4A_450/2013[1]

Judgment of April 7, 2014

First Civil Law Court

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

X._____,
Represented by Mr. Homayoon Arfazadeh and Mr. Jacques Python,
Appellant

v.

1. Y._____ Engineering S. p. A.
2. Y._____ S. p. A.
Both represented by Mr. Paolo Michele Patocchi and Mr. Paolo Marzolini,
Respondents

Facts:

A.
A.a.
X._____ (hereafter: X._____ or the Appellant) is a foreign company active in the field of industrial production of aluminium foil and aseptic packaging for food products.

Y._____ Engineering S.p.A. (hereafter: Y._____ Engineering) is an Italian law company constituted on October 6, 1997, indirectly belonging to group Z._____ S.p.A., which is active in particular in producing and commissioning industrial units. It was held by Y._____ Group S.p.A. (hereafter Y._____ Group), a subsidiary of Z._____ S.p.A. created on January 26, 1988, and put into voluntary

[1] Translator's Note: Quote as X._____ *v.* Y._____ Engineering and Y._____ S.p.A., 4A_450/2013. The original decision is in French. The full text is available on the website of the Federal Tribunal, www.bger.ch.

liquidation on March 7, 2005. Y._____ Engineering was also put into voluntary liquidation on May 16, 2005; it stayed there until May 8, 2006.

Y._____ S.p.A. (hereafter: Y._____), an Italian law company and a subsidiary of Z._____ S.p.A., was constituted on February 23, 2005. On March 4, 2005, it acquired a department (or a division) without legal personality named Y.D._____ from Y._____ Group.

A.b.

On January 25, 2001, after negotiations started in 1997, X._____ and Y._____ Engineering entered into three contracts – a *General Agreement*, a *Contract for Supply of Equipment* and a *Contract for Service* – the purpose of which was the delivery of an aluminium foil plant on a turn-key basis (hereafter collectively referred to as "The Contracts"). The work was initially to be delivered on November 29, 2004. Its total price of EUR 73 million was payable by way of documentary credits to be opened in favor of the Italian company against presentation by the latter of some performance bonds issued by a bank, among other guarantees. The Contracts were signed by A._____, chief financial officer of Y._____ Group for the Italian party on the basis of a power of attorney issued on the 22nd of the same month by B._____ in his double capacity as president of Y._____ Engineering and executive director of Y._____ Group. All are governed by Swiss law and contain an arbitration clause providing for the resolution of disputes as to performance by way of an arbitration conducted in English in Geneva under the aegis of the International Chamber of Commerce (ICC).

A.c.

At the beginning of October 2003, the completion of the project was suspended with each contractual party claiming the other was responsible, which caused some lengthy and delicate negotiations. They concluded with a Plan of Execution dated April 18, 2004, but unsigned, which outlined the agreement between the parties. Among other things, it was mentioned that X._____ did not wish to complete the project with Y._____ Engineering but with Y.D._____.

In a letter dated April 20, 2004, C._____, the head of the Y.D._____ department, advised X._____ that a member of this department – D._____ – would be the new person in charge of the project. Another letter meant for X._____ was attached, written on Y._____ Engineering letterhead and signed by the CEO of this company (E._____) and countersigned under the caption *Acknowledgement* by F._____, from Y._____ Group, the text of which was as follows: "*As per your request [Y._____ Engineering] hereby agrees to appoint Mr. C._____ the full responsibility for completion of the X._____ project. [Y._____ Group] acknowledge and agrees with this decision*…"[2] After this letter was sent, Y._____ Engineering no longer intervened directly in the completion of the project.

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

On May 26, 2004, two protocols were signed by G._____ on behalf of X._____ and by C._____ on behalf of Y._____ Engineering. One of them simply states that X._____ and Y._____ Engineering settled their differences and intended to complete the project as soon as possible. The other, (hereafter "the Long Protocol") contains seven points and outlines in detail the steps to be taken for this purpose. It starts with a reference to the transfer of responsibilities mentioned in the aforesaid letter of April 20, 2004, ("*With reference to the responsibility transfer letter date April 20, 2004…*"[3]) and to the five meetings between "*Dr. C._____ of Y._____ Engineering and Mr. G._____ of X._____*".[4] Clause 7 of the Long Protocol provides that Y._____ Group would provide X._____ with an irrevocable guarantee on May 28, 2004, at the latest, with a view to guaranteeing its obligations under the Contract of Service.

In a letter of December 22, 2005, (hereafter "the *Suspension Letter*"), Y._____ Engineering invoked the failure to pay its invoices issued between June and December 2005 and X._____'s failure to prepare for the commissioning of the plant and advised X._____ that it had suspended the performance of the work.

In mid-February 2006, the parties met to try to amicably settle the dispute from which the Suspension Letter originated and its consequences. This attempt resulted in the preparation of a draft Memorandum of Agreement but failed. On February 21, 2006, B._____ sent a letter to the principal shareholder of X._____ in which it pointed out the following in particular: "*I also accepted to transfer the realization of the project from Y._____ Engineering (Mr. E._____) to Y.D._____ (Mr C._____). As you might remember, this action was notified to X._____ with Y._____'s letter dated April 20, 2004*."[5]

Y._____ Engineering sent a letter to X._____ on February 26, 2007, formally notifying the termination of their contractual relationship.

B.

On January 27, 2006, Y._____ Engineering invoked the arbitration clauses inserted into the three aforementioned Contracts and filed a request for arbitration against X._____. Its final submissions sought an order that X._____ pay a total EUR 9'652'264.67 with interest.

On April 24, 2006, X._____ submitted its answer with a view to obtaining an award attributing the entire responsibility of the failure of the common project to Y._____ Engineering and drawing the financial consequences there from. To this effect, it submitted a counterclaim against Y._____ as well.

Each party then appointed a lawyer of its country as Arbitrators and the two Co-Arbitrators chose a Swiss advocate as Chairman of the Arbitral Tribunal. The choice was ratified by the ICC Court of Arbitration on

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

July 25, 2006. On February 7, 2013, it appointed a new Chairman as a consequence of the death of the acting Chairman.

With Y._____ having refused to take part in the arbitral proceedings, X._____ withdrew some of its counterclaim on July 16, 2007. It reintroduced it with other submissions by filing a separate request for arbitration against Y._____ and Y._____ Engineering on the same day, both being sought jointly for a total amount ultimately set at EUR 53'166'884.26. In their answer of September 24, 2007, to this request, the two Italian companies objected to the jurisdiction of the Arbitral Tribunal as to Y._____ and submitted on the merits that the claim of X._____ should be rejected. The two arbitral proceedings were then consolidated and Y._____ agreed to take part as Co-Respondent to the Counterclaims while maintaining its jurisdictional objection.

On July 31, 2013, the Arbitral Tribunal issued its final award of 752 pages, the operative part of which contains 29 items. In a majority decision, it denied the jurisdiction as to Y._____ and consequently rejected all the counterclaims against that company (n. 1 of the operative part). Moreover, since its denial of jurisdiction arose from Y._____ never having been a party to the January 25, 2001, Contracts, the Arbitral Tribunal also rejected the submissions by which X._____ – arguing instead that Y._____ and Y._____ Engineering were both parties to these Contracts and consequently were necessary joint defendants – asked that all submissions of Y._____ Engineering against it should be rejected because this company had no standing (*locus standi*) (n. 2 of the operative part). As to the merits, the Arbitral Tribunal upheld the various claims of Y._____ Engineering and X._____ in part. In a majority decision however, it entirely rejected counterclaim n. 3.9 by X._____ seeking payment of EUR 13'130'001.75 as damages for late performance and completion of the project by Y._____ and Y._____ Engineering (n. 22 of the operative part). Each Co-Arbitrator issued a dissenting opinion; one of these addresses in particular the issue of the jurisdiction *ratione personae* of the Arbitral Tribunal and the issue of the damages for late performance sought by X._____.

