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[...]

FRENCH REPUBLIC
ON BEHALF OF THE FRENCH PEOPLE

COURT OF APPEAL OF PARIS
Pole 5 - Chamber 16
International commercial chamber

JUDGMENT OF 1 DECEMBER 2020

APPLICATION FOR ANNULMENT OF AN ARBITRAL AWARD
(N° /2020, 20 pages)

Registration number in the general repertory: **N° RG 19/08691 - N° Portalis 35L7-V-B7D-B7ZWA**

Decision referred to the Court: arbitral award rendered in Paris on 31 January 2019 under the auspices of the International Court of Arbitration of the International Chamber of Commerce by the Arbitral Tribunal composed of Mr. A., President, and Messrs. O. and D., arbitrators (case n° (...)).

Application of the protocol relating to the procedure before this chamber dated 7 February 2018.

APPLICANT FOR THE APPEAL:

X.

[...]

DEFENDANT TO THE APPEAL:

Y.

[...]

COMPOSITION OF THE COURT:

Pursuant to the provisions of Articles 804 and 805 of the Code of Civil Procedure, the casew as heard on 12 October 2020, in a public hearing, the lawyers not having opposed this, before Mr François ANCEL, President, in charge of the report and Mrs Fabienne SCHALLER, Judge.

These magistrates gave an account of the pleadings in the deliberation of the Court, composed of:

Mr. François ANCEL, President
Mrs. Fabienne SCHALLER, Judge.
Mrs. Laure ALDEBERT, Judge.

Clerk, during the oral pleadings: Mrs. Clémentine GLEMET

JUDGMENT:

- RENDERED IN ACCORDANCE WITH THE REQUIREMENT OF OPPORTUNITY TO BE HEARD.
- by placing the judgment at the disposal of the clerk of the Court, the parties having been previously notified of it under the conditions provided for in the second paragraph of Article 450 of the Code of Civil Procedure.
- signed by François ANCEL, President, and by Clémentine GLEMET, Clerk, to whom the minute was handed over by the magistrate who signed it.

I. FACTS AND PROCEDURE:

1- Company Y. (hereinafter referred to as "Y.") is a Singaporean company, operating in the field of environmental technologies and services, particularly waste management.

2- In September 2006, company Y. won a tender launched by X. for a project including the design, construction, operation and maintenance of a household solid waste management including sorting and recycling facilities, a specially-engineered landfill, a composting landfill, a composting site and a waste incineration plant, located on the outskirts of the industrial city of Z.

3- On October 17, 2006, X. and company Y. signed a contract for the design and construction of the waste management centre and transfer stations, as well as for the subsequent operation and maintenance of the maintenance of the centre.

4- The project was implemented as of 17 November 2006, and the design and construction work were carried out until 2011.

5- The execution of the project encountered difficulties and company Y. made claims for payment by X. and/or the Engineer (who, starting from June 2008, was also the representative of the Ministry in charge of the project), as the case may be, particularly for design and construction work. These requests were rejected.

6- It is under these circumstances that, on 15 April 2015, company Y. brought an arbitration claim against X. to order the latter to pay a total amount of QAR 364,839,693.75 and SGD 613,216.13. During the arbitration proceedings, on 3 August 2016, X. made a partial payment in the amount of QAR 96,726,897.10 (corresponding to the release of the second half of the holdbacks), which was one of the claims made by company Y. in the arbitration proceedings against X.

7- X. requested the dismissal of the claims brought by company Y., challenging in particular the admissibility of some of the claims and, for some of them, the jurisdiction of the Arbitral Tribunal to hear them, on the grounds of the violation, according to it, of Articles 20.1 to 20.5 of the contractual conditions (C1) on construction.

8- By an award rendered on 31 January 2019, the arbitral tribunal constituted under the Rules of Arbitration of the International Chamber of Commerce in ICC Case No.[…], and composed of Professor A., Chairman, and Mr. D., Q.C., and Dr. O., arbitrators, rejected notably "*the request [of X] for the dismissal of [Y.'s] claims*

for lack of jurisdiction and inadmissibility" and granted the majority of the claims made by company Y., ordering X. to pay a total principal sum of more than QAR 123 million (in addition to the amount already paid by X. for the release of the holdbacks), and approximately USD 3.4 million for arbitration costs.

9- On 17 April 2019, X. filed an application with the Paris Court of Appeal for the partial annulment of the Award and, more specifically, the annulment of paragraphs 898.1, 898.2 (a) to (l), i.e. 12 of the Arbitral Tribunal's decisions.

10- The examination of the case was conducted in accordance with the protocol for proceedings before this Chamber dated 7 February 2018, accepted by the parties in accordance with Article 4.1.

II. CLAIMS OF THE PARTIES:

11- In its last submissions, communicated electronically on 2 October 2020, X. requests,as a matter of substance, that the Court, in accordance with Articles 1520-1, 1520-3 and 1520-4 of the Code of Civil Procedure:

- Reject the objection of inadmissibility raised by company Y.;

- Hold that the Arbitral Tribunal failed to state the reasons for its finding that it had jurisdiction to hear the claims of Y., for which an argument of lack of jurisdiction was raised, and therefore did not comply with its mission;

- Hold that the Arbitral Tribunal did not comply with its mission by disregarding the limits of the dispute resolution clause in the Contract;

- Hold that the Arbitral Tribunal was incorrect in its finding that it had jurisdiction over claims made by Y., in violation of the dispute resolution clause in the Contract;

Accordingly, to:

- Partially annul the Award, based on Articles 1520-1 and 1520-3 of the CPC, and more specifically the following decisions:

[...]

- Hold that the Arbitral Tribunal decided *ultra petita* with respect to the claim of company Y. relating to work performed in the entry area by awarding the latter compensation in excess of the amount claimed and consequently, annul paragraphs 661 to 668 of the Award and decision 898-2 (h) on the basis of Article 1520-3° of the CPC;

- Hold that the Arbitral Tribunal failed in its mission by assuming the power to decide in equity and accordingly, annul the following parts of the Award and subsequent decisions based on Article 1520-3° of the CPC:

[...]

- Hold that the Arbitral Tribunal acted in violation of the requirement of opportunity to be heard and consequently, annul the following decisions, based on Article 1520-4 of the Code of Code of Civil Procedure:

[...]

- Order company Y. to pay the Applicant for the Appeal the sum of EUR 200,000 under Article 700 of the Code of Civil Procedure and to pay all costs.

12- **According to its last pleadings communicated electronically on 6 October 2020, Company Y.**, requests that the Court, in accordance with Articles 700, 1466 and 1520 of the Code of Civil Procedure:

- Declare X.'s claims inadmissible, based on the alleged non-compliance of company Y. with Articles 20.1 *et seq.* of the contractual conditions C1, seeking the partial annulment of the Award rendered on 31 January 2019 by the arbitral tribunal;

- Reject all of X.'s claims for partial annulment of the Award rendered on 31 January 2019 by the arbitral tribunal;

- Dismiss, consequently, X.'s application for annulment;
- Dismiss all of X.'s actions, claims and arguments;

- Order X. to pay to company Y. the sum of EUR 580,000 under Article 700 of the Code of Civil Procedure;
- Order X. to pay all the costs.

13- The case was closed on 6 October 2020.

