4A 430/2020[1]

Judgment of February 10, 2021

First Civil Law Court

Federal Judge Hohl, Presiding,
Federal Judge Kiss,
Federal Judge Niquille,
Federal Judge May Canellas,
Federal Judge Kölz (Mr.), alternate judge.
Clerk of the Court: Mr. Carruzzo.

A._____,
Represented by Mr. Mr. Pierre-Yves Gunter, Ms. Alexandra Johnson, and Ms. Nadia Smahi, as well as by Mr. Bernhard Berger,
Appellant

v.

B._____,
Represented by Mr. Michael Kramer, Ms. Tanja Planinic, and Mr. Andreas Lienhard,
Respondent

Facts:

A.
By contracts dated July 4, 1995, and October 31, 1997, both entitled "Natural Gas Purchase and Sales Contract" (hereinafter, the contracts or the GPSC), B._____ (Respondent, Claimant), a company based in [name of country omitted], undertook, in return for a fee, to supply natural gas to A._____ (Appellant, Respondent), a company incorporated in [name of country omitted], for a period of twenty-five years from the first delivery. The main clauses of both agreements were identical, subject to the quantity of gas to be delivered. The price of the commodity was fixed according to a contractual formula. The first gas delivery took place at the end of 1997/beginning of 1998.

The contracts were amended several times, in particular to change the price and quantity of gas to be supplied.

[1] Translator's Note: Quote as A._____ *v.* B._____, 4A_430/2020.
The decision was issued in French. The full text is available on the website of the Federal Tribunal, www.bger.ch.

The sanctions imposed on Iran between 2007 and March 2008 had an impact on A._____'s ability to pay the amounts due for the various natural gas deliveries in the agreed currency, *i.e.*, in US dollars (USD). Therefore, the parties agreed, by Amendment No.1 of March 30, 2008, to change the currency of payment to euros (EUR).

According to an Amendment No 5, signed on June 16, 2010, A._____ undertook to pay interest on arrears of 7.5% per annum, should it fail to pay the undisputed invoices within thirty days of their issuance. During the proceedings, however, B._____ conceded that it had never applied this clause.

In October 2012, the United States of America and the European Union imposed new sanctions on Iran, hindering A._____'s access to the international banking system and preventing it from making bank transfers in euros. An Amendment No. 6, entered into on December 17, 2012, authorized A._____ to pay for successive gas deliveries, by providing goods, precious metals, services or performing certain work. This Amendment was to remain in effect until A._____ was able to pay the price for the gas delivered under the regular payment method.

On September 16, 2013, the parties entered into an Amendment No. 7 whereby A._____ acknowledged that it owed B._____ an amount of approximately EUR 855'000'000 for the gas delivered to that date. On this occasion, they decided to transform the said debt into a trade loan at an interest rate of 5% per annum. They also provided for a mechanism to adjust the terms of the amendment in the event of an increase or decrease in the debt. Amendment No. 7 was to be effective until the parties agreed on another payment mechanism or until A._____ was able to make timely payments under the terms of the GSPG.

During the course of the contractual relationship, A._____ complained to B._____ on various occasions about the quality and quantity of gas supplied and demanded certain price decreases. For the first time since 2010, A._____ contested an invoice issued by B._____ in December 2015. It did the same for several invoices issued in 2016. During the same year, A._____ sent various letters to B._____ in which it criticized it for not having respected its contractual obligations.

In January 2016, the economic sanctions against Iran were lifted. Until the beginning of October 2016, A._____ nevertheless encountered difficulties in making bank transfers. Between October 3 and December 31, 2016, however, it succeeded in transferring a sum of approximately EUR 208 million to B._____ by means of an indirect payment route through bank accounts opened in the names of third parties.

At the end of December 2016, the parties met several times to discuss the amount of A._____'s debt and the terms of repayment. They agreed that A._____ would pay certain amounts to B._____ in January-February 2017. They agreed to postpone the final decision on the repayment plan for A._____'s debt to the end of February/beginning of March 2017. In addition, they found common ground regarding the establishment of a working group to jointly verify, by the end of February 2017, the

amount of the debt and penalties claimed by A._____ due to insufficient gas deliveries and gas supply not meeting the agreed qualitative criteria.

Effective January 1, 2017, B._____ decided to stop delivering gas to A._____.

By letter dated January 2, 2017, A._____ informed B._____ that its decision to suspend gas deliveries was premature and unjustified. However, A._____ stated that it was prepared to negotiate an agreement with B._____ that would resolve all the issues in dispute.

In January or February 2017, A._____ consulted an English lawyer. On the basis of the advice given by the latter, it decided at the end of February 2017 to stop paying B._____. On February 28 and March 18, 2017, A._____ sent two letters to B._____, in which the contractual breaches attributed to B._____ are listed in detail, and argued that its claims for insufficient quality and quantity of gas delivered largely erased its debt to B._____.

In their subsequent discussions, the parties were unable to resolve their differences.

B.
On December 21, 2017, B._____, relying on the arbitration clause inserted in the contracts, submitted a request for arbitration, directed against A._____, with the International Court of Arbitration of the International Chamber of Commerce (ICC). In essence, it requested the Arbitral Tribunal find that the Respondent had breached its contractual obligations by failing to pay the amounts due for the gas delivered upon the lifting of international sanctions in January 2016, by failing to pay the price of subsequent gas deliveries, and by failing to pay the interest due. It also requested that the defendant be ordered to pay it an amount of approximately EUR 1.66 billion.