C.

On September 16, 2013, X._____ filed a civil law appeal with the Federal Tribunal. As a preliminary matter, it seeks leave to dispense with a translation of the award under appeal. The Appellant seeks the annulment of the July 31, 2013, award to the extent that the Arbitral Tribunal denied jurisdiction against Y._____ and a finding that there is jurisdiction with the matter sent back to the Arbitral Tribunal to change the operative part of the award as instructed. On the merits, it seeks the annulment of n. 22 of the operative part of the award under appeal with the matter sent back to the Arbitral Tribunal for a new decision on its claim for damages connected with the late performance of the contractual obligations of the two Italian companies. The Appellant argues that the Arbitral Tribunal violated Art. 190(2)(b) and (d) PILA[6] in dealing with the issue of jurisdiction and violated its right to be heard (Art. 190(2)(d) PILA) when reviewing the substantive claim, which is the second issue of this appeal.

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

In their answer of November 20, 2013, Y._____ and Y._____ Engineering mainly submit that the matter is not capable of appeal and, in the alternative, that the appeal should be rejected.

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

On December 9, 2013, and January 10, 2014, the Appellant and the Respondents filed their respective reply and rejoinder in which they maintained their previous submissions.

Reasons:

1.
According to Art. 54(1) LTF,[7] the Federal Tribunal issues its decision in an official language,[8] as a rule in the language of the decision under appeal. When the decision is issued in another language (here, English), the Federal Tribunal resorts to the official language chosen by the parties. Before the Arbitral Tribunal they used English while the briefs sent to the Federal Tribunal are in French. According to its practice, the Federal Tribunal will consequently issue its judgment in French.

Moreover, it is not customary for this Court to demand a translation of awards and decisions written in English (Bernard Corboz, *Commentaire de la LTF*, 2009, n. 71 ad Art. 77; see also: Jean-Maurice Frésard, *op. cit.*, n. 22 ad. Art. 54, p. 386). Consequently, the Appellant's preliminary submission to set aside this requirement is moot as the normal practice has been followed in this case. Therefore, there is no need to handle this submission formally or to mention it the operative part of this judgment.

2.
2.1.
In the field of international arbitration, a civil law appeal is admissible against the decisions of arbitral tribunals pursuant to the requirements of Art. 190-192 PILA (Art. 71(1)(a) LTF). The seat of the arbitration is in Geneva. None of the parties had its domicile in Switzerland within the meaning of Art. 21(1) PILA at the decisive time. The provisions of Chapter 12 PILA are accordingly applicable (Art. 176(1) PILA).

The Arbitral Tribunal upheld the objection against jurisdiction raised by the Respondents as to Y._____ and rejected one of the substantive claims of the Appellant. The latter is therefore particularly affected by the award under appeal to this extent; consequently, it has an interest worthy of protection to the partial annulment of the decision, which gives it standing to appeal (Art. 76(1) LTF). As it was filed in a timely manner (Art. 100(1) LTF in connection with Art. 45(1) and 46(1)(b) LTF), in the legally prescribed format (Art. 42(1) LTF), the appeal is admissible.

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[7] Translator's Note: LTF is the French abbreviation of the Federal Statute of June 17, 2005, organizing the Federal Tribunal, RS 173. 110.

[8] Translator's Note: The official languages of Switzerland are German, French and Italian.

2.2.
The appeal may only seek the annulment of the decision (see Art. 77(2) LTF, ruling out the applicability of Art. 107(2) LTF). However, when the dispute relates to the jurisdiction of an arbitral tribunal, it has been exceptionally admitted that the Federal Tribunal could itself find jurisdiction or lack of jurisdiction (ATF 136 III 605[9] at 3.3.4, p. 616; 128 III 50 at 1b).

The Appellant's submission that the Federal Tribunal itself states that the Arbitral Tribunal has jurisdiction against Y._____ is accordingly admissible.

2.3.
The Federal Tribunal issues its decision on the basis of the facts found in the award under appeal (see Art. 105(1) LTF). This Court may not rectify or supplement *ex officio* the factual findings of the arbitrators even if the facts were established in a blatantly inaccurate manner or in violation of the law (see Art. 77(2) LTF, ruling out the applicability of Art. 105(2) LTF). However, as was already the case under the aegis of the federal law organizing federal courts (see ATF 129 III 727 at 5.2.2; 128 III 50 at 2a and the cases quoted), the Federal Tribunal retains the competence to review the facts on which the award under appeal is based if one of the grievances mentioned at Art. 190(2) PILA is raised against such factual findings or when some new facts or evidence are exceptionally taken into account, in the framework of the civil law appeal proceedings (ATF 138 III 29[10] at 2.2.1 and the cases quoted). Whoever wishes to avail himself of an exception to the inviolability of the factual findings in the award under appeal must show, with precise reference to the specific passages in his briefs, that the facts he alleges the arbitral tribunal did not take into account were regularly submitted during the arbitral proceedings (judgment 4A_305/2013[11] of October 2, 2013, at 2.3 f.).

3.
In its first group of arguments, the Appellant relies on Art. 190(2)(b) PILA and claims that the Arbitral Tribunal wrongly denied jurisdiction as to Y._____. Invoking Art. 190(2)(d) PILA, it also argues a violation of its right to be heard as to the pertinent factual findings to resolve the jurisdictional issue.

3.1.
Seized with regard to a jurisdictional issue, the Federal Tribunal freely reviews the legal issues determining the jurisdiction or lack of jurisdiction of the arbitral tribunal, including preliminary issues (ATF 133 III 139 at 5, p. 141 and the cases quoted). However, this does not make this Court into a court of appeal. Therefore, it is not incumbent upon the Court to itself research which legal arguments could justify upholding the

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

[10] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/jurisdiction-of-the-cas-upheld-a-pathological-clause-has-to-be-s

[11] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/normative-interpretation-excluded-factual-findings

grievance based on Art. 190(2)(b) PILA in the award under appeal. Instead, it is for the Appellant to draw the Court's attention to them in order to comply with the requirements of Art. 42(2) LTF (judgment 4A_160/2007 of August 28, 2007, at 3.1; ATF 129 III 675 at 1.5, unpublished). Moreover, the Federal Tribunal only reviews the factual findings on which the award under appeal relies within the limits indicated above (see 2.3). It will step in for a violation of the right to be heard in particular (Art. 190(2)(d) PILA) if the arbitral tribunal disregarded its minimal duty to examine and handle the pertinent issues and did not take into consideration some statements, arguments, evidence, and/or offers of evidence submitted by one of the parties and which are important for the decision to be issued (judgment 4A_669/2012[12] of April 17, 2013, at 3.1 and the precedents quoted).

3.2.
When examining whether it has jurisdiction to decide the dispute at hand, the arbitral tribunal must determine the subjective scope of the arbitration agreement among other issues. It must determine which are the parties bound by the agreement and as the case may be, determine whether or not one or several third parties not mentioned there nonetheless fall within its scope. This issue of jurisdiction *ratione personae* is a matter of substance and must be resolved in the light of Art. 178(2) PILA (ATF 129 III 727 at 5.3.1, p. 736). The provision quoted establishes three alternative links *in favorem validitatis* without any hierarchy between them, namely the law chosen by the parties, the law governing the subject matter of the dispute (*lex causae*) and Swiss law (ATF 129 III 727 at 5.3.2, p. 736).

