4A_628/2015[1]

Judgment of March 16, 2016

First Civil Law Court

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

X._____ Ltd.,
Represented by Mrs. Dominique Ritter and Mrs. Diane Grisel,
Appellant

v.

Y._____ S.p.A.,
Represented by Mr. Elliott Geisinger, Mrs. Anne-Carole Cremades and Mrs. Julie Raneda,
Respondent

Facts:

A.

A.a. X._____ Ltd. (hereafter: X._____) is a company involved in the exploration and production of hydrocarbons.

Y._____ S.p.A. (hereafter: Y._____) is a company of [name of country omitted] law, which is active in exploration, production, pipeline distribution and processing, and marketing of hydrocarbons and their derivatives.

[1] Translator's Note: Quote as X._____ Ltd. *v.* Y._____ S.p.A., 4A_628/2015.
The decision was issued in French. The full text is available on the website of the Federal Tribunal, www.bger.ch

A.b. On July 10, 2002, at the end of tender initiated by Y._____, the latter and X._____ signed two contracts of association to search for and exploit oil deposits in two areas on the territory of [location omitted]. On April 2, 2012, the same parties signed two contracts for the formation of a group with a view to creating a joint operational organization to conduct and carry out oil operations in the oil fields located in those areas.

Art. 34.2 of the contracts of association, entitled "Arbitration" – to which Art. 22 of the contracts for the formation of the group also refers – states the following:

> Any disagreement between the Parties as to the performance or the interpretation of this Contract, which cannot be settled by the parties, shall firstly be the object of an attempt at conciliation pursuant to the ADR (Alternative Disputes Resolution) Rules of the International Chamber of Commerce (ICC).
>
> Any disagreement between the Parties as to the performance or the interpretation of this Contract, which is not resolved by way of conciliation, shall be decided in last instance by arbitration in accordance with the UNCITRAL arbitration rules by three (3) arbitrators appointed in conformity with such rules.
>
> Applicable law shall be the law of [name of country omitted].
>
> The place of arbitration shall be Geneva, Switzerland.
>
> The language of arbitration shall be French. However, English may be used if necessary.

A.c. Some disagreements arose between the parties and Y._____ relied on Art. 34.2 of the association contracts and Art. 22 of the contracts for the formation of the group to file a request for conciliation with the ICC International ADR Center (hereafter: the ADR Center), pursuant to the ICC ADR Rules of July 1, 2001, (hereafter: the ADR Rules).

The ADR Center acknowledged receipt of the conciliation request on September 15, 2014, and invited the parties to communicate their comments, if any, as to various procedural issues within 15 days. X._____ complied on October 3, 2014, and pointed out in particular that it wanted the conciliation procedure to be conducted pursuant to the ADR Rules and not under the ICC Mediation Rules in force as of January 1, 2014, (hereafter: the Mediation Rules). In an email of the same day, the ADR Center pointed out that according to the agreement of the parties, the ADR Rules would apply to the proceedings, which would be conducted in French with Paris as the "physical meeting place." Then, on October 16, 2014, It appointed a "neutral" Spanish citizen, within the meaning of the ADR Rules, as conciliator. In a letter of November 14, 2014, the Conciliator submitted a series of questions to the parties as to the conduct of the conciliation proceedings and proposed a meeting. On November 20, 2014, Y._____ gave its agreement to a first meeting and requested that it take place by way of a telephone conference. The same day, X._____ answered the Conciliator's questions and indicated the dates at which it would be available for such a telephone conference. On December 16, 2014, the Conciliator sent an email to counsel for the parties and set a conference call for the following day at 3:30 p.m.

On December 17, 2014, at 3:20 p.m., counsel for Y._____ sent an email to the Conciliator and to counsel for X._____ in which he stated that, with a view to facilitating the telephone conference set for 3:30 p.m. and to make it easier for the representatives of his client to participate, he proposed to use his telephone conferencing services. Counsel for X._____ opposed this because the telephone conference had been scheduled between counsel only and the Conciliator, adding that he had made no provisions for the representatives of X._____ to participate in the conference; and counsel suggested to the Conciliator either to proceed as originally anticipated or to postpone the meeting to a subsequent date, in which case, in view of the number of participants, he would ask that the meeting take place physically in Paris. Y._____ replied that it had never been decided that counsel only would participate in the telephone conference whilst agreeing to its postponement.

On January 8, 2015, the Conciliator contacted counsel for the parties again as to the continuation of the conciliation proceedings.

On January 16, 2015, Y._____ sent a request for arbitration for X._____. In a letter sent to the Conciliator on the same day, it stated that in its view the conciliation failed due to the other party, that it would not continue the *ad hoc* proceedings, and advised her of the filing of a request for arbitration. In a letter of January 20, 2015, X._____ advised the Conciliator that there was no reason to terminate conciliation proceedings which had not started for reasons independent of its will. In a letter of January 21, 2015, the Conciliator advised the parties that it could not notify to the ICC that the proceedings were closed without first conducting the discussion provided for at Art. 5(1) of the ADR Rules and therefore she proposed new dates for a meeting in Paris with counsel and the representatives of both parties. However, in a letter of January 26, 2015, Y._____ repeated its position that the conciliation procedure was finished. Upon receipt of this letter, the Conciliator informed the parties on January 30, 2015, that she interpreted Y._____'s attitude as a withdrawal from the conciliation, which she informed the ADR Center by letter of February 3, 2015.

In a letter of February 5, 2015, the ADR Center found that Y._____ intended to withdraw the request for conciliation and invited the parties to submit their comments. After an additional exchange by the parties, it confirmed in a letter of February 16, 2015, its understanding that Y._____ intended to withdraw the request for conciliation. Finally, in a letter of April 8, 2015, pointing out that Y._____'s share of the deposit had not been paid, it found that the ADR proceedings were terminated pursuant to Art. 6(1)(f) of the ADR Rules.

B.

On January 16, 2015, Y._____ initiated arbitration proceedings against X._____ pursuant to the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) in conformity with Art. 34.2 of the contracts of association and Art. 22 of the contracts for the formation of the group. Simultaneously, it appointed its arbitrator. In a letter of January 26, 2015, counsel acting for X._____ in

the arbitration advised counsel for Y._____ that the request for arbitration was moot because the ICC conciliation procedure was still pending. Then, in her letter of February 19, 2015, advising counsel for the other party of the name of the arbitrator chosen by her client, she pointed out that she intended to challenge the jurisdiction of the Arbitral Tribunal, pursuant to applicable Swiss law.