14- The Court refers, for a fuller statement of the facts, claims and grounds of the parties, to the aforementioned pleadings, in application of the provisions of Article 455 of the Code of Civil Procedure.

III. GROUNDS OF THE PARTIES AND REASONS FOR THE DECISION:

On the ground for annulment alleging the lack of jurisdiction of the arbitral tribunal (Article 1520 (1°) of the Code of Civil Procedure)

15- X. argues, as a matter of substance, that the award is subject to partial annulment on the basis of Article 1520 (1) of the Code of Civil Procedure on the grounds that the arbitral tribunal wrongly declared itself as having jurisdiction to hear claims made by company Y. that had not been the subject of the dispute settlement procedure set out in clause 20 of the contractual conditions C1, which the parties intended to set as a condition of their consent to the jurisdiction of the arbitral tribunal to hear the dispute.

16- It thus contests that the parties intended to confer on the arbitral tribunal the broadest possible jurisdiction and specifies that the notion of "disputes" referred to in the arbitration clause should be understood as referring only to claims that have been dealt with in accordance with provisions of clause 20 of the contractual conditions C1, and considers that the interpretation by company Y. of the scope of application of the arbitration clause would render clause 20 ineffective.

17- X. argues that as a result of this lack of jurisdiction, the decision at paragraph 898.1 of the award should be annulled, as well as the passages of the award and decisions mentioned at paragraph 53 where the arbitral tribunal accepted jurisdiction to hear the claims made by company Y.

18- It states that this ground is admissible, since it concerns an objection to jurisdiction and not merely a question of admissibility of the claims of company Y., on the grounds that the parties, through such clause, intended to limit the scope of application *ratione materiae* of the arbitration clause, and hence the jurisdiction *ratione materiae* of the arbitral tribunal.

19- In response, company Y. argues notably that the ground raised by X. does not concern the jurisdiction of the arbitral tribunal but the admissibility of the claims

of company Y. and does not, therefore, fall within the scope of instances provided for in Article 1520 of the Code of Civil Procedure. It states in this respect that jurisdiction raises a question of the distribution of the power to judge a dispute between the jurisdiction of arbitral tribunals and state courts and that the ground alleging non-compliance with the conditions for the initiation of arbitration proceedings does not affect the parties' willingness to submit their disputes to the jurisdiction of an arbitral tribunal in preference to state courts.

20- In any event, company Y. maintains that the arbitral tribunal had jurisdiction to hear its claims, which fell within the scope of the arbitration agreement. It argues that the interpretation of the arbitration clause defended by X. goes against the rules of interpretation according to the common intention of the parties, based on the principle of *effet util*e and maintains that Article 1.3 "Amendments to the Contractual Conditions" states in clear and unambiguous terms that the parties intended to confer the broadest possible jurisdiction to the arbitral tribunal to hear all disputes that may arise between them in the performance of the Contract and in the execution of the Project.

Thereupon;

21- According to Article 1520, 1° of the Code of Civil Procedure, an action for annulment may be brought if the arbitral tribunal has wrongly declared that it has jurisdiction or wrongly declared that it does not have jurisdiction.

22- In this context, it is for the judge in the annulment proceedings to review the arbitral tribunal's decision on its own jurisdiction, whether it has declared itself as having jurisdiction or as not having jurisdiction, by looking for all the elements of law or fact which permit the appreciation of the scope of the arbitration agreement.

23- In the present case, it appears from the documents submitted that the contract concluded on 17 October 2006 between X. and company Y. includes a reference to the general contractual conditions relating to construction (C1), to the general contractual conditions relating to the operation (C2) dated 3 April 2005 and to special conditions entitled "Agreed amendments to the general conditions of contract".

24- In this case, Article 20 of the general contractual conditions (C1) entitled "Claims and Disputes" provides as follows:

"*20.1 Claims Procedure:*

If the Contractor intends to claim additional payment under any clause of these conditions or otherwise, he shall notify the Engineer as soon as possible and, in any event, within 28 days of the occurrence of the event giving rise to the claim.

The Contractor shall retain such contemporaneous documentation as may be necessary to substantiate any claim, either at the Site or at another location acceptable to the Engineer. Without admitting liability to X., the Engineer shall, upon receipt of such notice, inspect such documents and may instruct the Contractor to retain other contemporaneous documents. The Contractor shall permit the Engineer to inspect all such documents and shall (if so directed) submit copies thereof to the Engineer.

Within 28 days of such notification, or such other period as the Engineer may agree, the Contractor shall submit to the Engineer a statement of account containing details of the amount and basis of the claim. If the effects of the event giving rise to the claim continues, the said account shall be considered provisional.The Contractor shall then, at such intervals as the Engineer may reasonably determine, issue further provisional statements showing the cumulative amount of the claim and any other details. If interim statements are sent to the Engineer, the Contractor shall issue a final statement of account within 28 days of the cessation of the effects of the event.

If the Contractor fails to comply with this Sub-clause, he shall not be entitled to any additional payment.

20.2 Payment of Claims

The Contractor shall be entitled to have included in any Interim Payment Certificate the amount of any claim that the Engineer considers due. If the details provided are insufficient to substantiate the claim in full, the Contractor shall be entitled to payment of that portion of the claim which has been justified.

20.3 Disputes: Settlement by the Engineer

If a dispute arises between X. or the Engineer and the Contractor in relation to the Contract or the performance of the Work (during the progress of the Work, prior to the termination or abandonment of the Contract), it shall first be referred, for the purpose of its settlement, to the Engineer who shall, within ninety days after being requested to do so by either party, notifyX. and the Contractor of its decision in

writing. Subject to the following provisions, such decision on all matters so submitted shall be final and binding upon X. and the Contractor until completion of the Work and shall be immediately enforced by the Contractor who shall proceed with the Work with all diligence, whether or not the Contractor or X. requests the submission of any such dispute to the courts in the manner provided for hereunder.

20.4 Disputes: No Settlement by the Engineer

If the Engineer fails to give written notice of his decision in accordance with Sub-clause 20.3, within ninety days, or if X or the Contractor has reason to dispute the Engineer's decision, then X. or the Contractor may submit the dispute to the Competent Court of Qatar, provided that fifteen days' written notice has been given to the Engineer.

20.5 Disputes: Limitation

The Contractor may only submit the dispute to the Tribunal six months, at the latest, after the date of issuance of the Certificate of Completion, or of termination, abandonment or breach of the Contract, whichever occurs first."

[Editor's note: Any contractual provisions quoted in this decision, including those above,were translated into English based on the text of the French court decision. Therefore, the text of this translation may not be identical to the text of the actual contract, which is in English.]

25- It should be noted that Article 20 of the general conditions does not contain any arbitration clause but attributes jurisdiction to the courts of Qatar in the event of dispute.

26- However, these general conditions have been amended by the parties and the document entitled "Amendments to the Contractual Conditions" contains in Article 1.3 an arbitration clause which reads as follows:

[...] *("All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators in accordance with the said Rules").*

27- X. considers that this arbitration clause is not intended to replace the procedural obligations, mentioned at Articles 20.3 to 20.5, so that only disputes that have previously followed the procedure described in these articles may, in the event of a continuing dispute, fall within the jurisdiction of the arbitral tribunal.