Pursuant to the principle of the relativity of contractual obligations, the arbitration agreement included in a contract binds only the contracting parties. However, a number of occurrences such as the assignment of a claim, the joint or simple assumption of a debt, or the transfer of a contractual relationship have long lead the Federal Tribunal to hold that an arbitration agreement may bind even some persons that did not sign it and are not mentioned there (ATF 129 III 727 at 5.3.1, p. 735 and the cases quoted). Moreover, a third party involving itself in the performance of the contract containing the arbitration agreement is deemed to have adhered to the clause by conclusive acts if it is possible to infer from its involvement its willingness to be bound by the arbitration clause (ATF 129 III 727 at 5.3.2, p. 737; judgment 4P.48/2005 of September 20, 2005, at 3.4.1). As to legal persons, and depending on the circumstances, some contractual obligations may also be held against the mother company when the scopes of activity of the mother and the daughter overlap. Theoretically speaking, various juridical forms were imagined to justify refusing to take into account the formal independence of the mother and the daughter towards third parties. Besides piercing the corporate veil (*Durchgriff*) and taking into account an apparent power of attorney among other assumptions, responsibility based on the legal appearance seeks to protect the contractual counterparty – pursuant to the principle of reliance – in its erroneous belief to have concluded the contract with the mother company and not with the daughter company or even with both (ATF 137 III 550 at 2.3.2 and the commentators quoted; more generally ATF 138 III 755 at 8.3, p. 775 and the cases quoted; as to international arbitration, Berger and Kellerhals, *International and Domestic Arbitration in Switzerland, 2nd ed.*, 2006, ns. 523 ff).

[12] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/award-can-be-annulled-only-part

It is in light of these principles that the grievances raised by the Appellant will be reviewed hereunder. As a preliminary matter however, the reasons on which the legal solution adopted by the majority arbitrators and criticized by the Appellant rests must be summarized. These reasons are at pages 114 to 132 of the award (n. 119 to 158).

3.3.
3.3.1. The Arbitral Tribunal – this wording will be used henceforth to refer to the majority arbitrators unless otherwise specified – first quotes the following excerpt of a brief of the Appellant of September 2, 2008 (award n. 123):

> *In any event X._____ does not deny that until the transfer and assumption of the Agreements by the Y.D._____ of Y._____ SpA on 20th April, 2004, Y._____ ENGINEERING was the only party to GA, i.e. the General Agreement, the Service Contract and the Supply Contract.*[13]

On the basis of this statement by the Appellant, which it treats as an admission, the Arbitral Tribunal holds that it can dispense with examining the argument of the aforesaid company, according to which Y._____ Group was already a party to the Contracts when then were concluded in January 2001, as the admission means that Y._____ Engineering was the only original contractual counterparty of X._____. Hence, it must be researched whether Y._____ Group became an additional party to the aforesaid Contracts shortly before or at the time of signature of the protocols of May 26, 2004, because that is a necessary condition for Y._____ – which was only constituted on February 23, 2005 – could be recognized as well as a contractual party because it acquired Y.D._____ from Y._____ Group on March 4, 2005.

3.3.2. Essentially relying on the letter that Y._____ Engineering sent on April 20, 2004, (see the text of this letter at A.c, 2nd§ of this judgment) X._____ principally argued in the arbitral proceedings that, as a consequence of a three-party agreement entered into at the time, Y._____ Group had adhered to the contracts as a co-debtor of Y._____ Engineering towards X._____ for the performance of the obligations therein. The Arbitral Tribunal rejected the thesis of the three-party contract for the reasons summarized hereunder.

It fell to X._____ to prove that in April 2004, Y._____ Group intended to become an additional party to the Contracts. To do so, it could rely upon the matter in which it had understood in good faith the statements of will then made by Y._____ Engineering and/or Y._____ Group. The two letters of April 20, 2004 (see A.c, 2nd§, above), are not pertinent in this respect. They merely mean that Y._____ Engineering and not Y._____ Group entrusted C._____ with the entire responsibility of the completion of the project contemplated by the Contracts. That this person was not an employee of

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

Y._____ Engineering but instead an executive of Y._____ Group is not sufficient to conclude that it or Y._____ Group adhered to the Contracts as an additional debtor. Indeed, such a transfer of responsibility may also result from the involvement of a representative or a subcontractor acting in the name and on behalf of the person represented or the principle (*i.e.* Y._____ Engineering) without becoming personally liable for the obligations undertaken by the latter.

The Plan of Execution of April 18, 2004 (see A.c, 1st§, above), could indeed be a clue in support of the Appellant's argument because it had to be signed by Y.D._____ and not by Y._____ Engineering. However, it was never signed and the two protocols of May 26, 2004, are to be used instead because they were signed (see A.c, 3rd§, above). To be consistent with the argument, they should have mentioned Y._____ Engineering and Y._____ Group as parties to the protocols; failing this, Y._____ Group should at least have stated in a side letter that it adhered to the Contracts and to the protocols. Yet, this was not the case as the two protocols only mention Y._____ Engineering as a party (with X._____) and do the same on the line reserved for signatures. This also corresponds to the will expressed by Y._____ Engineering, while in the draft protocols, X._____ had proposed to mention Y.D._____ as a party. Moreover, Art. 7 of the Long Protocol anticipated the issuance of a of a corporate guarantee, the first draft of which was submitted to X._____ on May 26, 2004, and specified that Y._____ Group was the guarantor proposed for the obligations befalling Y._____ Engineering pursuant to the Contract for Service. Yet, the guarantee issued by the mother company makes sense only if it is not already committed itself next to its subsidiary as a co-debtor of the party in the favor of which the guaranty is constituted.

The circumstances after the protocols were signed do not reveal any indications of a will of Y._____ Group to adhere to the contracts. The text of the draft Memorandum of Agreement, apparently prepared by X._____ and discussed by the parties in February 2006 (see A.c, § before last, above) at a time when the request for arbitration had already been filed, mentions Y._____ Engineering only as a party, to the exclusion of Y._____. At the same time, C._____ indicated in answer to a request for clarification by X._____ that he dealt with the project "*on behalf of Y._____ Engineering*"[14] (award n. 145, last §). The letter from B._____ of February 21, 2005 (*recte:* 2006; see A.c, § before last, above), is not decisive: on the one hand, it does not mention any assumption of debt but simply a transfer of the performance of the project, which is consistent with the assumption that Y.D._____ acted only as a representative of Y._____ Engineering; on the other hand, this is only a presentation of the situation meant for the principle shareholder of X._____.

Finally, the two legal opinions submitted by the Appellant – one from Prof. H._____, the other from Dr. I._____ and Prof. J._____ – are not very useful in this case even though the legal theories they contain are essentially correct, because they are based on an incomplete description of the facts. The former, in particular, ignores the manner in which the Long Protocol came about and the issue of the corporate guarantee, while the latter does not even mention the existence of the Long Protocol.

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

The foregoing shows that in its letter of April 20, 2004, Y._____ Engineering nearly appointed C._____ as its representative with respect to X._____ for the continuation of the performance of the Contracts. Hence, Y._____ Group did not become a party to any of them. The protocols of May 26, 2004, did not change the respective positions of the various players. Consequently, it is not necessary to examine whether Y.D._____ performed as a subcontractor or merely on the basis of a mandate to represent Y._____ Engineering because Y._____ Group, namely Y.D._____ on its behalf, acted as representative in the name and for the account of Y._____ Engineering. Thus, it does not matter that the correspondence exchanged between the contractual parties was written to Y._____ Engineering on Y.D._____ letterhead, a division of Y._____ Group and then of Y._____, because it is customary for a representative to use its own letterhead when dealing with a third party on behalf of the principal. Hence, it must have been clear in the mind of X._____ that C._____ and his team only acted for the account of the other party to the Contracts, namely Y._____ Engineering.

3.3.3. Finally, the Arbitral Tribunal reviews the other three arguments developed by the Appellant to justify jurisdiction as to Y._____, namely the part played by this company in the performance of the Contracts, the rules of good faith and the principles concerning transparency or piercing the corporate veil. Relying on the opinion of Berger and Kellerhals (*op. cit.*, ns. 519 ff), it gives them the common denominator of compliance with the rules of good faith.