In the following months, the parties discussed the terms of appointment of the chairman of the Arbitral Tribunal, X._____ insisting on reserving its right to challenge its jurisdiction in connection with the issue of conciliation. On May 22, 2015, the Secretary General of the Permanent Court of Arbitration made the appointment. The Arbitral Tribunal decided on July 31, 2015, to decide on its jurisdiction in the first phase of the arbitration. Two exchanges of briefs took place on this issue.

This being done, the Arbitral Tribunal admitted jurisdiction as to the dispute between the parties in an award on jurisdiction of October 13, 2015, rejecting the jurisdictional defense raised by X._____, and declaring Y._____'s claim admissible.

C.

On November 16, 2015, X._____ (hereafter: the Appellant) filed a civil law appeal with an application for a stay of enforcement with a view to obtaining the annulment of the aforesaid award and the finding that the Arbitral Tribunal lacked jurisdiction *ratione temporis* in this matter. In a letter of November 20, 2015, it sought an *ex parte* order.

The application was admitted and the stay was issued *ex parte* by decision of the presiding judge of November 24, 2015.

By letter from the Chairman of December 11, 2015, the Arbitral Tribunal produced its file and waived the right to express its views as to the request for a stay of enforcement and implicitly as to the appeal.

In its answer of December 22, 2015, Y._____ (hereafter: the Respondent) submitted that the appeal should be rejected and the *ex parte* stay of enforcement revoked.

In its reply of January 6, 2016, the Appellant and the Respondent, in its rejoinder of January 22, 2016, maintained their respective submissions.

Reasons:

1.

1.1. In the field of international arbitration, a civil law appeal is admissible against the decisions of arbitral tribunals pursuant to the requirements of Art. 190 to 192 PILA[2] (Art. 77(1) LTF[3]).

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

When an arbitral tribunal rejects a jurisdictional defense in a separate award, it issues a preliminary award (Art. 186(3) PILA). This is the case here. Pursuant to Art. 190(3) PILA, such an award may be appealed to the Federal Tribunal only on grounds of improper constitution (Art. 190(2)(a) PILA) or lack of jurisdiction (Art. 190(2)(b) PILA) of the arbitral tribunal. The Appellant invokes the latter ground and argues that the Arbitral Tribunal should have denied jurisdiction *ratione temporis*. Furthermore, it does not avail itself of the opportunity given by recent case law of the Federal Tribunal to invoke the grounds of Art. 190(2)(c)-(e) PILA, provided they are strictly limited to issues directly concerning the composition or the jurisdiction of the arbitral tribunal (ATF 140 III 477[4] at 3.1, 520 at 2.2.3).

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

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

1.2. The appeal of an international arbitral award may only seek annulment (see Art. 77(2) LTF, ruling out the application of Art. 107(2) LTF). However, when the dispute concerns the jurisdiction of an arbitral tribunal, the Federal Tribunal may itself find the jurisdiction or lack thereof (ATF 136 III 605[5] at 3.3.4, p. 616; 128 III 50 at 1b).

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[2] 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.

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

[4] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/arbitration-clause-not-rescinded-subsequent-"showpiece"-contract

[5] 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

The Appellant's submission seeking a finding by the Federal Tribunal itself that the Arbitral Tribunal has no jurisdiction in its dispute with the Respondent is therefore admissible. Moreover, nothing would prevent this Court from applying the principle expressed in the adage *a maiore minus* to stay the case if necessary until the conciliation procedure is finished, instead of finding that the Arbitral Tribunal lacks jurisdiction *ratione temporis* (judgment 4A_124/2014 of July 7, 2014, at 2.2).

1.3. The Federal Tribunal issues its decision on the basis of the factual findings in the award under appeal (see Art. 105(1) LTF). It may not rectify or supplement *ex officio* the factual findings of the arbitrators, even if the facts were established in a blatantly inaccurate manner or in violation of the law (see Art. 77(2) LTF, ruling out the application of Art. 105(2) LTF). However, as it was already the case under the aegis of the Federal Statute organizing the Courts (see ATF 129 III 727 at 5.2.2; 128 III 50 at 2a and the cases quoted), the Federal Tribunal nonetheless retains the competence to review the factual findings on which the award under appeal is based if one of the grievances mentioned at Art. 190(2) PILA is raised against such factual findings or when some new facts or evidence are exceptionally taken in to account in the framework of the civil law appeal (judgment 4A_54/2012 of June 27, 2012, at 1.6).

2.

The Appellant argues that the Arbitral Tribunal wrongly accepted jurisdiction, disregarding the preliminary and mandatory conciliation mechanism contained at Clause 34.2 of the contracts of association which bound the parties, the aforesaid clause being also applicable to the contracts for the formation of the group by way of reference (at Art. 22 of the latter). Before analyzing the argument based on Art. 190(2)(b) PILA, the reasons in the preliminary award (*see* 2.1.1, above) must be summarized and also the arguments submitted by the parties to criticize them (*see* 2.1.2, above) or in support (*see* 2.1.3, above).

2.1.
2.1.1. As a preliminary issue, the Arbitral Tribunal notes that the parties agree that the issue as to its jurisdiction is governed by Swiss law.

Reviewing first whether the conciliation was binding or not, it points out that the reference to the ADR Rules at Art. 34.2 of the contracts of association locks the conciliation attempt into a structured institutional framework and a procedure covering every step in the process, from the filing of the request to the end of the ADR. In its view, the words "attempt at conciliation" used in the first paragraph of the clause describe an obligation to try to find a solution to the dispute in good faith by way of a conciliation procedure, the concept of an attempt being somehow inherent to the very word 'conciliation' because the result of the move is uncertain. Similarly, in its view, the absence of a specific time limit within which the attempt at conciliation must be initiated is not decisive to assess if the step is mandatory or optional. After stating the reasons why the case at hand is different from two cases previously adjudicated by the Federal Tribunal (4A_46/2011[6] of

[6] Translator's Note: The English translation of this decision is available here:

May 16, 2011, and 4A_18/2007 of June 6, 2007) and pointing out that the Respondent itself initiated the conciliation proceedings before filing its request for arbitration, the Arbitral Tribunal reaches the conclusion that the mechanism precedent to arbitration was binding.

The Arbitrators then wonder whether, as the Respondent argues, the conciliation was bound to fail in the case at hand. They answer the question in the negative. In their view, the Respondent's very initiative to file a conciliation request and the exchanges that took place between the Conciliator and the parties argue in favor of an opportunity to resolve the dispute amicably, whatever remains to be done to achieve that. Moreover, the mere four months between the filing of the conciliation request and that of the arbitration request has nothing in common with the 15 months involved in another matter adjudicated by the Federal Tribunal (judgment 4A_124/2014 of July 7, 2014, cited above). Finally, according to the Arbitrators, the anticipated failure of a conciliation cannot be the mechanical result of possible tension between the parties in their commercial relationships.

