4A_146/2012[1]

Judgment of January 10, 2013

First Civil Law Court

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

State X._____,
Represented by Mrs. Dominique Brown-Berset and Mrs. Dominique Ritter
Appellant,

v.

Company Z_____,
Represented by Mr. Wolfgang Peter, Mr. Sébastien Besson and Mrs. Julia Xoudis,
Respondent,

Facts:

A.
A.a
On February 29, 1968, the State X._____ (hereafter: the Appellant) and the Company Z._____ (hereafter: the Respondent) entered into a Participation Agreement for the construction, maintenance, and operation of a pipeline on the Appellant's territory.

Art. 12 (a) of the Participation Agreement contains an arbitration clause worded as follows:

> *"If at any time within the period of this Agreement or thereafter, any doubt, difference or dispute shall arise between the Parties concerning the interpretation or execution of this Agreement or anything connecting therewith or concerning the rights and liabilities of the Parties hereunder, the same shall, failing any*

[1] Translator's note: Quote as State X._____ *v.* Company Z._____, 4A_146/2012. The original decision is in French. The text is available on the website of the Federal Tribunal www.bger.ch

> *agreement to settle it by other means, be referred to arbitration. Each Party shall appoint one arbitrator. If such arbitrators fail to settle the dispute by mutual agreement or to agree upon a Third Arbitrator, the President of the International Chamber of Commerce in Paris shall be requested to appoint such Third Arbitrator. The decision of the Board of Arbitrators so appointed shall be final and binding upon the Parties."*[2]

Appellant's exhibit 5*bis* proposes the following French translation of the aforesaid clause:

> *"Si, à quelque moment que ce soit pendant la durée du présent Accord ou ultérieurement, un doute, différend ou litige quelconque se produit entre les Parties concernant l'interprétation ou l'exécution de cet Accord ou toute matière y relative, ou concernant les droits et obligations des Parties découlant de cet Accord, et à défaut d'accord sur un autre mode de règlement, ce doute, différend ou litige sera soumis à l'arbitrage. Chaque Partie nommera un arbitre. Si ces arbitres ne règlent pas le litige d'un commun accord, ou s'ils ne se mettent pas d'accord sur le choix d'un Troisième Arbitre, il sera demandé au Président de la Chambre de commerce internationale [CCI] à Paris de nommer ce Troisième Arbitre. La décision du Tribunal arbitral ainsi constitué sera définitive et obligatoire pour les Parties."*

A.b

On October 14, 1994, the Respondent initiated arbitration proceedings based on the arbitration clause by appointing its arbitrator and inviting the Appellant to appoint its own. The Appellant refused because the object of the dispute was insufficiently identified and no prior negotiations had taken place.

Faced with this refusal, the Respondent seized the President of the Paris District Court on August 22, 1995, seeking the appointment of the arbitrator. The request was rejected at first but granted at the end of a number of procedural events that need not be recalled here. On February 1, 2005, indeed, the First Chamber of the French Cour de Cassation rejected the Appellant's appeals against the judgments of March 29 and November 8, 2001, by which the Paris Court of Appeal gave the Appellant a time limit to appoint its arbitrator and then appointed an arbitrator due to the Appellant's failure to do so. The rejection of the appeals was justified as follows:

> "Considering, however, that the impossibility for a party to seize a jurisdiction, albeit an arbitral one, entrusted with deciding its claim to the exclusion of any state court and to exercise in this manner a right belonging to the international public policy consecrated by the principles of international arbitration and Art. 6 of the European Convention on Human

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

> Rights, constitutes a denial of justice justifying the international jurisdiction of the President of the Paris District Court in its mission of assistance and cooperation of the state court to the constitution of an arbitral tribunal when there is a connection with France; that the judgment under appeal having stated that in the present state of the jurisprudence of the Appellant's Supreme Court Z._____ company was no in a position to seize the courts [of the Appellant] or [of the Respondent] to appoint an arbitrator in lieu [of the Appellant] which refused to do so, since [the Appellant] had specifically refused to acknowledge their respective jurisdiction to do so, such impossibility being general and lasting and, finally, that the connection with France, albeit thin, based on the choice of the President of the ICC in Paris for the possible appointment of a third arbitrator, was the only one of which Z._____ company could usefully avail itself to ensure the realization of their common intent to resort to arbitration, the Court of Appeal correctly deducted that this constituted a denial of justice to company Z._____ justifying the international jurisdiction of the French Courts; that by holding that when the President of the District Court denied jurisdiction to issue a decision he disregarded the scope of his powers and thus decided *ultra vires* negatively speaking, the Court of Appeal justified its decision in accordance with the law."