A._____ argued that the submissions made by the Claimant should be rejected. As a counterclaim, it invited the arbitrators to find that the Claimant did not comply with its contractual obligations, or that it had breached them. It also claimed compensation for the damage suffered as a result of the insufficient quality and quantity of gas delivered and the Claimant's decision not to supply it with gas from January 1, 2017. It also offered the aforementioned claims by way of set-off against the Claimant's claim for payment. In addition, it requested the Arbitral Tribunal to order the Claimant to immediately resume gas deliveries until the expiry of the GPSC.

An Arbitral Tribunal of three members was constituted, its seat fixed in Geneva and English designated as the language of the proceedings.

After hearing the case, the Arbitral Tribunal closed the proceedings on April 15, 2020. On June 18, 2020, it issued its final award, the operative part of which reads, inter alia, as follows:

> For the reasons set forth above, the Tribunal:
>
> a. Declares that:

i. A._____ breached its obligation under the 1995 and 1997 Gas Supply Contracts and Amendments thereto by (a) failing to pay for delivered natural gas and accrued interest after December 31, 2016, when Amendment No. 7 ceased to have effect; and (b) disavowing all payments to B._____ for delivered natural gas on 18 March 2017;

ii. A._____ is liable to B._____ for the breaches set out at item (a) (i) (a) above in an amount representing the amount of the "trade loan" established by Amendment No. 7 plus accrued interest thereon at a rate of 5% per annum (simple), reduced as mentioned below (item (a) (v));

iii. B._____ breached its obligations under the 1995 and 1997 Gas Supply Contracts and Amendments thereto by (a) failing to apply price reductions for quantity and quality deficiencies in respect of gas deliveries from 1. November 2015 to 31 December 2016; and (b) failing to deliver gas to A._____ from 1 January to 18 March 2017;

iv. B._____ is liable to A._____ for the breaches set out at item (a) (iii) above; and

v. A._____ is to pay B. _____ EUR 1'540'443'613.01 towards the amount of the "trade loan" established by Amendment No. 7 plus simple interest thereon at 5% p.a. from 4 March 2020 until the date of the Award;

vi. Simple interest at the rate of 7.5% p.a. on the resulting amount (*i.e.,* EUR 1'540'443'613.01 plus 5% interest on that principal amount from 4 March 2020 until the date of the Award) shall be payable thereafter from the date of the award until the date of the payment.

b. Orders:

i. A._____ is to pay B. _____ EUR 1'540'443'613.01 towards the amount of the "trade loan" established by Amendment No. 7 plus simple interest thereon at 5% p.a. from 4 March 2020 until the date of the Award;

ii. A._____ to pay B._____ simple interest at the rate of 7.5% p.a. on the resulting amount at item (b) (i) above from the date of the Award until the date of full payment.

iii. (...)

iv. (...) v. (...)

c. Dismisses all others claims. In particular:

i. (...)

ii. (...)

iii. Denies B._____'s request to declare the dismissal of all of A._____'s counterclaims in their entirety and with prejudice;

iv. (...)

v. Denies A._____'s request to grant A. _____'s counterclaims to the extent this request has not been granted above;

vi. Denies A._____'s request to order B._____ to compensate A._____ for its breaches of the 1995 and/or 1997 Contracts, as amended, and related agreements to the extent this request has not been granted above;

vii. Denies A._____'s request to award A._____ compensation in damages and/or by way of an off-set, in respect of B._____'s breaches of contract to the extent this request has not been granted as above;

viii. (...)

ix. Denies A._____'s request to order B._____ to immediately resume the deliveries of Gas in accordance with the 1995 and 1997 Contracts, as amended, until those Contracts come to an end, without prejudice to the price review request made by A._____;

x. Denies A._____'s alternative request to order B._____ to fully compensate A._____ for failure to deliver gas under the 1995 and 1997 Contracts, as amended, until those Contracts come to an end;
xi. (...)
xii. (...)
xiii. (...)[2]

The reasons supporting these sections of the operative part of the award will be set out below to the extent relevant to an understanding of the grievances directed against it.

C.
On August 25, 2020, the Respondent (hereinafter, the Appellant) submitted a Civil appeal with the Federal Tribunal, together with a request for suspensive effect, for the purposes of having the award rejected. In its reply of October 8, 2020, B. _____ (hereinafter, the Respondent) submitted that the appeal should be rejected insofar as the matter was capable of appeal.

The Arbitral Tribunal declined to decide on the request for suspensive effect and stated that it had no observations to make on the appeal.

An addendum to the final award, dated September 28, 2020, correcting the amount of the award, was transmitted to the Federal Tribunal by letter dated October 2, 2020.

The Appellant voluntarily submitted a reply, prompting a rejoinder from the opposing party.

The request for suspensive effect was refused by Order of the Presiding Judge on December 10, 2020.