Art. 5(1) of the ADR Rules states the following:

> The Neutral and the parties shall promptly discuss, and seek to reach agreement upon, the settlement technique to be used, and shall discuss the specific ADR procedure to be followed.

In analyzing the wording of this provision, the Arbitral Tribunal finds that the formula to be used to settle the dispute was already the subject of an agreement between the parties because it was specifically mentioned in Art. 34.2 of the contracts of association as an "attempt at conciliation." As to the second part of the provision quoted, namely the determination of the specific ADR procedure to be followed, the Arbitrators point out that whilst the Conciliator and the parties have an obligation to discuss the matter, they do not have to reach an agreement. The ICC ADR Guide (hereafter: the ADR Guide) does not require this obligation be fulfilled by a discussion taking place in an actual meeting or by way of a foreign conference but may take place, as it did in this case, by way of several exchanges of letters and emails and telephone conversations between the parties and the Conciliator. Therefore, the Arbitral Tribunal disagrees with the Conciliator and the ADR Center in respect to the premature termination of the conciliation procedure. Contrary to their position, it instead takes the view indeed that a real and good-faith attempt at conciliation in conformity with the ADR Rules did take place between the parties. It is on this ground that it rejected the jurisdictional defense raised by the Respondent.

2.1.2. In criticizing these reasons, the Appellant states that the Arbitral Tribunal admitted that the mechanism precedent to arbitration provided at Art. 34.2 of the contracts of association was mandatory and rejected the notion that the process was a mere formality, only to hold against all expectation that an attempt at conciliation did take place in the case at hand. More specifically, it criticizes the Arbitrators for departing from the opinion expressed by the ADR Center and the conciliator as to the interpretation of Art. 5(1) of the ADR Rules, even though the ADR Centre is the body that issued the ADR Rules and is in

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http://www.swissarbitrationdecisions.com/no-breach-of-pre-arbitral-procedures-failure-to-deal-with-an-arg

charge of their implementation. Yet, in its letters of February 5, and 16, 2015, the ADR Centre – and the Conciliator in her letter of January 30, 2015 – found that the first meeting required by the provision of the Rules quoted did not take place.

In the Appellant's view, moreover, the fact that the Respondent participated in some exchanges of briefs and emails with the Conciliator for about a month with a view to agree on the terms of the procedure to be followed (role and method of the Conciliator, her right to make recommendations or a proposal to solve the dispute, *etc*.), as to its duration and the applicable rules, is manifestly not an attempt at conciliation. The opposite conclusion reached by the Arbitral Tribunal appears even more incomprehensible because the conciliation procedure went on for a mere four months before the Respondent filed its arbitration request.

In the Appellant's view, at the end of the day, it is the very essence of the attempt at conciliation that the Respondent disregarded when it withdrew its *ad hoc* request. Therefore, the Arbitral Tribunal should have rectified this by denying jurisdiction *ratione termporis* or, at the very least, by staying the arbitration with a view to facilitating a meeting between the parties and the Conciliator.

2.1.3. In seeking the rejection of the appeal, the Respondent mainly argues that the argument based on the alleged failure to comply with the conciliation procedure is misused by the Appellant. In support of the argument, it submits the following: *First*, it took the initiative to start the conciliation procedure; *Second*, the Appellant never tried to do the same when nothing prevented it from doing so; *Third*, the Appellant did not seek a stay of the arbitral proceedings to allow a new attempt at conciliation; *Fourth*, the Appellant did not translate its alleged will to settle the dispute amicably into action, contrary to what federal case law in this field requires (aforesaid judgment 4A_18/2007 of June 6, 2007, at 4.3.3.2); *Fifth*, when it stated its intent to file a counterclaim, the Appellant did not attempt to submit the counterclaim to conciliation even though it was a mandatory prerequisite by its own admission; *Sixth*, the Appellant behaved in an obstructionist manner throughout the conciliation procedure; *Seventh* and finally, the tone of the Appellant's briefs in the arbitral proceedings is hostile at the very least and does not display a conciliatory approach at all. To claim under such circumstances, as the Appellant does, it wants to implement a preliminary conciliation today when it appears doomed more than ever, is contrary to the rules of good faith according to the Respondent, so that the appeal should be rejected on this ground alone.

As an alternative, the Respondent argues that the grievance raised is unfounded because the Arbitral Tribunal rightly upheld its jurisdiction. In its view, the issue before the Arbitrators was not the interpretation of the ADR Rules but the arbitration clause in the contracts of association and in particular the words "attempt at conciliation" there. Yet, to address this issue, it did not matter how the conciliation procedure was terminated in light of Art. 5(1) and 6(1)(b) of the ADR Rules, an issue on which the ADR Center and the Conciliator stated their view. Be this as it may, the Arbitrators were not bound by the position they had adopted on the same issue.

Moreover, for the reasons summarized hereunder, the Respondent challenges the pertinence of the Appellant's argument, according to which the Arbitral Tribunal "arbitrarily found that the conciliation took

place": *First*, the pertinent clause requires only a "conciliation attempt" and not conciliation; *Second*, the factual circumstances upheld in the award under appeal show that an attempt at conciliation did take place between the parties and moreover, contrary to what the Appellant argues, this concept did not require the parties to discuss the merits of their dispute in practice because such an attempt could perfectly well fail before reaching that stage; *Third*, the interpretation given by the Arbitral Tribunal of Art. 5(1) of the ADR Rules is beyond criticism; *Fourth*, even if one were to agree with the interpretation of this provision given by the ADR Center and the Conciliator, the "withdrawal" of the conciliation request by the Respondent could produce its effect only in the future, so that act does not call into question the four months spent in an attempt at conciliation; *Fifth* and finally, the Appellant's argument based on arbitrariness is out of place in the case at hand, as the Federal Tribunal freely reviews the legal issues concerning the jurisdiction of the Arbitral Tribunal.

As a last point, the Respondent submits that even if it were well-founded, the appeal would not lead to the annulment of the award but rather to a stay of the arbitral procedure, with a time limit given to the parties to enable them to remedy the non-performance of the attempt at conciliation.