A.c

The appeals to the Cour de Cassation notwithstanding, the two arbitrators issued a first procedural order on October 8, 2002.

On December 24, 2003, the Respondent filed a Statement of Claim. It submitted that the Appellant should be ordered to pay some USD 800 million representing half the value of the assets connected to the 1968 Participation Agreement and moreover damages corresponding to the amount that a company by the name of Y._____ could be found owing at the end of another pending arbitration.

In its Statement of Defense of April 23, 2004, the Appellant asked the Arbitral Tribunal to deny jurisdiction because its arbitrator was appointed in violation of the arbitration clause. Moreover, it challenged the independence and the impartiality of the Respondent's arbitrator as to the latter's second head of claim. As to the merits the Respondent submitted that the two requests should be rejected and made a counterclaim seeking damages from its opponent for breach of the Participation Agreement.

On July 19, 2004, the Arbitrators set the seat of the arbitration in Geneva after the Respondent, by letter of December 24, 2003, accepted the proposal made to this effect

by the Appellant on October 21, 2003, with each party maintaining its position as to the validity of the appointment of the Appellant's arbitrator by the French Court.

In the framework of a new exchange of briefs the Appellant maintained its objection concerning this appointment despite the rejection of these appeals by the Cour de Cassation (see A.b above). The Parties and the Arbitrators therefore agreed that the issue as to the regularity of the composition of the Arbitral Tribunal would be addressed at first. After a first exchange of briefs, the Arbitral Tribunal held a hearing for oral arguments as to this issue on December 18, 2006, and then ordered a new exchange of briefs.

B.

On February 10, 2012, the Arbitral Tribunal issued an award entitled Partial Award, pursuant to which it rejected the Appellant's objections against the appointments of its arbitrator and of the Respondent's arbitrator, thus admitting the regularity of its composition.

In the award the Arbitral Tribunal emphasizes that the first duty of a signatory of an arbitration agreement is to appoint an arbitrator. According to the Arbitral Tribunal, the absence in the arbitration clause in dispute of a fallback provision applicable in case of breach of this obligation is not a loophole but rather confirms the inevitability of such a duty. Consequently, when a party, such as the Appellant, fails to appoints its arbitrator, the opponent is entitled to seize the State Court with jurisdiction to correct such a deficiency. This is a rule applied in many countries, including Switzerland (Art. 379 of the Federal Law on International Private Law of December 18, 1987 [PILA][3] RS 291). In the case at hand, the Arbitrators point out that the Appellant had the opportunity to put its arguments before the French Courts four times, that the right to be heard of all parties has been more than complied with, and that the decision of the Paris Court of Appeal to appoint an arbitrator on the Appellant's behalf, taken in order to avoid a possible denial of justice, was confirmed by the French Cour de Cassation. They conclude that the decision is perfectly valid and cannot legitimately be called into question.

As to the independence and the impartiality of the Respondent's arbitrator in connection with the second head of claim, the Arbitral Tribunal considered that it was not in a position to decide the issue for the time being as it is too closely connected to the merits of the case.

C.

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

On March 14, 2012, the Appellant filed a civil law appeal, inviting the Federal Tribunal to annul the award of February 10, 2012, and to find "the lack of jurisdiction of the arbitral body constituted in this case." It also sought a stay of enforcement and the removal of the names of the Parties in the version of the judgment that will be published on the internet and in the official register as required.

The following day, the Appellant filed a second version of its appeal in which it made some minor changes to the initial text which a computer breakdown had prevented it from finalizing. A stay of enforcement was issued *ex parte* by Presidential decision of March 20, 2012.

The Respondent submitted its answer on May 7, 2012, arguing that the matter was not capable of appeal and, in the alternative, that the appeal should be rejected. It also applied for an additional time limit to modify its answer if the Federal Tribunal take the Appellant's second brief into account.

On May 30 and June 18, 2012, the Appellant and the Respondent filed a reply and a rejoinder respectively in which they maintained their previous submissions.

The Arbitral Tribunal submitted a list of the exhibits in the file of the arbitration and did not express a view as to the merits of the appeal.