Reasons:

1.
According to Art. 54(1) of the Law on the Federal Tribunal of June 17, 2005, (LTF[3]; RS 173.1.0), the Federal Tribunal issues its judgment in an official language[4], as a rule, in the language of the award under appeal. When the decision was issued in another language (here English), the Federal Tribunal uses the official language chosen by the parties. Before the Arbitral Tribunal, they used English, while, in the Appeal Briefs sent to the Federal Tribunal, they used either French (the Appellant) or German (the Respondent). According to its practice, the Federal Tribunal shall consequently issue its judgment in French.

[2] Translator's Note: In English in the original text.
[3] Translator's Note: LTF is the French abbreviation for 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.

2.
In the field of international arbitration, civil appeals are admissible against the decisions of arbitral tribunals under the conditions set out in Art.190 to 192 of the Federal Law on Private International Law of December 18,1987, (PILA[5]; RS 291), in accordance with Art. 77 (1) LTF.

The seat of the Arbitral Tribunal is in Geneva. Neither of the Parties was based in Switzerland at the relevant time. The provisions of Chapter 12 of the PILA are therefore applicable (Art.176 (1) PILA).

3.
Whether as to the subject matter of the appeal, the standing to appeal, the time limit to do so or the ground for appeal raised in the Appeal Brief, none of these admissibility requirements raises any problems in this case.

As for the clause inserted in the contracts according to which "*the award shall be final and binding upon both Parties*", it does not constitute a valid waiver of the right to appeal within the meaning of Art. 192 PILA, as the Appellant correctly points out without being contradicted by the Respondent (judgments 4A_460/2013[6] of February 4, 2014, at 2.2; 4A_464/2009[7] of February 15, 2010, at 3.1.2). The matter is therefore capable of appeal.

4.
An appeal against an arbitration award must satisfy the requirement of reasoning as it follows from Art. 77 LTF in connection with Art. 42(2) LTF and the case-law relating to this latter provision (ATF 140 III 86 at 2 and references). This requires that the Appellant discuss the reasoning of the award and indicate precisely in what way it considers that the author of the award has infringed the law. This can only be done within the limits of the admissible arguments against the said award*, i.e.,* only with regard to the grievances listed in Art. 190 PILA where the arbitration is international in nature. Moreover, as these reasons must be offered within the appeal brief itself, the Appellant cannot use the procedure to ask the Federal Tribunal to refer to the allegations, evidence, or offers of evidence contained in documents from the arbitration file. In addition, the Appellant may not rely on pleas, *de jure* or *de facto*, that were not submitted in a timely manner – that is, before the expiry of the non-extendible time-limit for instituting proceedings (Art.100(1) LTF in conjunction with Art. 47(1) LTF) or to supplement, outside of the prescribed period, an insufficiently reasoned submission (Judgment 4A_478/2017 of May 2, 2018, at 2.2 and the case-law cited).

The Federal Tribunal adjudicates on the basis of the facts found in the award under appeal (see Art. 105(1) LTF). It may not rectify or supplement of its own motion the findings of the arbitrators, even if the facts have been established in a manifestly inaccurate manner or in violation of the law (see Art. 77(2) LTF, ruling out the applicability of Art. 105(2) LTF). When a civil law appeal against an international arbitral

[5] Translator's Note: PILA is the most frequently used abbreviation for the Swiss Private International Law Act of December 18, 1987.

[6] Translator's Note: The English translation of this decision can be found here: https://www.swissarbitrationdecisions.com/violation-right-be-heard-upheld-federal-tribunal

[7] Translator's Note: The English translation of this decision can be found here: https://www.swissarbitrationdecisions.com/no-waiver-of-the-right-to-appeal-to-the-federal-tribunal-in-the-

award is submitted, its mission does not consist of deciding with full power of review, like an appellate jurisdiction; rather it may only consider whether the admissible grievances raised against the award are justified or not. Allowing the parties to state facts other than those found by the arbitral tribunal, apart from the exceptional cases reserved by case law, would not be compatible with such a mission, even though these facts may be established by evidence contained in the arbitration file. However, the Federal Tribunal retains the right to review the facts underlying the award under appeal if one of the grievances listed in Art. 190(2) PILA is raised against this fact or new facts or evidence are exceptionally taken into account in the civil appeal procedure (judgment 4A 478/2017, cited above, at 2.2).

5.
In its first pleading, the Appellant, claiming that there was a breach of its right to be heard, argues that the Arbitral Tribunal wrongly and without being invited to, examined the question of the validity of the suspension of gas deliveries at a date after January 1, 2017 (the date on which the Respondent decided to stop supplying the Appellant with gas), without having first questioned the parties on this point that they had never pleaded. In doing so, the Appellant alleges that the Arbitral Tribunal based its award on unforeseeable legal considerations.

5.1. In Switzerland, the right to be heard mainly concerns the findings of fact. The right of the parties to be asked for their views as to legal issues is recognized in a restrictive manner only. As a rule, pursuant to the adage *jura novit curia*, state courts or arbitral tribunals freely assess the legal bearing of the facts and may decide on the basis of rules of law other than those invoked by the parties. Consequently, as long as the arbitration agreement does not limit the mission of the arbitral tribunal to the legal means invoked by the parties only, they do not have to be heard specifically as to the scope to be given to the rules of law. As an exception, parties do need to be asked for their views when the judge or the arbitral tribunal considers basing a decision on a norm or a legal consideration that was not raised in the proceedings and the relevance of which the parties could not have anticipated (ATF 130 III 35 at 5 and references). Determining what is unforeseeable is a matter of appreciation. Therefore, the Federal Tribunal shows restraint in applying the aforesaid rule for this reason and because the specificities of this type of procedure must be taken into account by avoiding the use of an argument of surprise with a view to obtaining substantive review of the award by this Court (Judgment 4A_716/2016[8] of January 26, 2017, at 3.1). It further underlined it, a few years ago, by refusing to extend this case law to the establishment of facts (Judgment 4A_525/2017 of August 9, 2018, at 3.1 and the judgments cited).