2.2. The Federal Tribunal reviews arguments in respect of the violation of a contractual mechanism which is a mandatory prerequisite to arbitration (conciliation attempt, recourse to an expert, mediation, *etc.*) in light of Art. 190(2)(b) PILA concerning the jurisdiction of the Arbitral Tribunal. It does so as a default choice, in a manner of speaking, as the argument cannot be connected to another ground for appeal in this provision, thus implicitly admitting that such a violation would certainly not be serious enough to fall within the procedural public policy contemplated by Art. 190(2)(e) PILA (on this issue, see ATF 132 III 389 at 2.2.1), but that it should nevertheless be sanctioned in one way or the other. This does not mean that in the Court's mind this connection would necessarily dictate the solution to be adopted in order to properly sanction the filing of a request for arbitration without accomplishing the mandatory prerequisite agreed upon by the parties (aforesaid judgment 4A_124/2014 of July 7, 2014, at 3.2 and the precedents quoted).

Seized of a jurisdictional objection, the Federal Tribunal freely reviews the legal issues determining the jurisdiction of the arbitral tribunal or the lack thereof. If necessary, it will also review the application of relevant foreign law. The Court does so with full power of review but will accept the majority view expressed as to the issue at hand and, in case of controversy between case law and legal doctrine, it will defer to the opinion of the highest court of the country that adopted the applicable legal provision (last case quoted, *ibid*.).

2.3.

2.3.1. Under the influence of American and English business and legal circles, some alternative dispute resolution methods (Alternative Dispute Resolution or ADR) met with great success in Europe and particularly in Switzerland in the last few years. Conciliation and mediation are examples of such methods (aforesaid judgment 4A_124/2014 of July 7, 2014, at 3.4.2 and the references). The non-binding character of the solution proposed to the parties differentiates such methods from state courts or arbitration

proceedings. Several institutions adopted rules as to these alternative dispute resolution methods (aforesaid judgment 4A_18/2007 of June 6, 2007, at 4.3.1). The ICC did so with the ADR Rules in force as from July 1, 2001, accompanied by the ADR Guide (see ICC publication n. 809 of 2001 containing the rules and the Guide; hereafter: the brochure), then the Mediation Rules in force as of January 1, 2014, accompanied by Mediation Guidance Notes, which substituted the previous rules, such documents being available on the ICC website (www.iccwbo.org; for more precise reference, see Verbist, Schäfer and Imhoos, *ICC Arbitration in Practice*, 2nd ed., 2016, p. 246).

2.3.2. The ICC adopted the ADR Rules with a view to the parties seeking an amicable resolution of their dispute with the assistance of a mediator (referred to as the "Neutral" in the terminology of the rules), pursuant to a regulated procedure. The optional nature of the procedure explains why for the ICC, the letter A in the ADR acronym stands for *Amicable* rather than for *Alternative* (Verbist, Schäfer and Imhoos, *op. cit.*, p. 248). The procedure is dealt with in just seven articles and displays flexibility, speed, reasonable costs, and confidentiality. It does not lead to an award or to an enforceable decision of the Neutral but in the most favorable course of events, it may lead to an agreement between the parties, putting an end to their dispute which is binding upon them pursuant to the law applicable to the agreement (ADR Guide, Introduction, brochure, p. 17 *f.*). When there is a preexisting agreement to resort to the ADR Rules, the ADR procedure is introduced by a written request sent to the ICC (Art. 2(A) of the ADR Rules). The Neutral must then be chosen according to the selection procedures at Art. 3 of the ADR Rules. Then, the ADR process starts under the Neutral's guidance, according to Art. 5(1) of the aforesaid ADR Rules (see 2.1.1, above). The formulae which may be used in the framework of the ADR Rules are mediation, the Neutral evaluation, the mini-trial, any other formula or combination of formulae (for more details, see ADR Guide at Art. 5 of the ADR Rules, brochure p. 27 *ff.*). Moreover, nothing prevents the parties from resorting to ADR during the arbitration (ADR Guide, Introduction, brochure p. 18). Pursuant to Art. 5(2) of the ADR Rules, failing an agreement on the parties on the formula to be used, it will be mediation. According to the ADR Guide, when the parties agreed to submit their dispute to the ADR Rules, they may not withdraw from the procedure before the first discussion with the Neutral takes place, according to Art. 5(1) of the aforesaid rules. This provision maintains the meaning of the agreement between the parties by forcing them to assess together the opportunities afforded by the ADR procedure (see Art. 2(A) of the ADR Rules, brochure p. 22). Pursuant to Art. 6(1)(b) of the ADR Rules, ADR proceedings are terminated, among other circumstances, when, at any time after the discussion referred to in Art. 5(1) has occurred, one or more of the parties notifies the Neutral in writing of a decision to no longer to pursue the ADR proceedings. The mandatory nature of the discussion is meant to enable ADR to prosper in the best conditions; indeed before the first discussion with the Neutral, the parties cannot appreciate the opportunities offered by the procedure (ADR Guide at Art. 6 of the ADR Rules, brochure p. 30(b). It is therefore important that there should be at least a discussion between the parties and the Neutral, whether or not it leads to an agreement (Verbist, Schäfer and Imhoos, *ICC Arbitration in Practice*, 1st ed., 2005, p. 180).

On January 1, 2014, the Mediation Rules, comprising of ten articles, came into force. They replace the ADR Rules. The title of the Rules was amended as in 90% of the cases submitted to an ADR process, mediation is the formula chosen by the parties (Verbist, Schäfer and Imhoos, *op. cit.*, 2nd ed., p. 248).

According to the transitional provision at Art. 10(1) of the Mediation Rules, parties that had agreed to refer their dispute to the ICC ADR Rules prior to the date of the entry into force of the new Rules shall be deemed to have referred their dispute to the ICC Mediation Rules, unless any of the parties objects thereto, in which case, the ICC ADR Rules shall apply. This exception is applicable in the case at hand, as was noted above (see lit. A.c., 2nd §), thus the ADR Rules are the only ones to be considered here. Yet, this does not mean that no lessons can be drawn from the rules presently in force to resolve the dispute at hand. On the contrary, it is interesting to notice as to the minimum duration and the end of the mediation process that, according to Art. 7 of the Mediation Rules, the Mediator and the parties must promptly discuss the manner in which the mediation shall be conducted (§ 1) and that after the discussion, the Mediator must promptly provide the parties with a written note informing them of the manner in which the mediation shall be conducted; moreover, by agreeing to refer a dispute to the Mediation Rules, each party agrees to participate in the proceedings at least until receipt of the note from the Mediator (§ 2). Yet, according to its commentators, Art. 7(2) of the Mediation Rules was inspired by the aforesaid Art. 5(1) of the ADR Rules (Verbist, Schäfer and Imhoos, *op. cit.*, 2nd ed., p. 254). This means that the alignment of the two provisions is not without interest to interpret the older one, which is applicable in this case. Moreover, Art. 8(1)(b) of the Mediation Rules states, as an extension of Art. 6(1)(b) of the ADR Rules, that the mediation process ends with a written confirmation of its termination, sent by the Centre to the parties. This follows a written notification sent to the Mediator from any party that such party has decided it no longer wishes to pursue mediation; such a notification may be sent at any time after the party has received the Mediator's note referred to in Art. 7(2).