28- Analysed in these terms, this ground is admissible.

29- However, the terms of the arbitration clause contained in the abovementioned Article 1.3, in relation to which it is not indicated in the agreement that contains it that the arbitration clause is intended to be inserted in the abovementioned description and to replace Article 20.4 of the general conditions that grant jurisdiction to the courts of Qatar, are general and unambiguous since this clause covers "all disputes" arising out of or in connection with the contract.

30- Even though this clause is not intended to remove the process previously established by the parties in Article 20 of the general contractual conditions to attempt to resolve their disputes, the failure to comply with this process cannot lead to limiting, in view of the generality of the terms of the arbitration clause, the jurisdiction of the arbitral tribunal, without prejudice to the arbitral tribunal's assessment of the admissibility of claims that have not been made in compliance with this process, it being observed that this last question does not affect, in any event, the jurisdiction of the tribunal and therefore cannot serve as a basis for a ground for annulment based on Article 1520, 1° of the Code of Civil Procedure.

31- Therefore, the arbitral tribunal is considered to have rightly declared itself as having jurisdiction and the ground for annulment is rejected.

On the ground of annulment based on the failure of the arbitral tribunal to comply with its mission (Article 1520 3° of the Code of Civil Procedure)

32- X. seeks partial annulment of the Award on the basis of Article 1520(3) of the Code of Civil Procedure, arguing, on the one hand, a lack of reasoning as to the jurisdiction of the arbitral tribunal and, on the other hand, that it had decided *ultra petita* and thirdly, that it had wrongly assumed the power of an amiable compositeur.

33- With regard to the lack of reasoning, X. states that if the arbitral tribunal found that it had jurisdiction to decide upon the claims submitted by company Y., which X. argued did not fall within the scope of the arbitration agreement agreed by the parties, the tribunal refrained entirely from giving reasons for its decision on this issue, limiting itself to discussing the objection of inadmissibility without addressing the issue of its jurisdiction.

34- With regard to *ultra petita*, X. argues that the tribunal disregarded its mission by awarding to company Y. an amount that was higher (QAR 2,591,892.98) than that

requested by the latter (QAR 2,572,826.64) with respect to the claim for the work carried out in the entry area.

35- Finally, X. argues that the arbitral tribunal did not comply with its mission by assuming the power of an amiable compositeur, instead of applying the rules of law chosen by the parties. It specifies that by deviating from the strict application of the contractual provisions and by moderating their effects, in consideration of the factual circumstances at stake, the tribunal ruled in equity and not in law, and therefore violated its mission.

36- In response, company Y. argues that the arbitral tribunal complied with its mission by giving reasons for its decision on jurisdiction, contrary to X's assertion. Company Y. states in this respect the arbitral tribunal devoted 33 pages of the award to a comprehensive analysis of X's objections to its jurisdiction, in a section entitled "Issues of Admissibility and Jurisdiction" and finally concluded that the objections to jurisdiction and admissibility raised by X should be rejected.

37- Y adds that the failure to state reasons for an award does not constitute grounds for the initiation of an action for annulment under French law of international arbitration and that the review of the existence of reasons is thus a restricted, purely "material" review, exclusive of any assessment of the content and relevance of the reasons adopted by the arbitral tribunal and of any review of the substance of the award.

38- With regard to the argument that the arbitral tribunal decided *ultra petita*, company Y. points out that it asked the arbitral tribunal to order X. to pay such sums as it deemed appropriate and that the amount awarded for the additional works carried out in the entry area of the Centre was based on a joint assessment by the parties' experts, which was not contested by X. in the arbitration proceedings. It adds that exceeding the amount of a claim does not fall within the scope of *ultra petita* when the amount does not exceed the total amount of the claims and that in this case the arbitral tribunal awarded him an amount lower (QAR 123 million) than his claims.

39- As to X's claim regarding amiable composition, company Y. argues that an award cannot be annulled on this basis, where the award is reasoned in law, and argues that in the present case the arbitral tribunal decided its claims, in accordance with the provisions of the Contract and Qatari law applicable to the merits, without "dismissing" these provisions.

Thereupon,

40- According to Article 1520, 3° of the Code of Civil Procedure, an action for annulment may be brought if the tribunal issued its decision without complying with the mission entrusted to it, which is limited primarily by the subject matter of the dispute, as determined by the claims of the parties.

On the claim that the award failed to state reasons as to the jurisdiction of the arbitral tribunal;

41- In this case, the arbitration clause provides for arbitration to be held in Paris and under the rules of the International Chamber of Commerce (ICC).

42- According to Article 25.2 of the ICC Rules of Arbitration (1998 version), which is reproduced in Article 31 (ICC 2012 version) and Article 32 (ICC 2017 version), the award must state the reasons on which it is based.

43- It was therefore part of the mission of the arbitrators to give reasons for their award.

44- However, it should be recalled that it is not the mandate of the judge in the annulment proceedings to review the content of the reasons given in the arbitral award, nor whether it is convincing, but only the existence of the latter, it being specified that the arbitrators are not obliged to conform to the parties with respect to the detail presented in their arguments.

45- It is clear from the contested award, and particularly at paragraph 78, which is in Section III of the award entitled "*Summary of Claims*", that the tribunal considered X's claim challenging the jurisdiction of the arbitral tribunal, as it states in that paragraph that "*Respondent [X.] has challenged primarily the admissibility of the claims, or the jurisdiction of the Arbitral Tribunal to hear them as a whole, and in relation to each claim, while considering them on the merits, in the alternative*".

46- The tribunal then expressly addressed this issue in Section IV of its award, specifically entitled "*Issues of Admissibility and Jurisdiction*", setting out its views at paragraphs 122 to 158 of this award and concluding in its operative part at paragraph 898.1 that "*the Respondent's request for the dismissal of all the claims of the Claimant for lack of jurisdiction or inadmissibility is dismissed*".

47- In this respect, it is clear from the tribunal's reasoning on the issue of "admissibility and jurisdiction" that it chose to address it by considering, as it explains first at

paragraph 122, "Y.*'s argument that the agreed modifications entirely replaced sub-clauses 20.3 to 20.8, and the validity of the various time limits provided in these provisions under Qatari law*". The arbitral tribunal then adds that it wishes to examine "*also the conduct of the parties with respect to the applicability of the disputed provisions*" and "*concludes that it is impossible to declare that Y.'s claims are purely and simply inadmissible on the grounds that one or more of the provisions of clause 20, or clause 8.3, have not been complied with*".

48- If the choice to deal with and therefore to state the reasons for its decision on the issue of "admissibility and jurisdiction" according to this framework does not clearly assist in facilitating the distinction between issues of admissibility and jurisdiction, especially since the arbitral tribunal also assesses in this section whether or not company Y. has complied with the stages prior to resorting to arbitration, it does not, however, entail the consequence that X. intends to give to the effect that there is no reasoning on the issue of jurisdiction where the arbitral tribunal has chosen to deal with these two concepts together and that, without any possible ambiguity, the purpose of these paragraphs in light of the heading of this section was to answer these two questions simultaneously and comprehensively.