5.2. Before examining the merits of the Appellant's complaint and in order to understand its scope, it is necessary to summarize, as a preliminary point, the reasons given by the Arbitral Tribunal in the part of its award devoted to the matter at issue, namely the chapters entitled "A._____'s claims for non-delivery from 1 January 2017 onwards" (Award, nos. 436 to 504), and the chapter entitled "Adjustments in respect of penalty claims for the period 1 January to 18 March 2017" (Award, nos. 641 to 643).

The Arbitral Tribunal begins by setting out the respective positions of the parties. It notes that the Respondent argues that it was entitled to cease supplying gas as of January 1, 2017, in accordance with

[8] Translator's Note: The English translation of this decision can be found here: https://www.swissarbitrationdecisions.com/atf-4a-716-2016

Art. 7.1.3 of the UNIDROIT[9] Principles, which enshrines the 'exception of non-performance' (*exceptio non adimpleti contractus*). For its part, the Appellant argues that the conditions for the application of the aforementioned provision have not been met and that the Respondent has, in any event, suspended the gas deliveries in a manner contrary to the rules of good faith.

The Arbitral Tribunal then considers whether the Respondent was entitled to suspend the delivery of gas as of January 1, 2017, and answers this question in the negative. In this regard, it considers that the Respondent's decision to stop supplying gas was excessive and unreasonable, given the commitments made by the parties during their meetings held at the end of December 2016. Therefore, the Appellant was entitled to price reductions, as penalties, as of January 1, 2017.

However, the Arbitral Tribunal considers that such penalties are only due for a limited period of time ending on March 18, 2017. It points out that the Appellant changed its attitude towards the end of February 2017. Based in particular on the letters sent by the Appellant dated February 28 and March 18, 2017, the Arbitrators consider indeed that the Appellant clearly decided to go back on the agreement reached at the end of December 2016 and expressed its intention to no longer pay the Respondent. In so doing, the Appellant refused to comply with its obligation to pay the price, thereby authorizing the Respondent to suspend its own performance, in accordance with Art. 7.1.3 of the UNIDROIT Principles, which the Arbitrators consider to be applicable.

In the end, the Arbitral Tribunal found that the Appellant was entitled to price reductions for the period between January 1 and March 18, 2017, but was not entitled to additional damages. The amount of EUR 29'380'384.80, corresponding to the penalties due for the period in question (January 1 to March 18, 2017), could therefore be set off against the Respondent's claims for payment.

5.3. In support of its grievance, the Appellant argues, in summary, that the only question that arose during the arbitration proceedings was whether or not the Respondent was entitled to suspend gas deliveries on January 1, 2017. On the other hand, the parties have never claimed or argued that Respondent could legitimately cease supplying gas at a date later than January 1, 2017. In this regard, the Respondent points out that the Respondent has always argued that it was legitimate to stop supplying gas as of January 1, 2017. On the other hand, the Respondent did not present any alternative argument to show that the suspension of deliveries was valid as of February or March 2017. In the Appellant's view, the Respondent even acknowledged that penalties would have to be calculated from January 1, 2017, through April 2019 (or through November 2018), if the validity of the suspension of gas deliveries were to be denied. By taking the initiative to reconsider the issue of the Respondent's right to stop supplying gas at a date later than January 1, 2017, the Arbitral Tribunal dealt with a legal issue that had never been litigated by the parties, without first giving them the opportunity to express themselves.

Continuing its argument, the Appellant states why, in its opinion, the parties could not have foreseen the relevance of the elements relied upon by the Arbitral Tribunal. It endeavors to show that it could never

[9] Translator's Note: UNIDROIT, formally, the International Institute for the Unification of Private Law, is an intergovernmental organization whose objective is to harmonize international private law across countries.

have imagined that the Arbitrators would examine an issue not raised by the parties. According to the Appellant, if it had been raised by the Arbitral Tribunal, it could have presented its arguments and drawn the Arbitrators' attention to the context in which the letters of February 28 and March 18, 2017, were sent.

5.4. The Appellant cannot be followed when it argues for the 'effect of surprise'. At most, it can be conceded that the parties, in their respective submissions, focused on the suspension of gas deliveries as of January 1, 2017. Drawing the conclusion that the parties could in no way envisage that the Arbitral Tribunal would examine whether or not the cessation of gas supply was justified at a later date, is a step too far.