Reasons:

1.
According to Art. 54 (1) LTF,[4] the Federal Tribunal issues its decision in an official language,[5] as a rule in the language of the decision under appeal. When the decision was issued in another language (here in English) the Federal Tribunal resorts to the official language chosen by the parties. Before this Court, they both used French. The judgment will therefore be issued in French.

2.
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 (Art. 77 (1) LTF).

2.1

[4] Translator's note: LTF is the French abbreviation for 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.

The seat of the arbitration was set in Switzerland. At least one of the parties (in this case both) did not have its domicile in Switzerland at the decisive time. The provisions of chapter 12 PILA are accordingly applicable (Art. 176 (1) PILA).

A civil law appeal is admissible against the decisions of arbitral tribunals pursuant to the requirements of Art. 190 to 192 PILA (Art. 77 (1) LTF). The object of the appeal may be a final award, which ends the arbitration on substantive or procedural grounds; a partial award, which addresses part of the quantum of a claim in dispute or one of the various claims, and a preliminary or interim award as the case may be, deciding one or several substantive or procedural issues (on these notions see ATF 130 III 755 at 1.2.1 p. 757). The contents of the decision under appeal and not its title are decisive to assess whether the matter is capable of appeal. (see ATF 136 III 200 at 2.3.3 p. 205, 597 at 4).

When an arbitral tribunal decides the regularity of its composition in a separate award, it issues a preliminary award (Art. 186 (3) PILA). Such is the case here, although the award under appeal is improperly entitled "Partial Award". Pursuant to Art. 190 (3) PILA the award could be appealed to the Federal Tribunal only on the grounds of irregular composition (Art. 190 (2) (a) PILA), or lack of jurisdiction (Art. 190 (2) (b) PILA) of the arbitral tribunal. Only these two grievances were submitted to the review of this Court in this case.

2.2
The Appellant is particularly affected by the award under appeal, which compels it to submit to an arbitral tribunal, the jurisdiction and the regular composition of which it challenges. Therefore it has an interest worthy of protection, which gives it standing to appeal (Art. 176 (1) LTF).

2.3
The Appellant states – without contradiction by the Respondent – that the award under appeal was first communicated by fax on February 13, 2012, and then by registered letter that reached its counsel on February 20, 2012.

Should the first method of transmission of the award be considered valid, the thirty-day time limit from the notification of the final award (Art. 100 (1) LTF), during which the appeal must be sent to the Federal Tribunal, would end on March 14, 2012. This means that only the first appeal brief, mailed that day, was filed in a timely manner, excluding the second brief, as it was mailed the following day. Conversely, if the notification of the aforesaid award by fax did not start the thirty-day time limit to appeal, as is the case in particular for the awards of the Court of Arbitration for Sport (judgment 4A_392/2010[6] of January 12, 2011, at 2.3.2), the thirty-day time limit would instead

[6] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/notification-of-an-award-by-fax-time-limit-to-appeal-does-not-ru/

commence on February 21, 2012, so the second appeal brief would have also been properly filed before the time limit expired. However one does not know if the Parties agreed on a specific manner of notification, such as the communication of the original by registered mail, for the awards to be issued in the arbitration involved.

Be this as it may, comparing the two briefs shows that the second essentially rectifies some formal errors contained in the first one and is therefore not an additional appeal, which would be inadmissible due to late filing. There is accordingly no reason for this Court not to take into consideration the second brief to decide the appeal at hand. There is no need in this respect to grant the Respondent's request for an additional time limit to modify its answer as may be required by the second appeal brief. Indeed, the Respondent had the time to do so during the exchanges of briefs as the two versions of the appeal were communicated to the Respondent with the invitation to file its answer and also because it was given the opportunity to submit a rejoinder.

Consequently the following will be based on the grounds set forth in the second appeal brief.

2.4
The Appellant's submission as to the removal of the names of the parties in this judgment is not reasoned as required and has no independent bearing since, as a matter of principle, the judgments of the Federal Tribunal are published in an anonymous format pursuant to Art. 27 (2) LTF.

Moreover, it is doubtful that the Appellant's intent to preserve anonymity is realistic, this being a *cause célèbre*, which has been covered extensively in published commentaries that used the names of the parties, particularly in France (see among others HORATIA MUIR WATT, Revue de l'arbitrage, 2005, p. 695 ss; THOMAS CLAY, Revue critique de droit international privé, 2006, p. 142 ss; SIMON HOTTE, Dalloz, 2005, p. 2728 ss; PHILIPPE FOUCHARD, Revue de l'arbitrage, 2002, p. 442 ss; DANIEL COHEN, Journal du droit international, 2002, p. 503 ss; PIERRE LALIVE, Bulletin de l'Association Suisse de l'Arbitrage [ASA], 2002, p. 553 ss), with one commentator writing that the judgment of the Cour de Cassation of February 1, 2005, was "in the pantheon of the great decisions of arbitration law" (CLAY, op. cit., p. 142 *in fine*).