In the framework of its subsumption, the Arbitral Tribunal rejects the argument that Y._____ could not deny having become a party to the Contracts without breaching the aforesaid rules. Recalling that C._____ intervened in the performance of the Contracts as a mere representative of Y._____ Engineering on the basis of a power of attorney which did not intend to make Y._____ Group an additional party to them, it points out that after renouncing the corporate guarantee of Y._____ Group, X._____ must have been aware that Y._____ Engineering remained its sole contractual partner. Therefore, X._____ had no reason to consider Y._____ Group, through Y.D._____, as an additional party to the Contracts, so that it could not take the view in good faith that Y._____ Group had adhered to the obligations undertaken by Y._____ Engineering in the Contracts.

Having excluded its jurisdiction *ratione personae* towards Y._____, the Arbitral Tribunal does not find it necessary to examine whether in the opposite assumption Y._____ would have been bound by the obligations which fell to Y._____ Group pursuant to the Contracts simply because the company had transferred Y.D._____ to it as of March 4, 2005.

In conclusion, the Arbitral Tribunal denies jurisdiction as to Y._____ which leads it to reject all counterclaims by X._____ to the extent that they are aimed at the aforesaid company.

3.4.
In a first part of its appeal brief entitled "Reminder of the facts concerning jurisdiction" (p. 7 to 18), X._____ outlines, in detail, the circumstances which lead it to deal with the Respondent Italian companies with a view to the construction of an aluminium foil plant, the modalities of the conclusion of the three Contracts meant to cover the project, the behavior of the parties in their completion phase, and the conditions under which the contractual relationships ended.

This is a long statement mostly of an appellate nature, in which the Appellant seeks to make its own version of the pertinent facts without limiting itself to those found by the Arbitral Tribunal. That the introduction to the statement is a reminder of case law concerning Art. 190(2)(d) PILA does not change the matter as the author does not comply with the strict requirements of the case law (see 2.3, *i.f.*, above) but instead behaves as though he were arguing in a court of appeal entitled to freely review the factual findings of the lower court. This is not compatible with the nature of an appeal to the Federal Tribunal in the field of international arbitration. Consequently, this Court shall address only the facts found in the award under appeal.

3.5.
This being pointed out, the legal arguments raised in the appeal as to the jurisdiction of the Arbitral Tribunal *ratione personae* must be addressed (appeal p. 21 to 42). For the sake of simplicity and clarity, this Court will review them in the sequence followed by the Appellant, which divides its legal argument into six parts (let. C, n. 3, let. a-f) and the titles proposed by the Appellant for each of them will be adopted. While not necessarily quoting them specifically, this will be done with a view to the objections raised by the Respondents against these arguments in their answer to the appeal (p. 15 to 27) and considering the additional remarks made by all parties in the reply and the rejoinder. The titles reproduced hereunder are literally taken from the appeal brief.

3.5.1.
Y._____ as a successor of Y._____ Group (appeal, p. 22.a)
According to the Appellant, the Arbitral Tribunal rightly found at n. 120 to 122 of the award that Y._____ – having succeeded Y._____ Group and having been assigned the assets of the latter – must take over all obligations that it and its Y.D._____ division contracted towards X._____. According to the Appellant, its own claims against Y._____ Group would therefore be opposable *ipso facto* and *de jure* to Y._____, a point which is not in dispute.

It must be found with the Respondents (answer n. 85) that the Appellant over-interprets the text of the passage of the award it invokes. Indeed at n. 125 (ii) of the award, the Arbitral Tribunal points out that, should it find that Y._____ Group became a party to the Contracts, it would still have to determine whether the acquisition of the Y.D._____ division by Y._____ on March 20, 2005, mentioned at n. 120 of the award, brought about the transfer of the Contracts including in the arbitration clauses from Y._____ Group to Y._____. Later on, after excluding that Y._____ Group adhered to the Contracts, it states that the alternative question formulated hereunder thus becomes moot so that it may

dispense with examining it (award n. 157 and note 176, p. 131). Accordingly it is wrong to claim, as the Appellant does, that the Arbitral Tribunal answered this question in the affirmative. This means that, should this Court disagree with the Arbitral Tribunal as to the main issue, it could not find in favor of jurisdiction in respect of Y._____ as the Appellant specifically requests (appeal, p. 51, submission n. 4). In this assumption, §1 of the operative part of the award under appeal should be annulled and the case sent back to the Arbitral Tribunal to ultimately decide the submission left undecided.

3.5.2. **The refusal to examine the history of the relationships, in particular the negotiations and the signature of the Contracts** (appeal, p. 22 to 24.b)

It has been seen (cf. consid. 3.3.1 above) that the Arbitral Tribunal held, on the basis of the Appellant's statements in one of its briefs, that X._____ had conceded that Y._____ Group was not a party to the Contracts at the time they were concluded. For this reason, it did not conduct any further review as to whether the aforesaid company had been involved in the negotiations that lead to the signature of the Contracts in January 2001 or if it could be considered as an initial contracting party.

Relying on the dissenting opinion issued by its party-appointed Arbitrator (p.4 to 6, n.7 to 12), the Appellant seeks to challenge or at least to minimize the scope of this admission or confession by placing its statements into context. This is not admissible. Indeed, the statements of a party in a brief in the file of the arbitration are in the realm of facts and as such they cannot be reviewed by the Federal Tribunal. That Y._____ Group was not originally a party to the Contracts certainly does not necessarily exclude its possible active participation to their negotiation. However, the statements made by X._____ on this last issue at n. 22 to 42 of its appeal brief will not be taken into account for the reasons mentioned above (see 3.4).

3.5.3. **Reasons in the award as to the facts leading to the conclusion of the May 2004 Protocols** (appeal, pp. 24-31, let. c)

Under this title, the Appellant outlines the manner in which, in its opinion, the three documents or series of documents reviewed hereunder should be interpreted. It sees in them as many conclusive manifestations of will which, interpreted according to the principle of reliance, would lead to the conclusion that Y._____ Group had adhered to the Contracts of the spring of 2004.

3.5.3.1. *The two letters of assumption of responsibility of April 20, 2004, and the hypothesis of a subcontract* (appeal, pp. 25-27, [i])

Here the Appellant refers to the text of the April 20, 2004, letter submitted as Exhibit C-61 in the arbitration (see A.c, 2nd§, hereabove). It states that the letter – signed by both Y._____ Engineering (E._____) and Y._____ Group (F._____) – followed its request not to continue the performance of the project with Y._____ Engineering but with Y.D._____. The explanation appears plausible on the basis of the very text of the letter at issue ("As per your request"[15]) and of n. 1 of the Plan of Execution dated April 18, 2004 ("X._____ does not wish to continue Project completion through Y.E._____ [for Y._____

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

Engineering], but is open interface and complete the Project through Y.D._____"[16]), particularly as this letter put an end to the delicate negotiations after the completion of the project was suspended in early October 2003, due to the serious disagreements between the contractual parties.