As the Appellant itself notes in its Appeal Brief, the Appellant argued that the Respondent was not justified in discontinuing gas supplies "as of January 1, 2017", for which reason it claimed payment of an amount of EUR 584 million as penalties (price reductions), as well as damages. In addition, the Appellant requested the Arbitral Tribunal order the Respondent to immediately resume the supply of gas. For its part, the Respondent requested that the counterclaims be dismissed in their entirety. Therefore, in order to decide on the counterclaims, the Arbitral Tribunal had to determine whether or not the Respondent was entitled to stop supplying gas, not only as of January 1, 2017, but also throughout the period covered by the counterclaims. Therefore, the Appellant should at least have considered the possibility that the Arbitrators might reconsider, at a date later than January 1, 2017, the question of the Respondent's right to suspend the delivery of gas.

It should be noted, secondly, that the Arbitral Tribunal accepted that the Respondent could legitimately refuse to supply gas from March 18, 2017, pursuant to the *non adimpleti contractus* rule enshrined in Art. 7.1.3 of the UNIDROIT Principles. However, the parties devoted considerable space in their respective submissions to the application of this Article in this instance. The Respondent, who argued that the Appellant's case should be rejected, admittedly claimed that this standard applied as of January 1, 2017, in view of the Appellant's conduct during 2016. It did not argue*, expressis verbis*, that the Appellant's conduct in the first months of 2017 also justified the suspension of gas deliveries under Art. 7.1.3 of the UNIDROIT Principles. Nevertheless, the question of the possible application of art. 7.1.3 of the UNIDROIT Principles was at the heart of the present dispute. In this respect, contrary to the argument put forwards by the Appellant, it is not decisive that the Arbitral Tribunal did not include in the list of issues to be resolved, under no. 459 of its Award, the question of the Respondent's right to suspend deliveries after 1 January 2017. The Appellant could not but be aware of the fact that this question was contentious - given that the Respondent was seeking the rejection of all the counterclaims by invoking, *inter alia*, Art. 7.1.3 of the UNIDROIT Principles - and therefore had to consider all the hypotheses, which were few in number, in which this standard could be applied during the entire period covered by its counterclaims. This is all the truer since the Respondent, as it convincingly states under nos. 105 and 106 of its Answer, argued several times in its post-hearing brief of January 31, 2020, that the Appellant had expressed its intention, at the beginning of 2017, to stop paying its debt. Therefore, the Appellant had to at least consider the hypothesis that the Arbitral Tribunal could justify the application of Art. 7.1.3 of the UNIDROIT Principles with regard to its conduct at the beginning of 2017. In any event, as it was seeking an order to resume deliveries, the Appellant should have expected from the outset that the Arbitral Tribunal would consider whether or not the suspension of deliveries was justified, and not only with regard to the situation prevailing

on January 1, 2017. The fact that the Arbitral Tribunal chose a different date than the one put forward by the parties, from which the cessation of deliveries was justified, was not unforeseeable, as this was a complex case which required the parties to examine all possible scenarios.

Nor can the Appellant be followed when it criticizes the Respondent for not having made a subsidiary finding that it had the right to stop all gas deliveries as of February or March 2017. It is also clear from the explanations given in paragraph 1.5 of the Reply brief that the Appellant's assertion that the Respondent acknowledged that the penalties should be paid until November 2018, in the event that the suspension of deliveries as of January 1, 2017, proved to be unjustified, is incorrect. As Respondent was seeking to dismiss the counterclaims in their entirety, the Arbitral Tribunal was well within its rights to consider whether the Respondent was entitled to stop supplying gas not only as of January 1, 2017, but also thereafter. With all due respect to the Appellant, the Arbitrators could not simply decide whether the suspension of gas supply as of January 1, 2017, was justified or not; they also had to decide whether the Appellant's claims should be upheld in full. Therefore, the Appellant could not exclude that the Arbitrators might choose another solution than the one it would have liked to see them adopt. In the end, the Arbitral Tribunal opted for a middle way, which is why it only partially admitted the counterclaim submitted by the Appellant.

It should also be noted, as rightly pointed out by the Respondent, that the letters dated February 28 and March 18, 2017, on which the Arbitral Tribunal relied, *inter alia*, to justify the application of Art. 7.1.3 of the UNIDROIT Principles from the latter date, were indeed produced by the parties and they had full opportunity to express themselves on their content and scope. The Appellant submits that the parties did not rely on said documents to justify the suspension of the gas supply from mid-March 2017. It also insists that the parties could not have foreseen the conclusions that the Arbitrators would draw on the basis of these documents, which is why they should have been questioned on this point by the Arbitral Tribunal beforehand. Such an argument falls wide of the mark. The right to be heard certainly allows each party to express its views on the facts that are essential to the award to be issued, but it does not require the arbitrators ask the parties to state their position on the scope of each of the documents produced, nor does it authorize one of the parties to limit the arbitral tribunal's autonomy in assessing a particular piece of evidence on the basis of the purpose for which it was submitted. Thus, if each party could decide in advance, for each piece of evidence produced, what evidentiary consequences the arbitral tribunal would be authorized to draw from it, the principle of free assessment of evidence, which is a pillar of international arbitration, would be rendered devoid of substance (judgments 4A_322/2015[10] of June 27, 2016, at 4.1; 4A 538/2012[11] of January 17, 2013, at 5.1).

Ultimately, the Appellant, by arguing for the 'effect of surprise', is in fact seeking a way that will enable it to attack the manner in which the Arbitrators have legally assessed the elements relevant, in their view, to the controversial issue of the suspension of the supply of gas, in order to arrive at the result contained in the operative part of their award. It is not possible to follow it in this direction.