49- Moreover, by interpreting clause 20 at paragraphs 130 to 141, the tribunal necessarily found that it had jurisdiction since it states that "*Consequently, the court will consider the defences raised by the Defendant [X.] under clause 20 in the context of each claim whenever necessary and, where necessary, will draw the appropriate consequences under contract law*".

50- Similarly, in recalling at paragraph 158(d) that "*the submission of a dispute to a decision by the engineer under Article 20.3 is a procedural requirement that must generally be satisfied (unless waived or otherwise found to be unlawful) before a dispute can be submitted to arbitration*", the arbitral tribunal rejects the argument that the procedural prerequisites relate to an issue of jurisdiction and, in so doing, addresses the argument that there is a lack of jurisdiction.

51- According to these elements, and while it is not within the court's power to determine whether the case was correctly or incorrectly decided, the claim must be dismissed.

On the claim of ultra petita;

52- It is for the arbitral tribunal to decide within the limits of the claims made such that if it awards more than what was requested, its award may be annulled for having disregarded its mission.

53- In the present case, it is common ground that before the arbitral tribunal, as is clear from paragraph 638 of the award (but also from Annex A of the award), company Y. claimed, in respect of the work carried out in the entry area (concerning a fire station and a prayer room), that X. should be ordered to pay QAR 2,572,826.64, of which QAR 2,144,022.20 was for the works alone and QAR 428,802.20 was for the financial fees.

54- Determining this claim, the arbitral tribunal ordered X. to pay a sum of QAR 2,591,892.98 (see paragraph 898.2 (h) of the operative part of the award), of which QAR 2,253,819.98 was for the value of the additional work alone and QAR 338,073 was for the financial fees.

55- It is common ground that, in so doing, the tribunal allocated for this item of loss an amount that was greater than that expressly requested by company Y., even though this amount would be the one that corresponds to the joint evaluation of the Parties' experts.

56- In this respect, company Y. cannot validly invoke the fact that in its "Statement of Claim" of 30 June 2016, it had asked the Tribunal to order X. to pay the sums as determined by it "*and/or such other sums as the Tribunal may determine*", while this formula does not authorize the tribunal to go beyond the amounts requested, but only to award a different amount, if necessary, within the limit of this ceiling.

57- Similarly, if the accumulation of the claims for additional work (claims which are "not related to a time limit") by company Y. against X. amounted to QAR 243,903,608.50 and that the total amount of the orders finally made by the arbitral tribunal is lower, amounting to QAR 123,185,650.58, it is common ground that the arbitral tribunal did not decide to award an all-encompassing sum, but item by item.On the other hand, company Y. itself chose to make separate claims for different items and requested an award for each item in a specific amount, each of these items having distinct causes, since they related to the cost of additional work borne by this company and related to the design of collection/transfer stations, the provision of a telemetry system, the supply of water, the construction of a temporary access road, or the construction of a tower (W.), all of which are of a different nature.

[Editor's note: Paragraph "58-" does not appear in the original decision.]

58- It is therefore appropriate to consider that the arbitral tribunal, in this respect, did not comply with the mission that was entrusted to it and to declare the partial annulment of the award relating to the construction of buildings in the entry area,

and specifically paragraph 898.2 (h), without it being necessary to annul the grounds thereof.

On the claim based on amiable composition,

59- Amiable composition is a waiver, by contract, of the effects and benefit of the rule of law, the parties losing the prerogative of demanding its strict application and the arbitrators receiving the correlative power to modify or moderate the consequences of the contractual provisions whenever equity or the common and well-understood interest of the parties so requires.

60- In this case, it is clear from the terms of reference that the arbitral tribunal did not have the power to decide as an amiable compositeur and was to decide in accordance with the rules of Qatari law, as agreed in Article 1.3 of the amended contractual conditions.

61- In accordance with Article 21.2 of the Rules of Arbitration of the International Court of Arbitration of the Chamber of Commerce (2012), the "*arbitral tribunal shall take account of the provisions of the contract, if any, between the parties and of any relevant trade usages*".

On the allegation that the arbitral tribunal chose not to apply clause 20.1 of the general conditions;

62- As a matter of substance, X. complains that the arbitral tribunal rejected the application of clause 20.1 of the general conditions, even though this clause is unambiguous and provides that if the Engineer is not notified of a claim for additional payment within 28 days, the Contractor forfeits the right to further payment.

63- It appears from the award, however, that the arbitral tribunal did not decide as an amiable compositeur on this issue but relied on Qatari law.

64- At paragraph 131 of its award, the arbitral tribunal states that "*the contractual provisions adopted by the Parties are effective only under a specific national law; in this case, the law of Qatar. Therefore, these stipulations cannot contravene the mandatory provisions of the applicable law*" and then cites Articles 403 and 418 of the Qatar Civil Code (QCC) from which it deduced that they establish a regime of prescription based on public policy.

65- It then relies on Article 172 of the Qatar Civil Code, which requires the parties to perform their obligations in good faith. Noting, in particular, that in practice the engineer held two positions, that of engineer and chairman of the steering committee, the lack of clarity between these two functions, and that "*insofar as the Steering Committee examined the claims and judged them on the merits*", the tribunal considers that X. "*cannot now claim that the claims were not properly notified pursuant to sub-clause 20.1 of the GCC or that the engineer's decision was not sought, given that the Chairman of the Committee was also the engineer*" (§ 158 (f)).

66- The tribunal further states at paragraph 154 of the award that it would be "*contrary to good faith for the [X.] to argue now that these disputes should have been referred to the Engineer, as an independent decision-maker, when he had decided these disputes in favour of the Respondent*".

67- Finally, at paragraph 155 and "*Based on the foregoing findings*", the tribunal states that it "*rejects as a matter of principle the assertion that Y.'s claims that did not strictly comply with clause 8.3 or sub-clauses 20.1 and 20.3 must be rejected*".

68- It follows from these elements that if the arbitral tribunal considered that clause 20.1 could not, as a matter of principle, exclude the claims of company Y., it relied on the principle of good faith recognized by Qatari law, which cannot be assimilated to an assessment of the claim in amiable composition.

69- This claim will therefore be rejected on this point.

On the allegation that the arbitral tribunal set aside the contractual provisions with respect to claims for costs incurred in connection with the preparation of technical proposals;

70- As a matter of substance, X. contends that the arbitral tribunal granted Y.'s claims for reimbursement of the costs incurred in the preparation, at the request of the Project Manager, of a proposal concerning, on the one hand, the E. plant and, on the other hand, the transfer stations, it being that these proposals were not finally retained, even though, according to the former, the price fixed in the contract was a lump sum and could only be adjusted in the event of a change of the work, as ordered by the Engineer, so that "*in accordance with the contractual stipulations, Y. was not entitled to additional payment for the preparation of proposals, but only in the event of variation ordered by the Engineer, which was confirmed by the wording of clause 14.2 providing that a Contractor's proposal was to be prepared at the Contractor's own expense*".

71- However, it appears from the award that the tribunal considered in the circumstances of the case that "*the work done by Y. went far beyond the preparation of a proposal*" and insistedon the fact that X. "*after repeatedly encouraging Y. to perform design work for the Transfer Stations, cannot in good faith purport to exempt itself entirely from the cost of these works [...] on the grounds that it did notissue an instruction or a modification duly and properly in accordance with clause 14.3*" (paragraph 237).