2.5
When deciding a civil law appeal against an arbitral award the Federal Tribunal reviews only the grievances raised and reasoned by the appellant (Art. 77 (3) LTF).

As pointed out in a footnote on page 4 of its reply, the Appellant does not challenge the award of February 10, 2012, to the extent that it addresses the independence and the

impartiality of the arbitrator appointed by the Respondent (see *litt.* b last § above). That issue is therefore not before this Court.

2.6
The Federal Tribunal bases its decision on the facts found in the award under appeal (see Art. 105 (1) LTF). It may not rectify or supplement *ex officio* the factual findings of the arbitrators, even if the facts were 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). The factual findings of the award under appeal may however be reviewed if one of the grievances mentioned at Art. 190 (2) PILA is raised against them or when some new facts or evidence are exceptionally taken into consideration in the framework of the civil law appeal (judgment 4A_428/2011[7] of February 13, 2012, at 1.6 and the cases quoted).

The Appellant disregards these principles when devoting long parts of its briefs to state an array of facts not found in the award under appeal without invoking any grievance provided by Art. 190 (2) PILA enabling it to demand some additional factual findings in addition to those upon which the Arbitrators based the award. This is particularly the case for its allegation under heading "new pertinent facts (Art. 99 (1) LTF)" concerning the existence of a decree issued by its Minister of Finance on July 21, 2011, intended to clarify its official position towards the state in which the Respondent is based (appeal nr 82 to 85) or with regard to its detailed explanations, supported with a diagram, as to some other contracts allegedly related to the Participation Agreement and to the arbitration clauses therein (reply nr 44 to 60).

However there is no reason not to take into account the legal opinion produced by the Appellant as exhibit 52, namely a note dated March 14, 2012, emanating from professor [name omitted] (judgment 4A_190/2007 of October 10, 2007, at 5.1).

2.7
Moreover it must be pointed out that the legal argument contained in the reply goes way beyond that in the appeal brief. In doing so the Appellant overlooks the fact that a party may not use its reply to invoke some factual or legal arguments which it did not submit in a timely manner, namely before the non-extendable time limit to appeal expired or to supplement insufficient reasons beyond the time limit (judgment 4A_14/2012[8] of May 2, 2012, at 4).

3.

[7] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/dismissal-of-an-appeal-to-set-aside-a-cas-award-on-the-grounds-o/

[8] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/an-international-arbitral-tribunal-seating-in-switzerland-is-gen/

3.1
In a first group of arguments, the Appellant relies on Art. 190 (2) (a) PILA to argue that the Arbitral Tribunal was irregularly composed. Relying upon the legal opinion issued by professor [name omitted] on September 20, 2001, it argues that the nomination of its arbitrators was not done in accordance with Art. 12 (a) of the Participation Agreement, an issue that the French Courts would not have addressed. Relying on the opinion issued by professor [name omitted] in its note of March 14, 2012, the Appellant moreover challenges the view of the French Cour de Cassation according to which the right to seek the assistance of the State Court can indirectly be connected to Art. 6(1) of the European Convention on Human Rights (ECHR; RS 0.101). Moreover, by reference to a legal opinion issued on October 8, 2001, by professor [name omitted] it claims that it could not be compelled to appoint an arbitrator as long as the conflict lasts between it and the country in which the Respondent has its seat. Furthermore, still according to the Appellant, an award issued by an arbitral tribunal constituted without abiding by the will of the parties or the law of the country in which the arbitration will henceforth take place, namely Switzerland, would not be recognized and enforced under Art. V (1) (d) of the New York Convention of June 10, 1958 of the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention; RS 0.277.12).