2.4. The first issue at hand is to determine the alternative dispute resolution mechanism chosen by the parties, to the extent that they did choose one, with a view to settling their dispute amicably. The agreement of the parties as to this item must be interpreted, in this respect, in accordance with the general principles governing the interpretation of expressions of will (see hereunder, 2.4.1). One must then examine whether or not the method adopted by the co-contracting parties was applied correctly in the case at hand (see hereunder, 2.4.2). If not, one must verify if the Appellant could complain about this in the arbitral proceedings without committing an abuse of rights (see hereunder, 2.4.3). Should that be the case, the final enquiry shall be into the adequate sanction in the case at hand for the failure to comply with the mandatory prerequisite to the arbitration (see hereunder 2.4.4).

2.4.1.

2.4.1.1. In Swiss law, the interpretation of an arbitration agreement takes place according to the general rules of contract interpretation. The court must first research the real and common intent of the parties, even empirically as the case may be, on the basis of such clues as may be available, without limiting itself to inaccurate expressions and names they may have used. Failing this, the court shall determine the meaning that, in accordance with the principle of mutual trust, the parties could and should give to their respective expressions of will under the present circumstances, according to the rules of good faith (140 III 134 at 3.2; 135 III 295 at 5.2, p. 302 and the cases quoted).

2.4.1.2. In the case at hand, the Arbitral Tribunal essentially sought to demonstrate the binding nature of the mechanism precedent to arbitration contained at Art. 34.2 of the contracts of association. It does not appear to have enquired further as to the choice made by the parties in this clause of the alternative dispute resolution method, which may have fostered the resolution of their possible future disputes.

Without really challenging this, the Respondent submits an interpretation of the clause at hand by which it seeks to separate the words "conciliation attempt" from the reference to the ADR Rules that follows them. This intellectual severing enables it to argue that compliance with the terms defined by the ICC for the conciliation process was not decisive in the case at hand and that the meaning to be given to the aforesaid words is that which counts. Thus, the Respondent pits "conciliation attempt" against 'conciliation' to deduce that it was sufficient in the case at hand that conciliation was attempted in good faith, irrespective of its outcome and particularly, irrespective of the procedure applied.

Such reasoning is based on an artificial dichotomy of the words used by the co-contracting parties in the clause in dispute and is mere sophistry. This did not escape the Appellant's attention and it rightly challenges it in its reply (n. 47 to 52), without breaching the prohibition of supplementing its appeal in such a brief (judgment 4A_520/2015 of December 16, 2015, at 3.3.1), contrary to what the Respondent claims in its rejoinder (n. 13 to 19). Indeed, it goes without saying that the words, "*shall at first be the object of a conciliation attempt pursuant to the ADR Rules*…" interpreted objectively according to the rules of good faith, clearly express the will of the parties – as the Arbitral Tribunal also emphasized – to confine the conciliation attempt to a structured institutional framework and a procedure covering all steps of the process, from the filing of the request to the termination of the ADR (award n. 148). The second paragraph of Art. 34.2 of the association contracts, which subjects recourse to arbitration to the condition that the dispute was not "*resolved by way of conciliation*," indirectly confirms this interpretation based on the principle of reliance.

Moreover, it is somewhat futile to try to draw a contrast between the concept of attempted conciliation and actual conciliation, as the Respondent does. Indeed, the Arbitral Tribunal's explanation is to be approved that the concept of 'attempt' is, to a certain extent, inherent to that of conciliation because the result of a conciliation is always uncertain (award n. 149). In other words, the two concepts are more or less interchangeable, for no-one would have the foolish idea to subject the right of the parties to initiate a claim in a state court or an arbitration to the attempt at conciliation being successful and transformed into actual conciliation because then there would no longer be a dispute to submit to the tribunal. It must be pointed out, incidentally, that Art. 197 of the Swiss Code of Civil Procedure (CPC; RS 272), introducing the provisions which govern mandatory conciliation, speaks itself of "attempted at conciliation" before proceeding on the merits. Finally, it must be emphasized that, taken to the extreme, the Respondent's argument would enable a claimant to file a claim in an arbitral tribunal the day after seizing the ADR Center, even though it would obviously have no intention to participate at all in the conciliation process, under the pretext that simply initiating the latter was already an attempt at conciliation. The *ad hoc* procedure instituted by the ADR Rules, which the Arbitral Tribunal itself emphasizes is binding, would become a dead letter. This is certainly not the result the parties contemplated when they inserted Art. 34.2 in their contracts

of association, nor is it that which a good faith third party placed in the same situation would objectively expect.

The clause must therefore be interpreted as meaning that the co-contracting parties made recourse to UNCITRAL arbitration subject to an obligation of a valid a prior attempt at conciliation, meeting all the requirements of the process established by the ADR Rules.

2.4.2. On the basis of the foregoing, it is not possible to accept that the Respondent complied with the mandatory preliminary conciliation before filing its arbitration claim, no matter what the Respondent and the Arbitrators say. This is the result of the review by this Court, on the basis of facts found by the Arbitral Tribunal of the legal reasons developed in the award (n. 160 to 166), the answer (n. 47 to 59), and the rejoinder (n. 20 to 27). Therefore, it does not matter that the Appellant incidentally claims that the Arbitral Tribunal "arbitrarily found that the conciliation took place" (appeal n. 34).

The intent of the parties, as it was deduced above from an objective interpretation of Art. 34.2 of the contracts of association, was on the one hand to make the attempt at conciliation a mandatory prerequisite to a possible subsequent arbitration procedure and was, on the other hand, to lock this move to the structured institutional framework afforded by the ICC ADR Rules. Logic therefore required that the parties, who had undertaken to comply with the rules, abide by them before submitting their dispute to arbitration. In other words, they had to wait before they initiated an arbitration until they had gone through all the steps of the conciliation process imposed by the ADR Rules. However, that did not happen.

As was already pointed out, pursuant to Art. 5(1) of the ADR Rules, the parties may not withdraw from the conciliation procedure before discussing the manner in which the mediation will be conducted with the Neutral (see 2.3.2, above). In this respect, the Arbitral Tribunal is certainly right to point out that the parties and the mediator, if they have an obligation to discuss the specific ADR process to be followed, are not bound to reach an agreement in this respect (award n. 162). Yet, this conversation or discussion must take place. According to the ADR Guide (ad Art. 5 of the ADR Rules, brochure p. 26),

> whilst it is normally preferable that the discussion takes place by way of a meeting between the parties and the Neutral, it may also be by way of a telephone conference, a video conference, or <u>any other suitable form</u>.