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[10] Translator's Note: The English translation of this decision can be found here: https://www.swissarbitrationdecisions.com/alleged-unpredictability-reasons-rejected

[11] Translator's Note: The English translation of this decision can be found here: https://www.swissarbitrationdecisions.com/alleged-lack-authority-representatives-creates-jurisdictional-issue

In light of the foregoing, the argument of breach of the right to be heard must be rejected.

6.
In a second argument, the Appellant argues that the Arbitral Tribunal decided *ultra petita*.

6.1. Art. 190(2)(c) PILA allows an award to be challenged*, inter alia*, where the arbitral tribunal has ruled beyond the claims for which it was seized. Awards granting more or something other than that which was claimed (*ultra* or *extra petita*) fall within that provision. According to case law however, the arbitral tribunal does not go beyond the claims if ultimately it does not award more than the total amount sought by the claimant, yet assesses some of the elements of the claim differently from that party or when, having been called upon to declare that a certain legal relationship does not exist and having decided that the claim is without foundation, it finds that the legal relationship at issue exists and does so in the operative part of the award rather than rejecting the action. Nor does the arbitral tribunal breach the rule *ne eat iudex ultra petita partium* when it qualifies the claim in different legal terms than the parties used. The principle *jura novit curia*, which applies to arbitral proceedings indeed requires the arbitrators to apply the law ex officio without being limited to the arguments raised by the parties. They are accordingly entitled to resort to arguments which were not invoked because that is not a new claim or a different claim but merely a new qualification of the facts of the case. The arbitral tribunal is however bound by the subject and the volume of the submissions before it, in particular when a party qualifies or limits its claims in the submissions themselves (judgments 4A 244/2020 of December 16, 2020, at 5.1; 4A 314/2017[12] of May 28, 2018, at 3.2.1; 4A 50/2017[13] of July 11, 2017, at 3.1).

Having regard to the principle expressed in the adage *a maiore minus*, it is obvious that an arbitral tribunal does not rule *ultra* or *extra petita* by granting less to a party than it requested (Judgment 4A 314/2017, cited above, at 3.2.2).

6.2. The Appellant does not claim that the Arbitral Tribunal awarded a total amount higher than that claimed by the Respondent. However, it argues that the Arbitral Tribunal wrongly decided *ultra petita* by taking the liberty of making the finding it did under (a)(i)(b) of the operative part. According to the plaintiff, the Arbitrators went beyond the scope of the claim before them by finding that the Appellant had breached its contractual obligations by refusing to pay for the gas delivered by the Respondent on March 18, 2017. The award under appeal should therefore, on the basis of Art. 190(2)(c) PILA, be rejected.

6.3. It is immediately questionable whether the Appellant, under Art. 76(1)(b) LTF, has an interest worthy of protection in the admission of the argument in question. Concluding that an award is annulled solely on the grounds that its operative part contains an unnecessary finding and has no significance of its own does not satisfy any interest worthy of protection (Judgment 4A_50/2017, cited above, at 3.3). Assuming it to be admissible at all, the argument in question could only be rejected. The Arbitral Tribunal has in fact

[12] Translator's Note: The English translation of this decision can be found here: https://www.swissarbitrationdecisions.com/atf-4a-314-2017

[13] Translator's Note: The English translation of this decision can be found here: https://www.swissarbitrationdecisions.com/atf-4a-50-2017

not decided beyond the claims for which it was seized. To be convinced of this, it is sufficient to note that the Respondent submitted the following argument, reproduced in the Award under appeal (no. 137):

> Claimant seeks an Award against Respondent
>
> (a) Declaring that:
>
> i. Respondent breached its obligations under the 1995 and 1997 Gas Supply Contracts to
>
> (a) pay for delivered natural gas upon the lifting of the 2012 Sanctions in January 2016,
> (b) pay for new deliveries of natural gas thereafter in accordance with the terms of Clause 12 of each of the 1995 and 1997 Gas Supply Contracts, and
> (c) pay the accrued interest pursuant to Amendment No. 7 of the 1995 Gas Supply Contract on the outstanding debt;"
> (This is a word highlighted by the Federal Tribunal.)[14]

As the Respondent correctly points out, the Respondent not only argued that the Arbitrators should find that Appellant had failed to pay for gas already delivered when the sanctions were lifted in January 2016, but also failed to pay for new gas deliveries after that date. This interpretation is confirmed by the use of the term "thereafter". Moreover, the Respondent has not limited the scope of its argument under (a) i. (b). In these circumstances, it must be conceded that the Arbitral Tribunal did not go beyond the scope of the Respondent's submissions in finding that the Appellant had breached its contractual obligations by refusing to pay for the gas delivered on March 18, 2017. In view of the principle of *a maiore minus*, it is clear that the Arbitrators did not decide *ultra petita*.

In any event, it is clear that if the Arbitral Tribunal took the trouble to make the said finding in the operative part of its Award, it was to specify the extent to which it had granted the counterclaims made by the Appellant. It should be recalled that the Appellant claimed the payment of penalties as of January 1, 2017. The Respondent sought to have the counterclaims rejected in their entirety. The Arbitrators found that the Respondent had breached its contractual obligations during the period from January 1 to March 18, 2017, and therefore partially allowed the counterclaim. Accordingly, the Arbitral Tribunal's finding is within the framework set by the parties' respective submissions on the counterclaims.