In its answer, the Respondent denies that the matter is capable of appeal in this respect on three grounds: first, because the Federal Tribunal does not have the power to review the decision taken by the French Cour de Cassation; second, because the Appellant abused its right by invoking this grievance when the intervention of the French Courts was the consequence of its breach of its duty to appoint an arbitrator and because it specifically recognized that the French decisions were binding the parties; finally, because it claims, as preliminary matter, the right to invoke the recognition of these decisions in Switzerland to the extent that they confirm the appointment of the Appellant's arbitrator, the requirements for such recognition (Art. 25 and 26 PILA) being fulfilled in its view. As to the merits, the Respondent challenges the interpretation of the arbitration clause made by the Appellant. It also argues that the French law of international arbitration would be the only pertinent one to determine whether the arbitrator was regularly appointed because his appointment process was initiated several years before the seat of arbitration was set in Geneva. Finally, according to the Respondent, the opportunity to recognize the award would not be a pertinent factor to decide the regularity of the composition of an arbitral tribunal.

3.2
Art. 190 (2) (a) – which makes it possible to sanction the irregular composition of the arbitral tribunal – covers two grievances: the breach of the contractual (Art. 179 (1) PILA) or legal (Art. 179 (2) PILA) rules on the appointment of arbitrators on the one hand and the breach of the rules concerning the impartiality and the independence of

the arbitrators on the other hand (Art. 180 (1) (b) and (c) PILA) (PIERRE-YVES TSCHANZ, in Commentaire romand, Loi sur le droit international privé - Convention de Lugano, 2011, nr 48 *ad* Art. 190 PILA). Only the former argument is before the Federal Tribunal in this case. The legal issues it raises will be reviewed freely (see ATF 136 III 605 at 3.1 and the case quoted), but exclusively within the framework of the arguments put forward by the Appellant (see *mutatis mutandis* ATF 134 III 567 at 3.1; also see: TSCHANZ, op. cit., nr 49 *ad* Art. 190 PILA).

3.3
The case at hand has a two salient features, which influence the grievance considered being capable of appeal. First, it is a fact that the Appellant's arbitrator was appointed by decision of a French Court (the Paris Court of Appeal on November 8, 2001) that the Appellant challenged – without success – in the highest civil court of the French judicial order (the Cour de Cassation, which issued its judgment on February 1, 2005). Secondly, that the appointment took place before the seat of the arbitration was set in another country (Switzerland, and more specifically Geneva) by the arbitrators appointed (decision of July 19, 2004, ratifying the agreement reached by the parties in December 2003).

3.3.1 It was shown (see at 2.2) that for the appeal to be admissible the Appellant must have an interest worthy of protection. An interest worthy of protection is found in the practical value that the Appellant would derive from the appeal being admitted (ATF 137 II 40 at 2.3 p. 43). From this point of view, considering the second circumstance just emphasized, one may reasonably wonder whether the Appellant, in challenging the award of February 10, 2012, still has any practical interest in indirectly challenging the decision of the Court of Appeal of Paris, ratified by the French Cour de Cassation, to appoint its arbitrator, bearing in mind that it concedes having no objection to make as to the honesty or competence of the arbitrator appointed. Assuming that the appeal were admitted as to this issue and the award annulled, it would be enough for the Respondent to call upon the competent judge of the canton of Geneva – the seat of the arbitration – to have the same person appointed as arbitrator for the Appellant in accordance with Art. 179 (2) and (3) PILA. The Appellant would then be in a situation identical to that which results from the award under appeal. The Appellant would object in vain in this respect that the seat of the arbitration was not validly set in Geneva because it was chosen by an arbitral tribunal allegedly composed irregularly. Let alone that it was incumbent upon the parties to choose the seat of the arbitration (Art. 176 (3) PILA), which they did, the Arbitral Tribunal having simply approved their choice, such objection, if it were upheld, would result in the entire chapter 12 PILA being inapplicable because the first of the two cumulative requirements of Art. 176 (1) PILA would fail, consequently rendering the matter entirely incapable of appeal *ipso jure*.

3.3.2 The first feature mentioned above excludes the possibility that the Federal Tribunal would re-examine the justification of the decisions issued by the French Courts, including the highest one, as to their international power to appoint an arbitrator in lieu of the appellant because the Respondent was facing the risk of denial of justice. It must also be noted that Decree nr 2011-48 of January 13, 2012, reforming the arbitration law at Art. 1505 (4) of the Code of Civil Procedure, codified the jurisprudence of the judgment of the Cour de Cassation of February 1, 2005, by stating that such a risk is sufficient ground to justify calling upon the French State Court in an international arbitration matter.