Emphasizing then the rest of the text of the first sentence of the aforesaid letter ("*[Y._____ Engineering] hereby agrees to appoint Mr. C._____ the full responsability* [sic] *for completion of the X._____ Project*"[17]), the Appellant points out that this part of the sentence does not refer to C._____ as an individual but in his capacity as the head of the Y.D._____ department of Y._____ Group, which is apparently not in dispute; it then dwells on the expression "*full responsability* [sic]." In its view, is an irreconcilable contradiction between the assumption of the entire responsibility for the completion of the project by Y._____ Group through its division Y.D._____ and the fact that the intervention of this company (Y._____ Group) would be seen as the mere involvement of a representative of Y._____ Engineering, namely a subcontractor or an agent it appointed to complete the project, which is the view of the Arbitral Tribunal. The arguments the Appellant submits to substantiate this point appear convincing. First, the words used by the author of the April 20, 2004, letter, which imply the transfer of the total responsibility between two companies of the same group for the completion of the remaining work could hardly be interpreted by X._____ according to the principle of reliance as anything but an assumption by a third company (Y.D._____, *i.e.*, Y._____ Group) of the obligations undertaken by its initial contractual counterpart (Y._____ Engineering), whether jointly or not. Failing this – in other words, if it had been only a matter of advising the Appellant of an internal reorganization between the mother and the daughter company for the completion of the project, which would have made the former a mere representative of the latter as a subcontractor or a mere agent – X._____ should not have understood in good faith that its request had been granted but instead that Y._____ Group did not accept any liability towards it. This would be tantamount to imposing upon the Appellant an interpretation totally contrary to its intent to see Y._____ Engineering, which it did not trust, substituted or at least backed up by another debtor affording better guarantees for the completion of the project and compliance with the obligations under the contracts. While it is certainly not excluded that a mother company would become a subcontractor in a contractual relationship between one of its daughters with the principle, such juridical form appears fairly atypical. At Art. 2(3) of the Contract for Service moreover, the parties clearly stated that they would deal directly without the intervention of a third party ("*… the Parties hereto will deal directly with each other to the exclusion of any agent or representative*"[18]). Finally, it does not appear that the parties ever used the words *subcontract* or *mandate* in the letters they exchanged.

3.5.3.2. *The "Plan of Execution" of April 18, 2004* (appeal, pp. 27-29, [ii])

As to this document, prepared two days before the aforesaid letters, the Arbitral Tribunal itself concedes that it could be interpreted as evidence that Y.D._____ was not supposed to act in this case as a mere representative of Y._____ Engineering but rather in its own name because it was anticipated that it would sign the Plan of Execution of April 18, 2004. However, the Arbitral Tribunal did not take this

[16] Translator's Note: In English in the original text.
[17] Translator's Note: In English in the original text.
[18] Translator's Note: In English in the original text.

document into account because it had not been signed (award n. 136). However, this did not prevent it from relying later on a mere draft of the *Memorandum of Agreement* to substantiate its view (award n. 144 and 145), a somewhat illogical method.

It must be accepted – as argued by the Appellant – that the Plan of Execution, albeit unsigned, is not without interest to determine the meaning of the expression of will contained in the two letters of April 20, 2004. Considering the three documents together, it does appear that in the two subsequent letters the first three items of the Plan of Execution were implemented to the extent that X._____ was informed that the total responsibility for the completion of the project would be entrusted to Y.D._____ because it no longer wanted to continue to work with Y._____ Engineering and that D._____ would be appointed as project manager.

3.5.3.3. *The May 26, 2004, Protocols* (appeal pp. 29-31, [iii])

According to the Appellant, the reasoning of the Arbitral Tribunal should be put into perspective based on the fact that Y._____ Group not only was not only formally mentioned as a party in the two protocols signed on May 26, 2004, – unlike Y._____ Engineering – but also did not express its will to adhere to them and to the Contracts by way of a side letter. The same applies to the conclusions at n. 138 of the award that in the draft protocols X._____ had attempted without success to mention Y.D._____ as a party to these agreements because Y._____ Engineering 's will to be there as such ultimately prevailed. Indeed, according to X._____, the accession of Y._____ Group to the Contracts had already occurred from one of the two letters of April 20, 2004, – which is accurate (see 3.5.3.1, above) – and to which the preamble of the Long Protocol specifically refers ("With reference to the responsibility transfer letter dated April 20th, 2004"[19]). The Appellant rightly deduces from this that the protocol at issue merely implemented the transfer of responsibility that took place slightly before a month earlier and fulfilled the agreements on specific issues previously discussed.

Moreover, one must point out that if the two protocols mention Y._____ Engineering below the signature line, they were signed by C._____, an individual the Long Protocol refers to "of Y._____ Engineering." Yet, he was then the head of the Y.D._____ division of Y._____ Group. This could not but increase the confusion in this matter, whether intentionally or not, as to the various names of legal persons which included the name "Y._____". Reference can be made to the general confusion apparent from the time of the conclusion of the Contracts if one remembers that they were signed in the name of Y._____ Engineering by the financial director of Y._____ Group (A._____) on the basis of a power of attorney issued by B._____ in his double capacity as Chairman of Y._____ Engineering and executive director of Y._____ Group. More generally, the various drafts inserted into Exhibit 11 to the Respondents' answer further confirm the complexity of the structural organization of the Italian companies which X._____ dealt with. Therefore, it appears questionable to blame the Appellant for not having always been able to identify its real contractual counterpart in the fog around the members of this group of companies. Yet, the confusion as to this group is an element that should not be neglected in

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

applying the principle of reliance, namely from the point of view of the addressee of the manifest intent emanating from either one of these companies.

Clause 7 of the Long Protocol is worded as follows:

> *To guarantee its obligations under the service contract, Y._____ shall issue an irrevocable corporate guarantee duly signed by its authorized signatories of the Corporation with such wordings acceptable to X._____ and not later than 28th May 2004.*[20]

At n. 137 *i.f.* of the award, the Arbitral Tribunal points out that the name "Y._____" mentioned in this clause means Y._____ Group. Referring to the wording "its obligations," which refers to this company, the Appellant deduces that as Y._____ Group had to guarantee its own obligations under the Contract for Service, Clause 7 appears to confirm that the company had indeed accepted contractual liability towards X._____. It adds that, had it ultimately renounced the guarantee contemplated, it was because it found it redundant after realizing that Y._____ Group had to guarantee its own obligations (appeal, p. 30). The merits of this argument based on wording should not be overestimated. Yet, the legal construction adopted by the Arbitral Tribunal on the basis of the same clause (see above at 3.3.2, §4 *i.f.*) does not appear convincing. There is indeed an irresolvable contradiction between admitting that Y._____ is a synonym of Y._____ Group in the text of the clause in dispute while also stating that the obligations to be guaranteed would be those of Y._____ Engineering (compare n. 137 *i.f.* with n. 139 of the award).

3.5.4. *The behaviour of the parties after the protocols* (appeal pp. 31-36 let. d)

At the beginning of this chapter, the Appellant generally argues that the Arbitral Tribunal violated Art. 190(2)(b) and (d) PILA by failing to examine the behavior of the parties during the time between, on the one hand, the signature of the protocols in May 2004 and on the other, the suspension of work on December 22, 2005, and the filing of the request for arbitration on January 27, 2006. Presented in this way, the argument is not admissible for lack of sufficient reasons (Art. 77(3) LTF; see 3.4, above). Thus, this Court shall limit its review to the arguments developed by the Appellant in the four sub-chapters of this section.

A preliminary remark must be made. One must indeed point out that, in order to apply the principle of reliance according to Swiss law, the behavior of the parties after the expression of will to be interpreted is not decisive, for one must research how the addressee of the expression of will could understand, in good faith, the will expressed by its contractual counterparty under all the circumstances prior to or concurrent with the expression of will in dispute. Thus, the subsequent behavior of the parties could not be taken into consideration with a view to subjective interpretation except if it made possible the establishment of a real and concurring will of the parties (see judgment 4A_436/2012 of December 3, 2012, at 3.1). Yet, in the case at hand, it goes without saying that the circumstances after the letter of April 20, 2004, containing the expression of will in dispute was received are of no help interpret it as they do not reveal any real and

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

concurring will of the parties at all as to this disputed issue. However, they could be helpful in applying the aforesaid case law, based on the rules of good faith, which makes it possible to deduce from the behavior of a party its intent to adhere to a contract it did not sign and to submit to the arbitration clause contained there (see 3.2, 2nd§, above).

3.5.4.1. *Draft "Memorandum" of the meeting of (sic) 13/14 February 2006* (appeal pp. 32 to 34, [i])
At n. 144 and 145 of the award, the Arbitral Tribunal sees a confirmation of its views in the fact that the draft Memorandum of Agreement merely mentions Y._____ Engineering and not Y._____ as a party and in a letter of February 10, 2006, where C._____ states that it acts on behalf of Y._____ Engineering (see 3.3.2, §5, above).