Relying and emphasizing the last part of the sentence, the Arbitral Tribunal stated that, on the basis of the extract reproduced in the award (n. 163), the discussion required may accordingly take the form of several exchanges of letters and emails and telephone conversations between the parties and the Conciliator, as it did here (award n. 164). Such a statement is too absolute. Besides the fact that the ADR Guide does not have force of law, the wording "*any other suitable form*" must be placed into the context of the sentence from which it has been extracted. Yet, that sentence suggests that an actual meeting between the mediator and the parties is the most appropriate solution but that, as an exception to the rule, such a meeting may be substituted with a telephone conference, a video conference or any other suitable means. The concept

of conference (by video or telephone) suggests that whilst it is desirable for the meeting to be held in one place, a substitute for the actual meeting of the parties must at least occur, namely to allow for a real, direct discussion between them, which supposes that the parties and the mediator may debate and exchange simultaneously despite their physical distance. Indeed, the idea is that the Neutral, in his capacity as a specialist in alternative dispute resolution methods, can enlighten the parties and exercise his power of persuasion toward them so that with his help they may find common ground as to the formula to be used to attempt to settle the dispute amicably or, if they have already agreed, as to the terms of the specific ADR process to be followed. Considered in this light, the wording "*any other suitable form*" would simply refer to the other modern means of communication, present or future, which would enable the parties and the mediator to exchange their views live, such as the various IT tools constantly being developed. Yet, it is true that the strict text of Art. 5(1) of the ADR Rules does not appear to impose simultaneous discussion between the protagonists at any cost, albeit over the telephone or any other suitable means of communication. First, it is not excluded that the provision may authorize a discussion spread over time, consisting of separate discussion between the parties themselves on the one hand and between the mediator and one of them on the other hand, no matter in what form the discussions take place. Yet, there must be a discussion and that discussion must consider the conduct of the ADR procedure, *i.e.* the formula to be used to resolve the dispute and/or the specific ADR process to be followed. Yet, in the case at hand, such discussion did not take place, even though, to endorse the Respondent's position, it should not purport to find a solution to the merits of the dispute. Thus, it appears clearly from the chronological summary of the steps taken by the parties after the introduction of the conciliation request, as was done above (see A.c, above) that these steps, carried out under the guidance of the recently-appointed Conciliator, concerned almost entirely the search for a date at which a telephone conference would be held to enable the parties and the Conciliator to discus the specific ADR process to be followed. In other words, all these steps were only precursors to the discussion foreseen by Art. 5(1) of the ADR Rules, which therefore never took place because they were interrupted before a date was set for this purpose, when the Respondent took the initiative to begin arbitration proceedings against the Appellant. This is what the Conciliator and the ADR Center rightly found in their respective letters to the parties, pointing out that the first meeting within the meaning of Art. 5(1) of the ADR Rules never took place and that the Respondent's initiative should be equated to a withdrawal of the request for conciliation. Moreover, the fact that the ADR Center found, in its letter of April 8, 2015, that the ADR proceedings were terminated in accordance with Art. 6(1) *f.* of the ADR Rules because the share of the payment to be made by the Respondent was not paid, does not change the matter from this point of view because that party had already clearly expressed that it did not intend to continue the ongoing conciliation procedure.

As an intermediary conclusion, it must therefore be held that, contrary to the opinion of the Arbitral Tribunal, there was no attempt at conciliation consistent with Art. 34.2 of the contracts of association in connection with Art. 5(1) of the ADR Rules in this case.

2.4.3. However, the Respondent submits in its main argument that the Appellant invokes the failure of the Arbitral Tribunal to abide by the mandatory preliminary conciliation agreed upon by the co-contracting parties in an abusive way (see 2.1.3, above).

2.4.3.1. Pursuant to Art. 2(2) CC,[7] the manifest abuse of a right is not protected by the law. This principle also applies to procedural matters. There may be an abuse of rights in particular when the exercise of a right corresponds to no interest. Moreover, the principle of good faith requires a party noticing an alleged procedural deficiency to point it out immediately at a time at which it may still be corrected, instead of waiting for the outcome of the proceedings to invoke it later on if the decision was not in its favor. The party acts in an abusive way, therefore, when invoking the failure to submit to mandatory preliminary conciliation in an appeal against the award when it had failed to propose it to the other party before the arbitration (judgment 4A_18/2007 of June 6, 2007, at 4.3.3.1 and references).

In the case dealt with in that judgment, there was hardly any hope left to conciliate the parties, even with the intervention of a third party, at the time the arbitration was initiated. Moreover and above all, the appellant chose to participate in the arbitration whilst keeping the opportunity to invoke the lack of preliminary conciliation in reserve, which it subsequently did by way of a civil law appeal based on Art. 190(2)(b) PILA against the final award, which was issued more than a year after the arbitration request was filed. When it argued in this Court to have firmly intended to settle the dispute amicably, the Federal Tribunal answered that had this been its real intention, it should have been translated into action, which it could have done by taking the initiative and implementing the mediation procedure whilst inviting the arbitral tribunal to issue a temporary stay of the proceedings it was conducting. This is why the Federal Tribunal pointed out that it would have rejected the argument of lack of jurisdiction due to an abuse of right if, contrary to what it held previously, the conciliation/mediation procedure reserved in the contract between the parties had been mandatory (quoted judgment at 4.3.3.2).

2.4.3.2. This jurisprudence is not uncontested. Thus, two writers consider that it would be inappropriate to make a general rule that the defendant's mere inaction would be sufficient to remedy the violation of a conciliation clause by the claimant. In their view, the principle must be upheld that it always behooves the claimant to demonstrate that he invited the defendant to conciliate, so that the latter should normally be authorized to raise a jurisdictional defense *ratione temporis* before the arbitral tribunal as long as he does so before any defense on the merits (Berger and Kellerhals, *International and Domestic Arbitration in Switzerland*, 3rd ed., 2015, n. 583). The pertinence of this doctrinal opinion needs not be examined any further. Indeed, no matter what the Respondent says, the circumstances of the case at hand are far from those of the case that led to the aforesaid judgment. Besides the mandatory nature of preliminary conciliation, the case at hand is singular, due to the following elements. The Respondent intended to take the Appellant to an arbitral tribunal and logically took the initiative of starting the conciliation procedure. The Appellant participated actively in the first phase of this procedure by answering the requests of the ADR Center first and then the Conciliator's with a view to organize the first discussion within the meaning of Art. 5(1) of the ADR Rules, which should take place in a telephone conference or an actual meeting of all interested parties in Paris. Then, against any expectation and whilst the parties had been chased by the Conciliator to move forward, the Respondent started arbitration – and the Appellant immediately

[7] Translator's Note: CC is the French abbreviation for the Swiss Civil Code.

complained – a step that the Conciliator and the ADR Center equated to a withdrawal of the conciliation request. Once the arbitration began, the Appellant immediately displayed its intent to raise a jurisdictional defense *ratione temporis* in the Arbitral Tribunal, which it did in a timely manner, whereupon the Arbitrators agreed to decide the issue as a preliminary matter and did so by issuing the preliminary award presently appealed.