In any event, even if the Arbitral Tribunal had wrongly included the finding as argued by the Appellant in the operative part of its award, this would not justify the intervention of the Federal Tribunal on the grounds of an alleged breach of Art. 190(2)(c) PILA, as the finding, which already appears in the reasons of the Award, does not, on its own, specifically prejudice the Appellant (Judgment 4A 50/2017, cited above, at 3.3).

7.
In a third and last plea, the Appellant argues that the award under appeal may be incompatible with substantive public policy (Art. 190(2)(e) PILA).

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

7.1. An award is incompatible with public policy if it disregards the essential and broadly acknowledged values which, according to prevailing views in Switzerland, should constitute the basis of any legal order (ATF 144 III 120 at 5.1; 132 III 389[15] at 2.2.3). Such is the case when it violates some fundamental principles of the law to such an extent as it is no longer consistent with the notions of justice and system of defining values (ATF 144 III 120 at 5.1). A holding of an arbitral tribunal contrary to substantive public policy is not sufficient; instead, the result of the award that must be incompatible with public policy (ATF 144 III 120 at 5.1). The incompatibility of the award with public policy, referred to in Art. 190(2)(e) PILA is a more restrictive concept than that of arbitrariness (ATF 144 III 120 at 5.1; judgments 4A_318/2018 of March 4, 2019 at 4.3.1; 4A 600/2016[16] of June 29, 2017 at. 1.1.4). According to the case law, a decision is arbitrary when it is manifestly untenable, seriously disregards a clear and undisputed legal norm or principle, or inexcusably offends justice and fairness; it is not enough that an alternative solution seems conceivable or even preferable (ATF 137 I 1 at 2.4; 136 III 316 at 2.2.2 and references cited). For there to be incompatibility with public policy, it is not sufficient to show that the evidence was wrongly assessed, a factual finding manifestly wrong, or a rule of law clearly violated (Judgment 4A_116/2016[17] of December 13, 2016, at 4.1; 4A 304/2013[18] of March 3, 2014 at 5.1.1; 4A 458/2009[19] of June 10, 2010 at. 4.1). The annulment of an international arbitral award on this ground of appeal is a rare occurrence (ATF 132 III 389[20] at 2.1).

In determining whether an award is compatible with public policy, the Federal Tribunal does not freely review the legal assessment of the arbitral tribunal on the basis of the facts found in its award. The only thing that matters, regarding the decision to be made in terms of Art. 190(2)(e) PILA, is the question of whether the result of this legal assessment made completely independently by the arbitrators is compatible or not with the jurisprudential definition of substantive public policy (Judgment 4A 157/2017[21] of December 14, 2017, at 3.3.3).

7.2. In support of its plea, the Appellant alleges that the Award is contrary to substantive public policy insofar as it orders it to pay interest at 7.5% per annum, calculated from the date of the Award, despite the fact that the Arbitrators were well aware that it is unable to pay the amounts it is required to pay, due to the new sanctions imposed on Iran by the United States of America since November 2018. According to the Appellant, it is unlikely that it will be able to pay the amounts it is required to pay in the coming

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[15] Translator's Note: The English translation of this decision can be found here: http://www.swissarbitrationdecisions.com/violation-of-public-policy-notion-of-public-policy-exclusion-of-

[16] Translator's Note: The English translation of this decision can be found here: https://www.swissarbitrationdecisions.com/cas-award-platini-case-upheld-swiss-supreme-court

[17] Translator's Note: The English translation of this decision can be found here: https://www.swissarbitrationdecisions.com/atf-4a-116-2016

[18] Translator's Note: The English translation of this decision can be found here: https://www.swissarbitrationdecisions.com/definition-public-policy-reaffirmed

[19] Translator's Note: The English translation of this decision can be found here: https://www.swissarbitrationdecisions.com/challenge-of-arbitrators-sitting-on-cas-panel-rejected-claim-of-

[20] Translator's Note: The English translation of this decision can be found here: http://www.swissarbitrationdecisions.com/violation-of-public-policy-notion-of-public-policy-exclusion-of-

[21] Translator's Note: The English translation of this decision can be found here: https://www.swissarbitrationdecisions.com/atf-4a-157-2017

months, or even years, as there is no indication that the U.S. sanctions could be lifted in the near future. It would thus run the risk of seeing its debt increase continuously due to the accumulation of interest and of never being able to repay its debt. Finally, referring to the *Matuzalem* decision (ATF 138 III 322[22]), the Appellant maintains that the award under appeal is contrary to substantive public policy because it seriously infringes its economic freedom.