72- Furthermore, if the arbitral tribunal considered that company Y. was entitled to compensation for unnecessary design costs, it decided to apply Article 263 of the QCC by considering that that the company, as a high-level professional, "*could have avoided at least some of the damage it claims by making reasonable efforts*", which led it to reduce the amount of damages sought by 25%.

73- It is clear from these elements that the Qatari tribunal applied the principle of good faith, referred to in Article 172 of the Qatari Civil Code, to interpret clause 14.1 of the contract, as well as Article 263 of the QCC, so that it has correctly decided in law the dispute that was submitted to it.

74- Furthermore, assuming that the application of this principle of good faith in Qatari law would not the undermine the very substance of the obligations agreed upon between the parties, it is not for the judge in the annulment proceedings to review the interpretation of the contractual provisions by the arbitral tribunal on the basis of the said principle of good faith.

75- This claim must therefore be rejected.

On the allegation that the arbitral tribunal ignored the contractual provisions of the Contract with respect to Y.'s claims for the additional works undertaken without a variation order, favouring an equitable approach;

76- As a matter of substance, X. argues that the arbitral tribunal allowed the claims for compensation for the additional works undertaken during the construction phase relating to the W. telecommunication system and an access road to the site, even though these had not been ordered and/or approved by the Engineer, as required by clause 14.1, and this for reasons thatit considers to be based in equity.

77- However, it should be noted that, with respect to the construction of the road, the tribunal interpreted the provisions of the contract and the invitation to tender to findat paragraph 577 that a road was necessary and that company Y. was entitled to compensation on the "*basis of Article 709 of the QCC (...) or on the basis of*

Article 256 of the QCC, given that the Project Managerdid not meet his obligations by refraining from providing a passable road" (paragraph 586).

78- It is clear from the foregoing that the tribunal decided in law on this claim.

79- With respect to the provision of telecommunications facilities, the tribunal found that company Y. was entitled to damages for X.'s breach of its contractual obligation and expressly relied on Article 256 of the Qatari Civil Code, which provides that if "*the debtor does not perform or performs late, he is obliged to compensate the creditor for the loss suffered by the latter, unless he proves that the non-performance or delay is due to an external cause beyond its control*" (provision quoted at paragraph 542 of the award).

80- Thus, the arbitral tribunal held that clause 14.1 of the contract was not intended to apply, as this claim by company Y. could not be assimilated to a request for modification of the work (paragraph 623).

81- These elements alone make it possible to find that the arbitral tribunal decided in law.

As to the allegation that the arbitral tribunal made up for the shortcoming of company Y. in order to secure the compensation of the latter;

82- As a matter of substance, X. argues that, on certain claims of company Y., the arbitral tribunal did not draw the legal consequences that were necessary in view of the arguments of the latter and, in particular, the finding that it that it was unable to prove the basis and/or the quantification of its claims related to electricity, and took the initiative to make up for the shortcoming of company Y., by considering that the latter should be compensated for the difference between the cost of producing electricity with diesel fuel and the cost it would have incurred if electricity had been available.

83- It appears from the award that company Y. made claims for compensation for the additional costs associated with the need to obtain electricity and for the consequences of a late provision of an electrical connection.

84- The arbitral tribunal refused to grant some of the claims of company Y. after finding that there was an "*overlap*" in the claims concerning electricity and that these claims "*lacked coherence*" (paragraph 486).

85- Having considered the fact that the claim" *varies over the different periods covered*", the tribunal decided to "*analyse the key issues according to the periods*" that it identified (paragraph 488).

86- It cannot be inferred from this approach, which consists of an analysis of the facts by the tribunal in order to respond in law to the claims, that there has been any violation of its mission or that the tribunal has not decided with regard to the contract and/or the applicable law, while the arbitral tribunal performs, at paragraphs 490 to 537, an assessment of the claims of company Y. in light of the contractual clauses and the documents submitted into evidence.

87- In order to condemn X. on some of these claims, the tribunal considered, after finding that the electrical connection "*was not available until 24 May 2011*", that X. had "*breached the contract by failing to provide a usable connection at the required time*" (paragraph 490).

88- In particular, it is statedat paragraph 493 that company Y. "*is entitled to reimbursement of costs that it can show it has incurred in supplying electricity using diesel generators in addition to the cost of electricity from the external grid operated by F. This period is between 30 July 2010 and 24 May 2011*".

89- It follows that the alleged complaintis not characterized, given that it does not fall within the power of the judge in the annulment proceedings to proceed, under cover of a ground for annulment, to an assessment of the reasons that led the tribunal to rule in this way.

90- It follows from all these elements that the application for annulment based on the violation by the arbitral tribunal of its mission will be rejected except with respect to the part of the award relating to the construction of buildings in the entry area, set out at paragraph 898.2(h) of the Award.

On the ground that the arbitral tribunal did not meet the requirement of opportunity to be heard (520-4 of the Code of Civil Procedure)

91- X. argues, on the basis of Articles 1520-4 and 1510 of the Code of Civil Procedure, that the arbitral tribunal disregarded the requirement of opportunity to be heard on several occasions, by basing several of its decisions on arguments that had not been raised by the parties during the arbitral proceedings or by choosing to make up for the failure of company Y. to establish its loss.

92- In reply, company Y. argues that the ground for annulment is inadmissible because the criticisms made by X. are directed exclusively at the method applied by the arbitral tribunal to assess the loss in respect of certain claims of company Y, which it accepted, and that the requirement of opportunity to be heard does not require that the methods of assessing the loss be submitted to the parties, as they are within the arbitrator's power.

Thereupon,

On the allegation that the tribunal decided on the compensation owed to company Y. for unnecessary design costs in relation to the transfer stations on the basis of a method of quantification not raised or discussed by the parties

93- X. argues, as a matter of substance, that the arbitral tribunal decided on the compensation due to company Y. for unnecessary design costs in relation to the transfer stations "*on the basis of a method of quantification not raised or discussed by the parties*".

94- It appears from the award on this point that the arbitral tribunal, while granting, as a matter of principle, the claim for the compensation of company Y., considered that it was appropriate to apply Article 263 of the QCC, invoked by X., allowing for a reduction in the amount of compensation due to the attitude of the victim, considering that company Y., "*as a high-level professional, could have avoided at least part of the damage it claims by making reasonable efforts*" (paragraph 240).

95- In application of this text, the arbitral tribunal chose to apply a 25% reduction to the amount of the said loss.

96- While X. had invoked Article 263 of the QCC to exclude any compensation, and company Y. intended to dismiss this principle of mitigation, it cannot be considered that the arbitral tribunal, in opting for a reduction of 25% of this loss, violated the requirement of opportunity to be heard.

97- In fact, on the one hand, it is clear that the question of the contribution by company Y. to its own loss was raised and discussed by the parties before the arbitral tribunal such that no fact or law was raised *ex officio* by the arbitral tribunal, considering that this discussion did not require the tribunal, regarding the evaluation of the damages, to retain only one or the other of the proposals advanced by the parties.

98- On the other hand, in order to assess a loss, the arbitral tribunal is not required to submit to the parties prior to the issuance of the award the details of its reasoning which led to its decision to apply a reduction of 25%.

99- In the light of these elements, this complaint will be dismissed.

[...]