As to the draft Memorandum of Agreement, the Appellant argues that it is untenable to attempt to extrapolate from a document written after the suspension of the work, the authenticity and the authorship of which were never established. In its view, this would be even more inadmissible as the team representing X._____ was composed of individuals who did not have the slightest knowledge of the history of the contractual relationships at hand and was headed by K._____, the chief executive of the principle shareholder of X._____, who had no connection with the project in which the latter was involved and intervened only as a mediator.

It does not appear from the award that the representatives of X._____ who took part in the negotiations knew anything of the history of the contractual relationship between this company and the Y._____ Group. However, it appears from the factual findings of the Arbitral Tribunal at n. 270, xii and xiii of the award (p. 204 f.) and from footnote 488 (p. 205) that the circumstances in which the draft at issue was prepared remained obscure to the very least, particularly as to its author. On this last issue, the Arbitral Tribunal is not categorical as it states: "*As it seems this draft memorandum has been prepared by Respondent*"[21] (award n. 144, last sentence). Under such conditions, prudence requires that no excessive credit should be given to this draft Memorandum of Agreement.

The exchange of letters mentioned at n. 145 of the award is hardly more enlightening. The February 7, 2006, letter signed by Mr. K._____ did not originate from X._____ and the passage quoted in the award (*ibid.*) demonstrates that the author was not aware of the relationship between the Appellant and the Italian companies and simply sought to know whether the people sent by Group Y._____ to participate in the discussions would be entitled to do so. And while C._____ indeed answered on the 10th of the same month that he was in charge of the project "on behalf of Y._____ Engineering," he hastened to add that he was doing so in accordance with the April 20, 2004, letter of the aforesaid company. It therefore comes down to the interpretation of this letter, which does not go in that direction (see 3.5.3.1, above).

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

3.5.4.2. *The letter from Y._____ Spa (Mr. B._____) of February 21, 2006* (appeal p. 34 to 36, [ii])
In a letter dated February 21, 2006, to the principle shareholder of X._____, B._____, stepping in as chairman of Y._____, wrote the following in particular: "*I also accepted to transfer the realization of the project from Y._____ Engineering (Mr. E._____) to Y.D._____ (Mr. C._____). As you might remember, this action was notified to X._____ with Y._____'s letter dated April 20th, 2004.*"[22] According to the Arbitral Tribunal, this statement is not conclusive because there is no mention of a transfer of liabilities but merely of the completion of the project, which would leave the assumption that Y.D._____ acted merely as representative of Y._____ Engineering unaffected. Moreover, the letter at issue was not sent to X._____ but to its principle shareholder and this would exclude a commitment of Y._____ towards the Appellant (award n. 146).

The Appellant rightly argues a violation of the principle of equal treatment with regard to this reason because the Arbitral Tribunal relied elsewhere on a correspondence between an officer of the principal shareholder of X._____ and C._____ (award n. 145). As to the rest, no matter what the Appellant says, the passage of the aforesaid letter just quoted does not actually mention a transfer of obligations considering its wording. On the other hand, it rightly states that there is no mention of representation either. Furthermore, in the paragraph following that from which the aforesaid passage was selected, B._____ states that "*Y._____ is therefore certainly ready to examine an extension of the guarantee period, that any way would be outside its contractuel* [sic] *obligations…*"[23] and Professor H._____ sees there a confirmation of the fact that Y._____ became the contractual counterparty of X._____, particularly because the author of the letter confirms at the end that Y._____ "*has never been in better economical conditions*"[24] (legal opinion, p. 5, n. 8, 2nd indent). Be this as it may, and consistent with the remark above (see 3.5.4, 2nd§), the February 21, 2006, letter is not pertinent to interpret that of April 20, 2004, which is supposed to have reflected the transfer of responsibilities from Y._____ Engineering to Y.D._____.

3.5.4.3. *The legal opinions of Pro. H._____ and (sic) Mr. J._____ and Mr. I._____* (appeal p. 36, [iii])
Under this heading, the Appellant does not explain the contents of the two legal opinions and neither does it indicate why they would substantiate its argument, merely explaining why the Arbitral Tribunal was wrong to leave them aside (award n. 147).

There is no need to address the criticism of the Arbitral Tribunal as to the evidence from which the three aforesaid experts reasoned in the case at hand. This Court shall simply apply to those facts that it may take into account, and to the extent necessary, the legal theories developed in the two legal opinions, which were considered essentially correct by the Arbitral Tribunal.

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

3.5.4.4. *Y._____ SpA as the exclusive counterpart of X._____* (appeal p. 36 [iv])

The Appellant also objects to the refusal of the Arbitral Tribunal to hold in its favor the fact that the entire correspondence exchanged between the parties as from April 2004 was on the letterhead of Y._____ Group, rather than Y.D._____. The Arbitral Tribunal did not consider this circumstance pertinent because it is common practice for a representative to use his own letterhead when dealing with a third party in the name of the represented, so that it must have been clear in X._____'s mind that when C._____ and his team were writing, they were doing so on behalf of the other contracting party the represented, namely Y._____ Engineering (award n. 150).

The premise of the reasoning escapes criticism. The same does not apply to its conclusion, at least if it must be understood as meaning that X._____ should have deduced from the mere use of a letterhead in the name of Y._____ Group (respectively, Y._____) that the Italian company was acting at a representative of Y._____ Engineering. Conversely, the same fact cannot be considered as proof of the absence of any power of representation, no matter what the Appellant thinks.

Be this as it may, it must be conceded that the file does not contain any document from which it could and should have inferred unquestionably that Y.D._____ was dealing with it as a representative of Y._____ Engineering.

3.5.5. *The extension of the arbitration clause to Y._____ SpA on the basis of the principle of good faith* (appeal p. 37 to 39 let. e)

Under this heading, the Appellant considers two independent legal issues which, in its view, should to confirm the jurisdiction of the Arbitral Tribunal as to Y._____.

3.5.5.1. *The Appellant's legitimate expectation and the extension of the arbitration clause to Y._____SpA* (appeal pp. 37-38, [i])

The Appellant bases its argument here on the legal opinion obtained from Dr. I._____ and Prof. J._____ (n. 25 to 50). In this legal opinion, the two experts advanced the opinion summarized hereunder on the basis of the legal principles recalled above (see 3.2, 2nd§).

3.5.5.1.1. In April 2004, further to the wish expressed by X._____ to have a more reliable partner than Y._____ Engineering to complete the ongoing construction project, Y._____ Engineering and Y._____ Group proposed to the Appellant a transfer of the total responsibility of the completion of the balance of the work to Y.D._____, a department of Y._____ Group and the proposal was accepted. All elements of a tripartite agreement for the transfer of the January 25, 2001, Contracts from Y._____ Engineering to Y._____ Group through Y.D._____ were thus met. Such a transfer made sense for X._____ only if it included the arbitration clauses contained in the three Contracts.

If the existence of such an agreement to transfer the Contracts is denied in the case at hand for lack of sufficient evidence, one would then have to admit, at the very least, an assumption of debt within the

meaning of Art. 175 ff CO[25] arising from the contract the transferee (Y._____ Group) would enter into with the creditor (X._____) as to the debts of Y._____ Engineering towards the Appellant, which would have the same consequence as to the arbitration clauses. As none of the parties argue that the former debtor, *i.e.* Y._____ Engineering, was released on this occasion, this is a case of joint assumption of debt. This legal form explains why Y._____ Engineering continued if not to handle directly the completion of the work on the plant, at least to play a role in the implementation of the Contracts by dealing with invoicing and the financing of the project for which the letters of credit had initially been issued in its favor.

