2, paragraph 1 of the General Conditions, the DAA comes into force when the principal, the contractor, and all members of the DAB have signed it. Failing this, legal writing considers that there is no validly constituted DAB and that the only remedy a party has when faced with the others refusal to sign the DAA is to go arbitration directly pursuant to Sub-Clause 20.8 (Baker, Mellors, Chalmers and Lavers, *op. cit.*, p. 520, n. 9.71). This means that, in the case at hand, the majority arbitrators were right to find that the DAB was not "*in place*"[15] when the arbitration request was filed, due to the parties having failed to sign a DAA with all of its appointed members. Moreover they note, without being contradicted by the Appellant, that they did not find in the two contracts in dispute or in the General Conditions any clause that would have compelled the Respondent to sign the DAA. In this respect, considering the circumstances germane to the case at hand, as they were recalled above, they cannot be

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

criticized for failing to denounce the Respondent's failure to sign the DAA from the point of view of the rules of good faith. Pursuant to these rules and considering the process of constitution of the DAB, it is indeed impossible to blame the Respondent for losing patience and finally skipping the DAB phase despite its mandatory nature in order to submit the matter to arbitration.

This being so, the sole argument based on the violation of Art. 190(2)(b) PILA appears unfounded, which justifies rejecting the appeal.

4.
The Appellant loses and shall pay the costs of the federal proceedings (Art. 66(1) LTF) and compensate its opponent (Art. 68(1) and (2) LTF).

Therefore the Federal Tribunal pronounces:

1.
The appeal is rejected.

2.
The judicial costs set at CHF 20'000 shall be borne by the Appellant.

3.
The Appellant shall pay CHF 22'000 to the Respondent for the federal proceedings.

4.
This judgment shall be notified to the representatives of the parties and to the chairman of the ICC tribunal.

Lausanne, July 7, 2014

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

Presiding Judge:	Clerk:
Klett (Mrs.)	Carruzzo

Title: ***Federal Tribunal upholds FIDIC pre-arbitration requirements***

Keywords: ***Arbitration clause, jurisdiction of the arbitral tribunal***

Stars: ****