It is true that according to the case law of the Federal Tribunal, when the State Court is seized of a request to appoint an arbitrator, its decision is issued in non-contentious proceedings and does not become *res judicata.* This means that the arbitrators still retain the ability to review the jurisdiction and the regularity of the composition of the arbitral tribunal in an independent manner (ATF 115 II 294 at 2a; 110 Ia 59 at 2b). The interim decision issued as to this issue is therefore subject to immediate appeal to the Federal Tribunal (Art. 190 (3) LTF) on the grounds stated at Art. 190 (2) (a) and (b) PILA (see TSCHANZ, op. cit., nr 47 *ad* Art. 190 PILA).

However, the legal situation in this case goes far beyond that just outlined in an ordinary case of recourse to the Swiss State Court to appoint an arbitrator in an arbitration governed by Art. 176 ff PILA. First, the appointment procedure was conducted in a country other than that in which the seat of the arbitral tribunal was set *pendente lite* and on the basis of another law than the *lex fori.* It is inaccurate to argue, as the Appellant does, that the appointment of its arbitrator was merely an administrative measure, non-contentious in nature, and comparable to the appointments of arbitrators made by the Court of Arbitration of the International Chamber of Commerce (reply nr 63). It appears to the contrary from the explanations of the Arbitral Tribunal and the exhibits in the file that the issue as to the international jurisdiction of the French Courts to appoint an arbitrator in lieu of the party failing to do so was amply discussed and that the Appellant had the opportunity to develop its arguments, in particular with the assistance of legal opinions, before a decision was issued by the Highest Civil Court of the French legal order in this respect, not *prima facie*, but in full awareness of all the pertinent elements. Finally, § 2.2.12 of the award under appeal shows that the Arbitrators did not at all express any intent to re-examine the decisions taken by the French Courts on this issue in dispute. To have done so would have been quite surprising as one can hardly imagine, at least in practice, that an arbitral tribunal would feel authorized to review whether or not the Supreme Court of the land approving the appointment of one of its two members had jurisdiction to do so under its own law.

There is therefore no need to examine whether or not the formal requirements of recognition in Switzerland of the decisions issued by the Court of Appeal of Paris and the French Cour de Cassation (Art. 25 and 26 PILA) are met, as the Respondent argues.

The consequence is that the Appellant cannot indirectly question the decisions taken by the French Courts as to their international jurisdiction to appoint an arbitrator against its will. Particularly because in their oral arguments before the Arbitral Tribunal at the hearing held in Paris on December 18, 2006, its representatives expressly chose not to do so because the judgment of the Cour de Cassation was final and binding and consequently bound the parties, the Panel, and all national courts (see the excerpt of the oral argument reproduced in the original and translated into French at page 24 and in the middle of page 25 of the Reply).

Also inadmissible are the arguments based on the conflict existing between the state in which the Respondent has its seat and the Appellant, which it already submitted to the French Courts with the assistance of the legal opinion of professor [name omitted] and which were rejected by them, at least implicitly. Moreover such arguments appear inadmissible to the extent that they rely in part on an inadmissible new fact (see above at 2.6) and because they were not developed in a manner consistent with Art. 42 (2) LTF before the filing of the Reply (nr 98 to 105; see 2.7 above).

3.3
Ultimately, once the criticism that the matter is not capable of appeal has been set aside, the only issue remaining within the framework of Art. 190 (2) (a) PILA is whether or not Art. 12 (a) of the Participation Agreement prevented the appointment of the Appellant's arbitrator by a State Court, whichever it may be. On the basis of its judgment of February 1, 2005, it would not appear that the French Cour de Cassation dealt with this issue although the Court had the legal opinion of professor [name omitted] devoted to this issue.

Before addressing the argument and in order to refute in advance an objection by the Appellant, it must be pointed out that pursuant to well-established case law, which is applicable here by analogy, the determination of the issue cannot depend upon whether or not a possible future award on the merits may be recognized and enforced under the New York Convention (see *mutatis mutandis* ATF 118 II 353 at 3d and judgment 4A_654/2011[9] of May 23, 2012, at 3.4 *in fine*).

3.4
The determination of the issue at hand requires an interpretation of the arbitration clause at Art. 12 (a) of the Participation Agreement. This shall be done in the light of

[9] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/motion-to-set-aside-a-tas-award-dismissed-by-the-federal-tribuna/

Swiss law according to Art. 178 (2) PILA and of case law (ATF 129 III 727 at 5.3.2 p. 736) as the seat of the arbitration has been set in Geneva.