On the basis of these facts, one hardly sees how the Appellant's behavior in the conciliation procedure or in the subsequent arbitration could be described as obstructionist, to use the adjective chosen by the Respondent, or consequently why appealing the award rejecting the jurisdictional objection would constitute an abuse of rights in the case at hand. Moreover, the arguments advanced by the Respondent in support of the opposite thesis are not sufficient to convince this Court.

According to the Respondent, the Appellant at first opposed the conciliation procedure initiated by the Respondent because the management representatives of the parties failed to meet as allegedly required by Art. 34.2 of the contracts of association. Yet, no such thing appears in paragraph 12 of the award to which the Respondent refers. It merely shows that, in a letter of September 30, 2014, sent to the Respondent's central manager, the Appellant's chairman expressed surprise that the Respondent took the formal step of submitting a request for conciliation to the ADR Center when it never took the initiative to try to call in the parties to enable them to discuss their problems directly without preconceptions and without the intervention of a third party in a spirit of loyalty and good faith. The Respondent answered, in a letter of October 16, 2014, that the conciliation initiated under the aegis of the ICC would also give the parties the opportunity to discuss the steps to be taken (award n. 13). To the very least, this puts into perspective the Appellant's alleged opposition to the conciliation procedure.

Moreover, the Respondent argues that the Appellant refused the participation of the Respondent's legal representatives in the telephone conference of December 17, 2014, and therefore imposed the postponement of the meeting even though the Appellant had previously told the Conciliator that it was inconceivable for an attempt at conciliation to take place without the active participation of the management of both parties. However, it cannot but be noted that the Respondent again pulls the fact alleged against Appellant out of its context to give it an importance that it does not have. In reality, as one can easily see by reading the summary of the pertinent circumstances (see A.c, § 4, above), everything suggests that the Appellant was taken aback by the proposal counsel for the Respondent made at the last minute to use its own telephone service to enable his clients to participate in the conference that would start 10 minutes later when the Appellant itself did not have its own representatives, taking the view, rightly or wrongly, that only the lawyers acting for the parties should participate in the telephone conference during which the only issue was the specific ADR process to be followed. As to the Appellant's subsequently expressed wish to see the managers of the two parties actively involved in the conciliation procedure, the Respondent wrongly sees an incompatibility there with the Appellant's behavior during the preparation of the telephone conference because that wish, expressed in answer to the general questions the Conciliator asked the parties, obviously did not relate to the aforesaid conference, the purpose of which was to organize the conciliation procedure, but to the conciliation that the Conciliator would attempt once the procedural issues were

resolved. Furthermore, the Appellant immediately suggested to the Conciliator to remain with the configuration it considered was initially foreseen or to organize a subsequent physical meeting of all protagonists in Paris. No matter what the Respondent says, such a proposal was hardly obstructionist.

The Respondent argues furthermore that the Appellant remained totally passive after the postponement of the telephone conference when a proactive attitude was required.

To formulate such a grievance is to switch roles. In doing so, the Respondent forgets that it – and not its opponent – filed the conciliation request and that it therefore mainly behooved the Respondent to do what was necessary for the *ad hoc* procedure to move forward. The Respondent also argues in vain on the basis of factual allegations not echoed in the factual findings of the Arbitral Tribunal, that the Appellant continued to block the project throughout the conciliation procedure, thus demonstrating the absence of any real will to find an amicable solution to the dispute between the parties on its part. As to the Respondent's criticism of the Appellant's attitude after the arbitration procedure was started, it is equally wrong-footed. This applies to the charge that the Appellant failed to submit to conciliation the counterclaims it made in the arbitration proceedings. Indeed, as the Appellant rightly emphasizes, if the conciliation request had not been withdrawn by the Respondent, the counterclaims would naturally have been dealt with in the framework of the conciliation procedure because they were one aspect of the dispute between the parties. It is just as futile to blame the Appellant for not initiating a new conciliation procedure when it had immediately raised the jurisdictional defense *ratione temporis* before the Arbitral Tribunal and the latter decided to address the issue as a preliminary matter and issued its preliminary award three months after taking this decision. Finally, arguing as the Respondent does that the tone of the briefs on jurisdiction submitted by the Appellant were hostile to say the least and did not display a conciliatory approach, without any further elaboration, is not an argument that can be upheld. Moreover, the Respondent cannot be followed when claiming that, under the present circumstances, the chances of success of a new conciliation proceeding appear even more unlikely than at the time the *ad hoc* request was filed. Besides the fact that its opponent argues the opposite (reply n. 35), the Appellant's argument is begs the question. Indeed, if it were sufficient to raise it to exclude any *a posteriori* control of mandatory preliminary conciliation, this would fly in the face of the principle of *pacta sunt servanda* (Patocchi and Favre-Bulle, *RSDIE,* 2012, p. 554) and allow a party to depart from its commitment in this respect on the basis of a mere assertion of its opinion as to the futility of such a prerequisite, which would therefore become mandatory in name only. It must be recalled that, in the view of the Arbitral Tribunal, the conciliation procedure between the parties was not bound to fail (award n. 159). More broadly, moreover, it would be wrong to underestimate the part a mediator can play in resolving a dispute and the beneficial influence that the force of persuasion of a person well versed in the alternative methods of dispute resolution may have upon the parties to a conflict. As two commentators point out, it is difficult to claim that mediation would have failed simply because an arbitration is pending because experience and statistics show that when mediation effectively takes place during the arbitration, it may very well be successful (Tschanz and Fellrath Gazzini, *Revue de l'arbitrage*, 2008, p. 768).

That being so, the Appellant does not abuse its rights when arguing that the Arbitral Tribunal was wrong to hold that the mandatory conciliation procedure was not complied with in the case at hand.

2.4.4.