On costs and expenses;

123-X., as the losing party, should be ordered to pay the costs.

124-In addition, X. must be ordered to pay to company Y., which had to incur irreducible costs in order to assert its rights, an indemnity pursuant to Article 700 of the Code of Civil Procedure, for which it is fair to set the amount, taking into account the meaning of the present decision, at EUR 200,000.

FOR THESE REASONS:

The Court,

1- Partially annuls the award rendered on 31 January 2019 under the auspices of the International Chamber of Chamber of Commerce in ICC Case No. (...) insofar as it ordered X. to pay to company Y. the sum of QAR 2,591,892.98 (paragraph 898.2 (h));

2- Dismisses the action for annulment as to the remainder;

3- Orders X. to pay company Y. the sum of EUR 200,000 under Article 700 of the Code of Civil Procedure;

4- Orders X. to pay the costs.

La Greffière ***Le Président***

C. Glémet F. Ancel

Commentary by Alexandre Malan*

In this judgment dated 1 December 2020, the International Chamber of the Court of Appeal of Paris (International Chamber) upheld the arbitration award rendered on 31 January 2019 under the auspices of the International Court of Arbitration of the International Chamber of Commerce (ICC).[1] The award was issued by a tribunal composed of three arbitrators: Professor Bernard Audit (President), Mr Nicholas Dennys (appointed by the investor) and Dr Omar Aljazy (appointed by the State). The seat of the arbitration was Paris, France.

This dispute opposed Keppel Corporation, a Singaporean-based company, against the State of Qatar in relation to a project for the design, construction, operation, and maintenance of a solid waste management centre. Keppel Corporation won a tender in September 2016 to carry out this project, including landfill and recycling facilities, in the south of Doha. The contract was signed by the Qatari Ministry of Environment on 17 October 2006, which marked the implementation of the project that continued until 2011. In April 2015, however, Keppel Corporation initiated arbitration proceedings against Qatar as it had not received any payment since the beginning of the project, in alleged violation of the obligations set out in the contract. While Keppel Corporation had requested that Qatar pay 364,839,693.75 Qatari riyals (QAR) and 613,216.13 Singaporean dollars, the arbitral tribunal ordered the State to pay QAR 123 million and the arbitration costs, which were approximatively equal to 3.4 million US dollars. Indeed, the arbitral tribunal rejected Qatar's application to dismiss Keppel Corporation's claims. Qatar sought a partial annulment of this award before the Court of Appeal of Paris.

Under French law, the annulment judge is not permitted to review the substance of the dispute.[2] Further to Decree n° 2011-48 dated 13 January 2011, Article 1520 of the French Code of Civil Procedure (CPC) lists five grounds on which an arbitral award may be set

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1. The International Chamber was founded in 2018 to *"adapt the French judicial system to contemporary international economic and legal issues"* (Court of Appeal of Paris, *The ICCP-CA General presentation* ,https://www.cours-appel.justice.fr/paris/presentation-generale-ccip-ca-iccp-ca. This chamber has wide jurisdiction to hear international disputes concerning international economic and financial relations, such as unfair competition, transportation, commercial contracts, and the breach of commercial relations. The International Chamber allows documents to be filed in English without translation into French, and questions may be put to parties, witnesses and experts, including in English. These different features make the International Chamber a suitable forum for the resolution of international disputes.
2. C. SERAGLINI, J. ORTSCHEIDT, *Droit de l'arbitrage interne et international*, Précis Domat, Droit privé, 2d Ed, pp. 989, p. 978; Cass., 1re civ., 6 October 2010, Bull. Civ. I, n° 184; Cass. 1re civ., 30 January 2019, n° 14-23822.

aside. Decree n° 2011-48 dated 13 January 2011 applies to all arbitration awards rendered after its entry into force, i.e. 1 May 2011).[3] Compared to other jurisdictions, the emergence of rules governing arbitration proceedings under French law occurred early. Whereas the first Civil Code of 1806 was not sufficient to deal with matters related to commercial arbitration, a decree was enacted on 14 May 1980. Contrary to other jurisdictions, such as England and the United States, "*the real impetus for a reconsideration of arbitration provisions under French law came, paradoxically, from the courts*".[4] Later, in 2011, France reformed its domestic and international arbitration law through the enactment of Decree n° 2011-48. The reform boosts the effectiveness of France's arbitration regime and solidifies the status of France as an arbitration-friendly jurisdiction.

The five grounds set out at Article 1520 of the CPC can be roughly summarized as follows:

Article 1520.1° of the CPC provides for recourse if the arbitral tribunal wrongly declared itself as having - or as not having - jurisdiction. This allows the judge to verify the existence of an arbitration clause, whether the clause was null or expired and to ensure the arbitrability of the subject matter. The analysis of the existence and validity of the clause is carried out *"subject to mandatory rules of French law and international public policy, according to the common will of the parties, without the need to refer to State law*".[5]

Article 1520.2° encompasses situations in which the arbitral tribunal was improperly constituted. Judicial control of an arbitral award is limited to ascertaining the parties' will as regards the constitution of the arbitral tribunal, as well as the impartiality and independence of the arbitrators.[6]

Article 1520.3° permits the annulment of the arbitral award if the arbitral tribunal did not respect the terms of the mission entrusted to it by the parties. This article applies when

3. C. JARROSSON, J. PELLERIN, "Le droit français de l'arbitrage après le décret du 13 janvier 2011", Rev. arb., 2011.5, pp. 5-86 ; S. BOLLEE, "Le droit français de l'arbitrage international après le décret n° 2011-48 du 13 janvier 2011", RCDIP, 2011/3 (N° 3), p. 553-579 ; E. GAILLARD, P. DE LAPASSE, "Commentaire analytique du décret du 13 janvier 2011 portant réforme du droit français de l'arbitrage", Cahiers de l'arbitrage, 1 April 2011, n° 2, p. 263 ; G. CARDUCCI, "The Arbitration Reform in France: Domestic and International Arbitration Law", Arbitration International, Volume 28, Issue 1, 1March 2012, p. 125-158.
4. T. E. CARBONNEAU, "Étude historique et comparée de l'arbitrage. Vers un droit matériel de l'arbitrage commercial international fondé sur la motivation des sentences", RIDC, pp. 727 - 781, 1984.
5. Cass. 1re civ., 30 March 2004, Rev. arb. 2005, p. 959, with a commentary by Ch. SERAGLINI.
6. Cass. 1re civ., 3 October 2019, n° 18-15.756, *Saas Buzwair Automotive (SBA) v/ Audi Volkswagen Middle East Fze (Audi);* Court of Appeal of Paris, 17 December 2019, n° 17/23073, *Laser*; ECHR, 22 October 2019, *Deli v. République de Moldova*, n° 42010/06, Dalloz actualité, 20 November 2019, obs. M. Kebir ; A. Malan "The fight for independence: a review of recent decisions rendered by French Courts regarding independence of arbitrators", Mealeys International Arbitration Report, 2012, Vol 7, §6, June 2012.

the tribunal has disregarded the scope of the parties' claims or exceeded the powers entrusted to it, or if the arbitrators did not respect the time limit set by the parties - in the terms of reference or through the arbitration institution - for rendering the award.