Should the two arguments above be set aside in favor of the subcontracting favored by the Arbitral Tribunal, the principle of good faith (Art. 2 CC[26]) would nonetheless require the recognition of X._____'s right to act against Y._____ Group directly on the basis of the arbitration clauses contained in the Contracts in consideration of the circumstances of the case at hand. Indeed, one must admit that Y._____ Engineering, the contractual partner, and Y._____ Group (through Y.D._____), the subcontractor, acted towards X._____ in such a manner that the latter could believe in the existence of a legal relationship with Y._____ Group in good faith, which justifies extending the original legal relationship to this subcontractor pursuant to the principle of reliance and hence allowing X._____ to also take Y._____ Group to the Arbitral Tribunal. The Italian companies were indeed aware of the importance that X._____ gave to the transfer of responsibilities as it wanted to deal in future with a more reliable contractual counterpart. Hence, if they did not want that company to rely on the appearance of adherence to the contracts that they had led it to believe, they should have so stated clearly. Yet, they did not do so and quite to the contrary, they carried out conclusive acts from which X._____ could in good faith infer that they considered that they were both bound by the Contracts, including the arbitration clauses therein.

3.5.5.1.2. By applying the legal considerations of the two experts to the circumstances of the case at hand, it appears that the Arbitral Tribunal wrongly excluded its jurisdiction towards Y._____ because Y._____ Group would not be bound by the aforesaid clauses.

Since Y._____ Engineering was not released from its contractual obligations towards X._____ forever, there is no need to research which of the possible legal forms (tripartite contract of adhesion, joint assumption of debts; theory of effective appearance, *etc.*) would better correspond to the circumstances of the case at hand. It suffices to hold that, pursuant to the principle of good faith and for the reasons indicated above, the Contracts and the arbitration clauses they contain are opposable to Y._____ Group.

However, as was already emphasized, such conclusion does not necessarily imply that X._____ is able to rely on these Contracts and agreements towards Y._____ (see above, 3.5.1).

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[25] Translator's Note: CO is the French abbreviation for the Swiss Code of Obligation.
[26] Translator's Note: CC is the French abbreviation for the Swiss Civil Code.

3.5.5.2. *The impact of Y._____ Engineering SpA being put into liquidation in May 2005 unbeknownst to the Appellant* (appeal pp. 38-39, [ii])

In this respect, the Appellant refers to a contractual clause (Art. 36 of the *Contract for Supply of Equipment*, under the caption *Bankruptcy*) and to a legal provision (Art. 379(1) CO). The former authorizes the principle to terminate the Contract, among other possibilities, in a number of occurrences connected to the solvency of the contractor. The latter states that a contract concluded in consideration of a contractor's personal abilities comes to an end in particular when, without fault, he becomes unable to complete the work. According to the Appellant, if Y._____ Engineering had been the only contractual party, it could not have been put into liquidation unbeknownst to and without the agreement of X._____ as it was in May 2005 and the latter certainly would have taken the necessary steps – as authorized by Art. 379 CO – if it had been informed that the Italian company was put into liquidation. Hence, the Arbitral Tribunal should have considered the argument, which it did not, thus violating the right to be heard. Reading this obtuse argument, one does not see what possible connection it could have with the issue of jurisdiction. Consequently, the Appellant argues in vain that the Arbitral Tribunal should have considered it.

3.5.6. *Even as a "sub-agent", Y._____ SpA is bound by the arbitration clause* (appeal pp. 39-42, let. f)

In the last part of its argument as to jurisdiction to *ratione personae*, the Appellant points out that after leaving open at §149 of the award the issue of the legal basis of the power of attorney pursuant to which Y._____ Group had dealt with X._____ on behalf of Y._____ Engineering, then applied Art. 398(3) CO (n. 291 and 390), thus likely concluding that Y._____ (*recte*: Y._____ Group) had acted as "sub-agent" within the meaning of this provision. In its view, as none of the parties had invoked it, the Arbitral Tribunal violated the Appellant's right to be heard by applying this *ex officio* without allowing it to argue the point. Still according to the Appellant however, there would be no reason to waste time on this breach because the Arbitral Tribunal should actually have accepted the jurisdiction by applying the provision quoted.

3.5.6.1. *X._____'s direct cause of action* (appeal pp.40-41, [i])

The Appellant refers to case law and legal writing in this field and argues here that in Swiss law, the existence of a sub-agency carries the right for the principal to act directly against the sub-agent for the good and faithful performance of the mandate, whether this is based on Art. 399(3) CO, on a third party stipulation (Art. 112(2) CO), or even on a contract with protective effect in favor of a third party (see ATF 121 III 310 at 4a and the authors quoted). Applied to the circumstances of the case, this principle of case law would imply, according to the Appellant, that X._____ (the principal) had a direct claim against Y._____ Engineering (the agent) and Y._____ (*recte*: Y._____ Group) (the sub-agent) jointly and was therefore entitled to take them to the same arbitral tribunal.

Considering the solution adopted by this Court (see 3.5.5.1, above), the Appellant's argument is not decisive to address the jurisdictional issue in dispute. Moreover, the last two passages of the award quoted (n. 291 and 390) are not decisive either as they concern the standing to act of Y._____ Engineering. As the Respondents rightly point out (rejoinder n. 11), it is §149 of the award which is pertinent as to the

jurisdiction of the Arbitral Tribunal. Yet, the issue of the legal basis of the relationship between Y._____ Engineering and Y._____ Group in the framework of the performance of the Contracts is expressly left open there. Moreover, there is serious doubt as to the existence of a sub-agency within the meaning of Art. 398(3) CO in this case, as one does not see how the hypothesis that X._____ and Y._____ Engineering were committed to a mandate (Art. 394 ff CO) would be compatible with the obligation to achieve a specific result – namely the delivery of a plant on a turnkey basis – that the Contracts imposed upon the Italian party, *i.e.*, to the presumed agent (appeal. p. 39 *i.f.* /40 *i.l.*). Moreover, the theory of an agency appears hardly compatible with the conclusion of the Arbitral Tribunal as to applicable law when it points out that the three Contracts of January 25, 2001, are governed by the United Nations Convention on Contracts for the International Sale of Goods (CISG; RS 0.221.221.1) (award n. 172). Finally, if one were to apply the rules of the work contract – a view that the Appellant claims to have argued throughout the arbitral proceedings (appeal p. 40, heading 1) – and acknowledged Y._____ Group as a sub-contractor, this would not yet mean that, as principle, X._____ could not have acted directly against this company by way of an exception to the principle that there is no legal relationship falling within a work contract between the principle and a sub-contractor (see Peter Gauch, *der Werkertrag, 5th ed.*, 2011, n. 162 ff).

3.5.6.2. *The applicability of the arbitration clause to Y._____ SpA* (appeal, p. 42, [ii])

In this last part of its argument, the Appellant seeks to demonstrate that the dispute resolution mechanism it agreed with Y._____ Engineering was applicable to Y._____ Group as a consequence of the transfer between these two companies of the full responsibility for the performance of the Contracts including the arbitration clauses, in accordance with case law concerning the extension of arbitration clauses to third parties. While convincing, the demonstration relates to an issue that does not appear to be in dispute and neither should it be. It is indeed clear that if one admits that Y._____ Group adhered to the Contracts – an issue which is in dispute – one must also recognize, due to the lack of any conclusive acts to the contrary, that by its compliance the company implicitly accepted the dispute resolution mechanisms that may arise from the performance of the Contracts as they had been agreed upon by the initial contracting parties.

3.6.

From all the foregoing, it appears that the Arbitral Tribunal wrongly denied jurisdiction as to Y._____ simply because the arbitration clause did not bind Y._____ Group. This does not yet mean that its decision to deny jurisdiction would not ultimately be accurate because it did not address an issue it had raised itself in the alternative, although the answer given to this question could be sufficient to confirm the decision under appeal.