3.4.1 The interpretation of an arbitration agreement is conducted in accordance with the general rules of contract interpretation. However, case law shows that the existence of a validly concluded arbitration agreement should not be admitted too easily when the issue is disputed (ATF 138 III 29 at 2.2.3; 129 III 675 at 2.3 p. 680 ff; 128 III 50 at 2c/aa p. 58; 116 Ia 56 at 3b p. 58). This is not the case here, however, because the Appellant does not challenge the validity of the arbitration clause (see reply nr 72).

Seized of a dispute as to the interpretation of a contract, a court must first seek to determine the real and common intent of the parties, on the basis of evidence, without heeding the inaccurate expressions the parties may have used (Art. 18 (1) CO[10]; ATF 131 III 280 at 3.1). This so-called subjective interpretation is a matter of fact and assessment of the evidence (ATF 132 III 626 at 3.1; 131 III 606 at 4.1 p. 611).

If the Court cannot sufficiently establish the real intent of the parties, or if it finds that one of the contracting parties did not understand the real will expressed by the other, it will seek to determine the meaning they could and should give to their reciprocal expressions of will according to the rules of good faith (principle of legitimate expectation; ATF 136 III 186 at 3.2.1). This objective interpretation is a matter of law and takes place not only in the light of the text and context of the terms but also on the basis of the circumstances preceding and accompanying them, to the exclusion of subsequent circumstances (ATF 136 III 186 at 3.2.1; 119 II 449 at 3a).

3.4.2 With reference to the legal opinion of professor [name omitted] the Appellant argues in substance that what is involved here is not a "pathological clause by accident or oversight" but a clause that the parties consciously accepted the limitations of, with a view to protecting the arbitration from any state intervention other than that of their respective courts, considering the personality of the contracting parties (a sovereign state and a national company of another sovereign state), the strategic objective of the contract (using the territory of the Appellant to carry oil to its destination directly) and its highly secret character, required by the political situation. For this is the reason, the seat of the arbitration and that of the applicable law were intentionally omitted in the arbitration clause. In other words, the parties intended to exclude a third party intervention, even a private one, in the appointment of the co-arbitrators, with the consequence that should one of the states fail to appoint its arbitrator, the arbitration would not take place. As to the possible choice of a third arbitrator, it would be made by a private person (the president of the ICC) again with the same intention.

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

According to the Appellant the resolution process of the disputes that could oppose the parties would specifically be organized as follows: in a first phase, the contracting parties would attempt to settle the dispute amicably. Should their negotiations fail, each would appoint its arbitrator; failing this, the arbitration would not take place, the parties having intentionally accepted the possibility of a stalemate in the arbitral proceedings, yet without excluding recourse to their national jurisdictions. Once appointed, the two arbitrators would endeavor to resolve the dispute by mutual agreement. If they could not, they would try to agree on the choice of a third arbitrator, failing which the president of the ICC in Paris would appoint one. The final award would then be issued by three arbitrators. However, to optimize their control on this dispute resolution process and preserve their equality, the parties would not have given a deciding vote to the third arbitrator.

3.4.3 The Arbitral Tribunal did not bring to light any concordant will of the parties in this case that would confirm the Appellant's interpretation of Art. 12 (a) of the Participation Agreement. The meaning of this arbitration clause – the text of which was reproduced above (see A.a) must accordingly be reviewed on the basis of the principle of legitimate expectation.

Reading the clause at hand shows no decisive element from which one could deduce that the Respondent could in good faith give only the meaning proposed by the Appellant to the expressions of will contained there. In particular, nothing in the text of the clause was apt to draw the Respondent's attention to the fact that by signing the Participation Agreement with such a clause, it would agree from the outset that the arbitral procedure adopted to dispose of the possible dispute in connection with the performance of the contract could be paralyzed *ab ovo* by the mere refusal of its contractual counterpart to appoint its arbitrator. In other words, the Respondent should not have had to deduce objectively from the text of the arbitral clause that it could be compelled to claim in the Appellant's State Courts against its contractual counterpart notwithstanding the existence of the arbitration agreement. And the latter also could not think that its contractual counterpart would accept to do so simply because it agreed to sign the Participation Agreement. Speaking more generally, it is difficult to see how a party would have no objection to entering into a contract, the performance of which is subject to the other party's whims. This being a most sensitive agreement due to the personality of the contractual partners and its objects – and an agreement preceded by long negotiations and involving huge financial interests – it is inconceivable that the parties would have consciously accepted a clause structured so that the refusal by one of them to appoint its arbitrator would *ipso jure* result in the inability to resort to this dispute resolution system or discontinue it definitely and force the Claimant to seize the courts of the very state that was its contractual counterpart or which controlled the national company that was a contracting party. To the contrary, everything suggests that the arbitration clause was drafted so as to

meticulously preserve their equality in the arbitral proceedings, the contractual parties having failed to consider the possibility that one of them could refuse to appoint an arbitrator.