The fourth paragraph, Article 1520.4°, refers to a violation of due process, such as the principle that both parties must be heard and the rights of defence. It is used, in particular, in situations where the arbitrators did not grant the same period of time to the parties during the course of the proceedings or grounded their decision on points that had not been invoked by the parties without inviting them to debate on them beforehand.

The last ground, defined in Article 1520.5°, allows broader recourse for annulment as it covers cases in which the recognition or the enforcement of the award would be contrary to international public order, as defined according to French standards.

Qatar based its action on three of those grounds to seek annulment of the arbitration award. First, it argued that the arbitral lacked jurisdiction pursuant to Article 1520.1° of the CPC. Second, it asserted that the tribunal did not comply with its mission pursuant to Article 1520.3° of the CPC. Finally, it considered that the tribunal failed to respect due process pursuant to Articles 1520.4° and 1510 of the CPC.

In this case, the Paris Court of Appeal, presided over by Judge François Ancel, rejected most of Qatar's claims and upheld the award. Nevertheless, the court recognized the relevance of the second ground that was raised, which concerned the tribunal's non-compliance with the mission entrusted to it. Indeed, the Paris Court of Appeal asserted that the arbitral tribunal could not sentence Qatar to pay a higher amount than what was claimed by Keppel Corporation. While Keppel Corporation had requested a compensation of QAR 2,591,892.98 for the work carried out in the entrance area of the construction project, the arbitral tribunal had awarded a higher compensation of QAR 2,572,826.64. Consequently, the Paris Court of Appeal partially set aside the award, considering that the arbitral tribunal had decided *ultra petita*. As it was possible to separate this portion of the award from the rest, the Paris Court of Appeal judged that it was appropriate to order the partial annulment of the award.

This Paris Court of Appeal decision is rooted in the well-established jurisprudence of French courts and follows the same trend as can be observed in several others matters. Indeed, the position of French courts has been reiterated in several cases concerning non-compliance with multi-tiered dispute resolution clauses (I) and the violation of a tribunal's mandate based on an *ultra petita* decision (II).

I. Non-compliance with multi-tiered dispute resolution clauses: a matter of admissibility of the claim rather than a matter of jurisdiction:

Qatar first argued that the dispute resolution procedure set out in Clause 20 of the contract was a condition of the parties' consent to the jurisdiction of the arbitral tribunal to hear their dispute. The State argued that since the parties had failed to comply with this pre-arbitral procedure, the arbitral tribunal lacked jurisdiction to hear the case based on Clause 20 of the contract. The State based its first recourse on Article 1520°1 of the CPC, which is one of the objections that can be used to ground the annulment of an award.[7]

Keppel Corporation pointed out the fact that, on one hand, the failure to comply with conditions precedent to the start of arbitration proceedings does not impact the parties' willingness to submit their dispute to the jurisdiction of an arbitral tribunal. Nor does it impact, on the other hand, the fact that the claims filed by the parties remained within the broad scope provided by the arbitration clause to hear all disputes which may arise. This arbitration clause is provided for in Article 1.3 of the *"Amendments to the contractual conditions".*

This point had been raised before the arbitral tribunal, which noted that Clause 20 was not an arbitration clause. In the event of dispute, the clause attributed jurisdiction to Qatar's national courts:

20.4 Disputes: No Settlement by the Engineer

If the Engineer fails to give written notice of his decision in accordance with Sub-clause 20.3, within ninety days, or if X or the Contractor has reason to dispute the Engineer's decision, then X. or the Contractor may submit the dispute to the Competent Court of Qatar, provided that fifteen days' written notice has been given to the Engineer.

Nevertheless, the Court of Appeal admitted that Article 1.3 of the "*Amendments to the contractual conditions*" included an arbitration clause:

All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators in accordance with the said Rules.[8]

Even though Qatar was considered by the Court of Appeal to have rightfully claimed that the arbitration clause should not replace the procedure set out in Clause 20 of the

7. See para. 4, above.

8. In the original French: "*Tous différends découlant du présent contrat ou en relation avec celui-ci seront tranchés définitivement suivant le Règlement d'Arbitrage de la Chambre de Commerce Internationale".*

contract, the Paris Court of Appeal judged that the non-compliance with the pre-arbitral procedure set out in the contract did not limit the jurisdiction of the arbitral tribunal under Clause 1.3 of the same contract. Hence, the Court dismissed this argument and found that the arbitral tribunal had jurisdiction to hear the case.

The Court's considerations are derived from the jurisprudence of French courts. Indeed, the Paris Court of Appeal had already reached the same finding in a decision dated 4 March 2004 in *Nihon Plast Co. v/ Takata-Petri Aktiengesellschaft*.[9] This reasoning was also followed by the same Court in a judgment dated 28 June 2016 in the case of *Vijay Construction Ltd v/Eastern European Engineering Ltd*. Indeed, in both cases, the fact that the pre-arbitral procedure had not been completed by the parties was not judged as a valid ground to annul the arbitral award. Most importantly, the Paris Court of Appeal does not consider the issue of non-compliance with the multi-tiered clause in terms of jurisdiction, but in terms of the admissibility of the claim. Since the French CPC does not include a ground for annulment based on the lack of admissibility of the claim in Article 1520, the request for annulment on this ground was dismissed. Therefore, the Paris Court of Appeal focused on the question of jurisdiction of the arbitral tribunal and did not review the admissibility of the claim.[10]

Consequently, this rejection of Qatar's claims regarding the lack of jurisdiction of the arbitral tribunal is based on well-established jurisprudenceof French courts, including the Paris Court of Appeal.

II. The violation of the mission granted to the arbitral tribunal by the parties: an *ultra petita* decision:

A second ground for annulment was raised by Qatar based on Article 1520.3° of the French CPC, which states: "[t]*he action for annulment is only available if the arbitral tribunal decided without complying with the mandate granted to it by the parties"*. Qatar argued that the arbitral tribunal did not fulfil its mandate for three reasons.

9. Court of Appeal of Paris, 4 March 2004, *Société Nihon Plast Co. v. Société Takata-Petri Aktiengesellschaft*, *Rev. arb.* 452 (2004); *Rev. arb.* 143 (2005); *The Paris Journal of International Arbitration*, 2013 Vol. 2, p. 327 et seq., by one of the co-authors: "Jurisdiction and Admissibility: a subtle distinction, not always easy to make in international arbitration"; A.V. SCHLAEPFER, A. MAZURANIC, "Drafting Arbitration Clauses in M&A Agreements", Global Arbitration Review, 5 December 2019.

10. Despite this, French courts do recognize the validity of such contractual clauses when the dispute is brought before a national court. The French *Cour de cassation* (Supreme Court) considers that a multi-tiered dispute resolution clause is binding on the national court's judge, regardless of the nature of the proceedings, and therefore the parties cannot file a claim before courts before having triggered the amicable resolution clause (Cass., 1re civ., 1 October 2014, 13-17.920). However, the parties are not obliged to reach an agreement, since the clause requires that they give their "best efforts" to negotiate in good faith to find an amicable resolution to their dispute (see, C. SERAGLINI, J. ORTSCHEIDT, *Droit de l'arbitrage interne et international*, 2eédition, précis Domat Droit privé, p. 38).