7.3. Such a plea does not stand up to scrutiny. The Arbitral Tribunal considered that the American sanctions against Iran did not prevent the Appellant from paying its debt. Under no. 529 of the Award, the Arbitrators stated as follows:

> A._____ next submits that the 7.5% interest rate contemplated in Amendment No. 5 should not be applied as B._____'s witness [name omitted] testified that the applicable rate for late payment should be less than 7.5% p.a. "if the late payment is due to an inability to pay as opposed to a decision not to pay". This – so says A._____ – is precisely the situation that A. _____ is in. Indeed, because of the re-imposition of U.S. sanctions in 2018 and the disconnection of Iranian banks from the SWIFT system, it is unable to pay [Respondent's Post Hearing Brief dated 31 January 2020, paras 232- 233]. It is not clear to the Tribunal how the re-imposition of US sanctions in 2018 would affect the applicable post-award interest rate, especially in circumstances where there are currently no EU or UN sanctions that would make payment of an award in euros illegal. Neither has A._____ proved that US sanctions are constitutive of force majeure as a matter of fact. The Tribunal therefore dismisses this argument.[23]

Therefore, the Appellant cannot be followed when it tries to call into question the considerations made on this point by the Arbitrators, by arguing before the Federal Tribunal that the sanctions imposed by the United States would prevent it from paying its debt to the Respondent and from paying the related interest. It is true that the Appellant refers to a passage in the award under appeal in which the Arbitrators, in considering whether to order the Respondent to resume delivery of the natural gas, considered that this was not justified, since, according to the Appellant's own expert, it was "practically impossible" for it to pay for the gas because of the US sanctions (Award, no. 656). This being the case, it cannot be inferred from this isolated passage that the Arbitral Tribunal endorsed the argument of the Appellant that it was impossible for it to pay its debt and the related interest due to the U.S. sanctions against Iran since November 2018. Rather, the opposite solution is required in view of the clear statement of the Arbitrators under no. 529 of the Award. The convincing explanations given in nos. 148 to 152 of the Respondent's Answer confirm this conclusion. When ordering the resumption of gas deliveries, the Arbitrators seem to have referred only to the alleged "practical impossibility" of the Appellant to pay its debt, on the basis of a hypothetical reasoning, and referring exclusively to the opinion of the Appellant's expert. It is therefore not possible to argue, as the Appellant does, that the Arbitral Tribunal "clearly held in the contested award that the Appellant was unable to make any payment to the Respondent" (Appeal, no. 105).

It should also be noted that the arbitral tribunal submitted the following question to the parties:

> Are there currently any UN sanctions against Iran relevant for this case? Are there any

[22] Translator's Note: The English translation of this decision can be found here: http://www.swissarbitrationdecisions.com/landmark-decision-of-the-swiss-supreme-court-international-arbit

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

> international bodies (including the EU) sanctions applicable which would be enforceable or recognized in Switzerland? What is the status of these sanctions, if any, under Swiss law? What would be the sanctions relevant for this case that would be a part of Swiss international "Ordre public" (especially under Art. 190.2 (e) Swiss Private International Law Act)? In particular, would any of these sanctions hinder the Tribunal from granting the Claimant's prayer for relief?" (judgment, no. 658).[24]

After having set out the respective positions of the parties on these issues, the Arbitrators considered that there was, at present, no obstacle to the making of an award ordering the Appellant to pay the Respondent a sum of money denominated in euros.

For the rest, the Appellant bases its argument, inadmissibly, on elements that are not apparent from the Award, in particular when it argues that its situation has worsened since February 2020, due to the decision taken by the Financial Action Task Force to place Iran on the blacklist of high-risk jurisdictions presenting substantial threats to the international financial system, or when it states that the American sanctions are unlikely to be lifted in the near future.

In view of the above, it is not possible to follow the Appellant when it argues that the Award seriously infringes its economic freedom, insofar as the American sanctions against Iran would prevent it from paying its debt. It must be emphasized, in view of the considerations made by the Arbitrators, that the Appellant's reasoning is based on an incorrect premise. Furthermore, the Appellant does not establish that it does not have the necessary resources to pay the amounts owed to the Respondent. Therefore, it cannot be held that the award under appeal is contrary to substantive public policy, since the Appellant has not shown how having to pay the Respondent the amount determined by the Arbitrators and the interest thereon would remove or limit its economic freedom to such an extent that the basis of its existence would be endangered.

For the rest, whatever the Appellant maintains, it should be noted that its situation is not comparable to that of the professional player Matuzalem, who was suspended from all soccer activities until he paid a debt of more than EUR 1 million, plus interest, to his former club (ATF 138 III 322[25]). Unlike the aforementioned footballer, the Appellant can, in fact, continue to carry out its commercial activities and thus derive significant income. Moreover, the financial resources of a company, active in the gas transactions sector, certainly have nothing to do with those of a professional footballer.

In short, the plea of incompatibility with substantive public policy is unfounded.

8.
From these conclusions it follows that the appeal must be rejected. The Appellant, who is unsuccessful, must pay the costs of the federal proceedings (Art. 66(1) LTF) and pay costs to the Respondent (Art. 68(1) and (2) LTF).

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[24] Translator's Note: In English in the original text.
[25] Translator's Note: The English translation of this decision can be found here: http://www.swissarbitrationdecisions.com/landmark-decision-of-the-swiss-supreme-court-international-arbit

For these reasons, the Federal Tribunal pronounces:

1.
The appeal is rejected.

2.
The judicial costs, set at CHF 200’000, are to be borne by the Appellant.

3.
The Appellant shall pay the Respondent compensation of CHF 250’000 for the federal proceedings.

4.
This decision shall be communicated to the parties' counsel and to the Arbitral Tribunal located in Geneva.

Lausanne, February 10, 2021

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

The Presiding Judge: The Clerk of the Court:

Hohl Carruzzo