From the fact that the parties set neither the seat of the arbitration nor the applicable law at Art. 12 (a) of the Participation Agreement, the Appellant deduces their common intent not to connect the arbitration to any legal order and consequently to exclude the intervention of any other judicial bodies than the Respondent's and the Appellant's to rectify or to appoint an arbitrator should one party refuse to do so (appeal nr 10;1 reply nr 43). However, this thesis of intentional silence essentially relies on a comparison between the agreement in dispute with other agreements (see reply nr 44 ff) which cannot be taken into account at this stage in the proceedings (see 2.6 2nd § *in fine* above). Moreover and above all, it backfires against the Appellant because admitting the jurisdiction of the national courts of the contractual parties as courts in support of the arbitration is incompatible with the Appellant's idea that the arbitration should not take place if one of the parties refused to appoint its arbitrator.

Similarly, the limited authority the Appellant would give to the possible third arbitrator does not appear from the wording of the arbitration clause. Indeed the latter merely mentions the definitive and binding nature of the "decision of the Board of Arbitrators so appointed," without any further details. In view of the silence in the text of the aforesaid clause it is therefore not possible to conclude – as the Appellant apparently suggests in somewhat unclear explanations (see appeal nr 98 to 100) – that the third arbitrator could not tilt the scale and, apparently, that the award should be unanimous.

Under such circumstances the Arbitral Tribunal was right to find that the Appellant could not rely on its erroneous interpretation of the arbitration clause to disregard its duty – based on the general principle that contracts are binding (*pacta sunt servanda*) – to appoint an arbitrator and to deny the Respondent's right to seize a state court to remedy its contractual counterpart's failure to do so.

3.5
The Appellant therefore wrongly invokes Art. 190 (2) (a) PILA to claim that, correctly interpreted, the arbitration clause should have led the Arbitral Tribunal to find that it was irregularly composed.

To the extent that the matter is capable of appeal therefore, the appeal is rejected as to this issue.

4.

Secondly, the Appellant argues that the Arbitral Tribunal was wrong to accept jurisdiction (Art. 190 (2) (b) PILA. Yet its somewhat unclear explanations show that, in reality, the Appellant is instead attempting to subject the same argument that it submitted on the basis of Art. 190 (2) (a) PILA to the review of the Federal Tribunal under another name, in particular by playing with the meaning of the English word jurisdiction (see appeal nr 118 to 133; reply nr 14 to 33). In other words, it is again the appointment of the arbitrator that the Appellant challenges although it gives it another name.

Moreover it is sufficient to read the pertinent part of the award under appeal (nr 2.2) to see that the two arbitrators did not at all address the issue of their substantive jurisdiction in connection with the Respondent's claims but that they merely stated the reasons for which they consider that they have been validly appointed to address the request for arbitration on the basis of Art. 12 (a) of the Participation Agreement.

To the extent that it addresses an issue which has not yet been dealt with by the Arbitral Tribunal, the Appellant's argument based on a violation of Art. 190 (2) (b) PILA is consequently inadmissible. Were it not that it would meet the same fate as the first argument.

5.
This being so, it is not necessary to issue a decision on the stay of enforcement sought by the Appellant and temporarily granted in the decision of the presiding judge of March 20, 2012.

6.
Pursuant to Art. 66 (1) and 68 (1) and (2) LTF the Appellant shall pay the costs of the federal proceedings and compensate its opponent. The importance of the amount in dispute justify charging the maximum court fee (Art. 65 (3) (b) and (5) LTF).

Therefore the Federal Tribunal pronounces:

1.
The appeal is rejected to the extent that the matter is capable of appeal.

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

3.
The Appellant shall pay to the Respondent and amount of CHF 250'000 for the federal judicial proceedings.

4.
This judgment shall be communicated to the representatives of the parties and to the Arbitral Tribunal.

Lausanne January 10, 2013.

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

The Presiding Judge: The Clerk:

Klett (Mrs.) Carruzzo