First, the arbitral tribunal awarded to the claimant an indemnity for a higher amount than claimed. Keppel Corporation had requested QAR 2,572,826.64 as compensation for the work carried out in the entrance area of the compound. The arbitral tribunal awarded a higher amount of QAR 2,591,892.98.

In order to avoid annulment of the award by the Court of Appeal, Keppel Corporation argued that it had introduced a particular formula in its statement of claim which specified that it asked the tribunal to pay the sums *"as it deemed appropriate".* In this case, the arbitral tribunal considered that the higher amount which it ordered Qatar to pay would be a fairer sum to compensate the work carried out in the entrance area. Besides, the total sum which was awarded as compensation did not exceed the total sum requested by the claimant.

However, the Paris Court of Appeal asserted that the arbitral tribunal should have made its award based on an assessment of the compensation on an item-by-item basis rather than in aggregate. Furthermore, the formula used by Keppel Corporation in its statement of claim did not authorize the tribunal to go beyond the sums requested, but only to award a different sum within the limit of the specific claim. This approach is in line with a strict interpretation of Article 1520-3° of the French CPC: the arbitrator is expected to address the parties' requests, including the details of the calculation of each of their claims. Therefore, the arbitrator may not award more than the sums requested by the parties for each claim, notwithstanding the fact that the sum awarded does not exceed the total amount claimed.

Consequently, the Paris Court of Appeal declared that the arbitral tribunal did not comply with its mandate and therefore decided to partially annul the award.

Although this decision of the Paris Court of Appeal is in line with well-established jurisprudence of French courts, in a recent case rendered on 12 January 2021 in *Seitur Agencia de Viajes y Turismo v/ Travel Holdings,* the Paris Court of Appeal decided otherwise.[11] In this case, the appellant argued that the arbitral tribunal wrongfully ordered the debtor to pay a higher sum than the amount that had been requested by the creditor. The Paris Court of Appeal did not consider that the arbitral tribunal decided *ultra petita*. Instead, the Court declared that the decision of the tribunal to apply a penalty payment constitutes an inherent and necessary extension of its mandate. The application of such penalty falls within the discretionary power of the arbitral tribunal, without the need to justify this finding. This principle is recognized by French national courts but is not

11. Court of Appeal of Paris, 12 January 2021, n° 17/07290; J. JOURDAN-MARQUES,"Chronique d'arbitrage: la révélation encore révolutionnée?", Dalloz Actualité, CIVIL | Arbitrage - Médiation - Conciliation, 22 February 2021.

systematically implemented in international arbitration. Consequently, the Paris Court of Appeal did not consider that it fell within the discretionary power of the arbitral tribunal to decide *ultra petita* in the case between Keppel Corporation and Qatar.

Second, the State of Qatar argued that the arbitral tribunal exceeded its powers by deciding as amiable compositeur. According to the State, judging in "*amiable composition*" or "*ex aequo et bono*" when the parties had not expressly conferred such mission on the tribunal was grounds for the annulment of the award based on Article 1520°3 of the CPC.

The difference between judging in law and deciding as amiable compositeur is set out in Articles 1511 and 1512 of the CPC. The former allows the arbitral tribunal to issue an award based on the strict application of the law applicable to the dispute, while the latter empowers the arbitral tribunal to decide in "*equity and conscience*,"[12] without necessarily applying the applicable law. Therefore, the outcome of a dispute is largely dependent on the choice between the two methods. This explains why the arbitral tribunal can only decide *ex aequo et bono* when it is expressly granted this power by the parties.

Nevertheless, an annulment judge is not allowed to review the merits of the case.[13] As a result, the control by the judge of the tribunal's logic is significantly restrained, including whether the arbitral tribunal has decided in law or in equity. The *Cour de cassation* (French Supreme Court) only requires annulment judges to check whether the arbitrators have considered equity considerations or if the award is based on law.[14]

In this case, the State of Qatar argued that the arbitral tribunal did not strictly apply the contractual provisions and limited its effects by considering factual circumstances which fall within the scope of a judgment in equity and not in law.

The Paris Court of Appeal noted that, as expressed by Qatar, the arbitral tribunal was not empowered to decide as amiable compositeur. In fact, it was bound to apply the provisions of the contract governed by Qatari law, pursuant to the Article 21.2 of the 2012 Arbitration Rules of the ICC International Court of Arbitration.

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12. R. H. CHRISTIE, "Amiable Composition in French and English Law", (1992), 58, Arbitration: The International Journal of Arbitration, Mediation and Dispute Management, Issue 4, pp. 259-266; Bin CHENG, PH.D., LIC.-EN-DR, 11 Justice and Equity inInternational law, *Current Legal Problems,* Volume 8, Issue 1, 1955, pp. 185-211.
13. C. SERAGLINI, J. ORTSCHEIDT, *Droit de l'arbitrage interne et international*, Précis Domat, Droit privé, 2e édition, pp. 989, p. 978; Cass., 1re civ., 6 October 2010, Bull. Civ. I, n° 184; Cass. 1re civ., 30 January 2019, n° 14-23822.
14. Cass., 1re civ., 1 February 2014, n° 13-18596; Cass., 1re civ., 21 November 2012, n° 11-12145 et 11-12197; Cass., 1re civ., 1 February 2012, *Bull. civ.* I, n° 14.

The Paris Court of Appeal reviewed the award and found that the arbitral tribunal had not decided in amiable composition but had rightfully based its decision on Qatari law. Indeed, the arbitral tribunal referred on several occasions to the Qatari Civil Code, namely Articles 403 and 418 related to the mandatory regime of prescription, Article 172 related to the principles of good faith, and Articles 263, 709 and 256 related to compensation.

The analysis of the award shows that the arbitral tribunal interpreted the principles of good faith under Qatari law, pursuant to Article 172 of the Qatari Civil Code. This article reads as follow:

> *"1. A contract shall be performed in accordance with its provisions and in such manner consistent with the requirements of good faith.*
> *2. A contract shall not be limited only to binding a party to its provisions but shall also cover whatever is required by law, customary practice and justice in accordance with the nature of the obligations contained in the contract."*

The doctrine also establishes that the obligation of cooperation is based on good faith requirements under Qatari law.[15] Considering these provisions and doctrine, the arbitral tribunal found that there was a blatant lack of good faith, as defined under Qatari law, since the Engineer and the Chairman of the steering committee were the same person carrying out two different functions. This constituted a lack of transparency. Since the arbitral tribunal was found to have applied the principle of good faith, as derived from Qatari law, rather than equitable principles detached from national law, the Court of Appeal dismissed the claim.

This judgment of the Court of Appeal of Paris is a good example of the reasoning of annulment judges based on the provisions of the French CPC, while also showing the subtleties that commonly arise in such disputes. It also illustrates that the options made available by the French CPC are restricted such that an award may be annulled on a limited number of grounds. From a more general standpoint, the Court clarifies the distinction between jurisdiction and admissibility in the implementation of multi-tiered dispute resolution clauses, whether it is appropriate for the arbitrator to decide in equity rather than on the basis of the law, and the circumstances in which an arbitrator is considered to have exceeded the mission conferred upon him or her by the parties.

15. A.H. AL MULLA, "The Principle of Good Faith in Contracts: Qatari Law Perspective", (2017) 19 Asian Bus Law, p. 131.