Under such circumstances, this Court shall annul §1 of the operative part of the award under appeal without finding the lack of jurisdiction *ratione personae* of the Arbitral Tribunal towards Y._____, this not having been yet established, the Arbitrators must address the issue left open and to draw the necessary consequences while complying with the reasons contained in this judgment as to the principal issue they addressed (see 3.5.1, above). At the end of this new review, should the Arbitral Tribunal reach the conclusion that it has jurisdiction as to Y._____ and consequently that it could no longer reject the

counterclaim of X._____ against this party for an alleged lack of jurisdiction, contrary to what was done at §1 of the operative part of the award in dispute, it will still have to change the headings of the operative part of the award rendered necessary by the extension of its jurisdiction *ratione personae* to Y._____.

4.
In a second argument concerning the award on the merits, the Appellant argues that the Arbitral Tribunal failed to consider in the award the arguments and the statements of facts it had submitted to substantiate its counterclaim n. 3.9 concerning the payment of EUR 13'130'001,75 as damages for the late performance and completion of the project, a submission that was rejected at n. 22 of the operative part of the award at issue.

4.1.
The right to be heard in contradictory proceedings within the meaning of Art. 190(2)(d) PILA certainly does not require an international arbitral award to be reasoned (ATF 134 III 186[27] at 6.1 and the references). However, it imposes upon the arbitrators a minimal duty to examine and address the pertinent issues (ATF 133 III 235 at 5.2, p. 248 and the cases quoted). This duty is violated when, inadvertently or due to a misunderstanding, the arbitral tribunal does not take into consideration some statements, arguments, evidence, and offers of evidence submitted by one of the parties and important to the decision to be issued (judgment 4A_304/2013 of March 3, 2014, at 4.2).

4.2.
While claiming not to do so, the Appellant criticizes the merits of the award in this respect as though it was arguing in a court of appeal. First, it points to a number of isolated paragraphs extracted from the 80 pages or so that the Arbitral Tribunal devoted to the issue in dispute and quotes them as such (p. 628 to 707, n. 1053 to 1128; also see in this respect the dissenting opinion of the Arbitrator chosen by the Appellant, p. 13 to 23, n. 28 to 59). It then revisits the findings of the arbitrators with direct reference to several exhibits in the arbitration file and then sets forth its own legal assessment of the facts it deems pertinent. Finally, because the Arbitral Tribunal did not adopt the Appellant's views in this respect, the Appellant argues that the Arbitral Tribunal misunderstood the point and confused the various issues before it. Thus the admissibility of this second argument appears doubtful at least, as the Respondents rightly point out. Be this as it may, the second argument cannot succeed, as opposed to the first one.

4.3.
In its counterclaim at issue, the Appellant sought the payment of damages for the financial harm it claimed to have undergone between October 2004 and August 17, 2007, as a consequence of delays in the completion of the project due to the Italian party.

[27] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/right-to-be-heard-equality-between-the-parties

The Arbitral Tribunal carefully reproduces the arguments advanced by the Appellant in support of this submission (award n. 1055 to 1060). Then it preliminarily states the limits *ratione temporis* within which the claim in dispute must be reviewed. In this respect, and for reasons that it is not necessary to state here, it excludes from this review all claims based on circumstances before the Long Protocol was executed (May 26, 2004) or after the *Suspension Letter* of December 22, 2005 (award n. 1063 and 1064). Then, it states the activities, which in its view, belong to the critical path, namely the tasks the completion of which could not be delayed at all as they would necessarily postpone the date of completion of the project. It includes startup and commissioning in the list (award n. 1066, vi). The Arbitral Tribunal then points out which of the essential tasks it considered would be the object of substantive review. It formally excludes startup and commissioning because, in its view, these activities fall within the period excluded by its decision as to the Suspension Letter (award n. 1071, v, b: "Considering the above the Arbitral Tribunal … will not analyze the delays in the startup and commissioning since these activities fall within the period covered by the outcome of the Suspension Issue"[28]). This being done, the majority arbitrators seek to determine on the basis of the various planning successively established for the completion of the project (award n. 1077), whether or not the other critical tasks they had reserved to examine were carried out in a timely manner and, if not, which of the contracting parties should be blamed for the delays (award n. 1070 to 1125). At the end of their analysis, they conclude that it is impossible to blame the Respondents for the delays in the construction work of the plant. This being done, they state the final result of their review as follows (award n. 1127):

> *Having concluded by majority that the Respondent has not proven that Claimant is responsable for the delays in the erection works and that, because of the outcome of the Suspension Issue, the Arbitral Tribunal, by majority, decides that Respondent is barred from raising any claims for the non-commissioning of the Plant, Respondent cannot claim from Claimant the bank charges paid for the Ordinary Loan, Special Loan and the extension of the Letter of Credit of EUR 11'221'853 referred to in para. 1057 hereinabove and the salaries paid for personnel on standby of EUR 1'760'137.55 summarized in paras. 1058/1059 hereinabove. The Arbitral Tribunal therefore, by majority, concludes that Respondent's Final Prayer for "Damages in Respect of the Delay" must be entirely dismissed*.[29]

Whatever the merits of the reasons of the Arbitral Tribunal as to this issue – a matter that cannot be reviewed by this Court – there is no continuum with the conclusion reached on this basis. In particular, it does not appear that the Arbitral Tribunal neglected any of the arguments that the parties had submitted as to the claim in dispute.

However, the Appellant argues the opposite. In its view, its claim for damages was principally based on the late performance by the Respondents before December 22, 2005; indeed, if one believes it, they had been late in initiating startup and commissioning although, according to the final schedule, these activities should

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

have been essentially finished before the Suspension Letter was sent on the aforesaid date. This has been overlooked by the Arbitral Tribunal, thus violating the Appellant's right to be heard by failing to examine the factual and legal arguments it had developed in this respect.

This argument developed in the brief is blatantly a disguised appeal, more precisely a device purporting to lead the Federal Tribunal to review the soundness of the substantive decision as to the merits of the issue in dispute. If it failed the argument, this Court would have to review the various schedules adopted in the case at hand in order to attempt to discover the date at which startup and commissioning should have been initiated, with a view to determining whether the date was between May 26, 2004, and December 22, 2005. Moreover, as the Respondents rightly point out in their answer to the appeal (n. 101), in another passage of the award (n. 265, i to iii), the Arbitral Tribunal finds that startup should have been initiated during the week beginning February 6, 2006. This is an actual factual finding (see n. 26: "This date … is to be retained and referred to as the «Planned Startup Date»"[30]) that the Appellant sought unsuccessfully to call into question in its reply and which certainly goes to the meaning of the reasons on which the Arbitral Tribunal based its rejection of Counterclaim n. 3.9.

Consequently, the Appellant has no valid reason to argue a violation of its right to be heard.

5.
The appeal has been admitted as to the first issue, though the question of the issue of jurisdiction *ratione personae* of the Arbitral Tribunal is not definitively settled and as to the second issue, to the extent that the matter was capable of appeal in this respect, it was rejected. Under such conditions, it is justified to divide the costs of the federal proceedings in equal shares between the Appellant and the Respondents, the latter being jointly liable for their share of the costs (Art. 66(1) and (5) LTF). As to the costs of the parties, each shall bear its own (Art. 68(1) and (2) LTF).

Therefore the Federal Tribunal pronounces:

1.
The appeal is upheld in part to the extent that the matter is capable of appeal.

2.
§1 of the operative part of the award under appeal is annulled and the matter sent back to the Arbitral Tribunal for a new decision consistent with the reasons of this judgment as to the issue of jurisdiction concerning Y._____.

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

3.
The judicial costs, set at CHF 45'000, are to be borne jointly by the Appellant in the amount of CHF 22'500 and the Respondents in the amount of CHF 22'500.

4.
Each party shall bear its own costs.

5.
This judgment shall be notified to the representatives of the parties, and to the chairman of the ICC Tribunal.

Lausanne, April 7, 2014

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

Presiding Judge:	Clerk:
Klett (Mrs.)	Carruzzo