2.4.4.1. As the Federal Tribunal already pointed out in its first decision on this judgment, there is controversy as to how the breach of a mediation agreement should be sanctioned when it required the parties to refrain from proceeding in an arbitration without first resorting to this alternate dispute resolution mechanism beforehand and the question may be formulated as follows: Does the party in breach of a mediation agreement merely incur possible damages to be paid to the other party or does it run the risk of seeing its claim declared inadmissible or even rejected (as it stands)? (judgment 4A_18/2007 of June 6, 2007, at 4.3.1). In its second judgment on the same issue, the Federal Tribunal recalled, as a preliminary issue, that in light of Art. 190(2)(b) PILA its review of the argument based on the breach of a contract mechanism which is a mandatory preliminary to the arbitration, did not mean in the Court's view, that such a reference would necessarily dictate the solution to be adopted to sanction the filing of a request for arbitration without first completing the mandatory preliminary step agreed upon by the parties. Whilst emphasizing again that the issue is hotly disputed, this Court suggested that the absence of consensus on this issue may be caused by the various solutions proposed to sanction it coming from tribunals or authors with different legal backgrounds, not all of which give the same meaning to the fundamental concepts to be taken into account in this context (power to adjudicate, admissibility of the claim, procedural exception, non-admissibility issue, *etc.*). The Court also noted that the very formulation of the issue in dispute as it was done in the aforesaid case, may be subject to debate because it seems to irreducibly oppose the substantive sanction (damages to be paid to the other party) and the procedural sanction (inadmissibility or dismissal of the claim as it stands). Yet, it is not certain that the two sanctions may not be combined. This being so, as the Court added, it is hardly possible to claim that there would be a marked tendency to sanction the violation of a mandatory condition precedent to the arbitration by a decision of inadmissibility *ratione temporis* of the claim on the merits. It would rather appear that a doctrinal majority is shaping, at least in Switzerland, in favor of staying the arbitration procedure and giving a time limit to the parties to enable them to remedy the omission (judgment 4A_46/2011[8] of May 16, 2011, at 3.4, quoting Poudret and Besson, *Comparative law of international arbitration*, 2nd ed., 2007, n. 13 *in fine*; Kaufmann-Kohler and Rigozzi, *Arbitrage international*, 2nd ed., 2010, n. 32a; Christopher Boog, *How to Deal with Multi-tiered Dispute Resolution Clauses*, Bulletin ASA, 2008, p. 103 *ff*, specifically p. 109). Yet in both cases, the Federal Tribunal left open the issue under review here: in the former case because the clause in dispute did not impose any mandatory conciliation mechanism; in the latter case because the mechanism was not breached, like in the subsequent case (subsequent judgment 4A_124/2014 of July 7, 2014, at 3.5), and that otherwise even the party claiming an alleged violation would have been committing an abuse of rights. However, this Court may not refrain from examining this question in the case at hand because it concluded

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

that the mandatory requirement of preliminary conciliation was breached and that the party arguing this breach is doing so in good faith.

The principle according to which the breach of a contractual mechanism which is a necessary preliminary to the arbitration be sanctioned was already established in the three aforesaid cases and may therefore be assumed (*contra* Tarkan Göksu, *Schiedsgerichtsbarkeit*, 2014, n. 76 to 79, which wrongly excludes any substantive or procedural sanction). This is not the case for the manner in which the breach should be sanctioned (on the various sanctions that can be envisaged, see among others: Baizeau and Loong, *Multi-tiered and Hybrid Arbitration Clauses*, *Arbitration in Switzerland – The Practitioner's Guide*, Arroyo [ed.], n. 46 to 50). In this context, remarks made at 3.4 of judgment 4A_46/2011,[9] quoted above, are still valid and must be recalled, and according to which one may reasonably doubt that the issue in dispute may be given an answer suitable to all possible cases.

However, sanctioning the party refusing to comply with its obligation to engage in a mandatory prerequisite with damages or to continue to the end of the specific ongoing procedure seeking to foster an amicable settlement of the dispute, is not a satisfactory solution. First, the sanction will come too late, depriving the obligation to resort to mediation before initiating an arbitration of any meaning. Second, it will be difficult, if not impossible, for the party that claims to be a victim of a breach of the mediation clause to justify the quantum of the damages. Indeed, it should not be easy to prove that failing to follow a mediation process all the way through to its end creates damage, as one of the principles of mediation is that there is no obligation to reach an agreement. This is why the only sanctions that could potentially be effective – declare the claim inadmissible, reject it as it stands, or stay the arbitration until the mediation process is completed – are procedural and not contractual in nature (Dominique Brown-Berset, *La médiation commerciale: le géant s'éveille*, RDS, 2002, vol. II, p. 319 *ff*, 368 *f.*; Samuel Monbaron, *La sanction de l'inexécution des clauses de médiation et conciliation en Suisse et en France*, RSPC, 2008, p. 425 *ff*, 433).

Declaring the claim inadmissible or rejecting it as it stands and closing the arbitration proceedings is certainly not the most appropriate solution for various reasons: first and above all, closing the proceedings puts an end to the arbitrators' mission so the arbitral tribunal would need to be reconstituted should the preliminary conciliation procedure fail to lead to an agreement once it is implemented or continued; then, there may be an issue in such circumstances as to whether the arbitrators initially appointed by the parties are still eligible to address the dispute between them; moreover, terminating the original process will prolong the proceedings and create additional costs to the potential detriment of both parties; finally, as a mediation request does not stop the statute of limitations, should a claim on the merits filed at the very end of the time limit be held inadmissible by the arbitral tribunal for failure to comply with the mandatory prerequisite of mediation, the claimant, which would have to remedy the omission, may not have the time to terminate the preliminary procedure before the expiry of the time limit it has to reintroduce its claim in a state court or before an arbitral tribunal – one month after the decision of inadmissibility if the claim must be

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

raised in Switzerland (Art. 63(1) and (2) CPC). Without a provision comparable to Art. 372(1)(b) *in fine* CPC causing *lis pendens* to run from the beginning of the preliminary conciliation procedure agreed upon, it could lead to the claim being definitively rejected because the time limit to bring the action has expired, unless if the precaution is taken to reintroduce it at the time of initiating or continuing the mediation procedure and the application for a stay until the end of the latter (see Boog, *op. cit.*, p. 109).

The best possible solution is therefore to stay the arbitration in conjunction with a time limit enabling the parties to proceed to conciliation if the claimant has already initiated the arbitration without complying with the mandatory prerequisite, or to resume and terminate a conciliation procedure validly initiated but unduly terminated. Such is also the majority opinion of commentators (in addition to the aforesaid reference, see also: Berger and Kellerhals, *op. cit.*, n. 584; Kaufmann-Kohler and Rigozzi, *international Arbitration, Law and Practice in Switzerland*, 2015, n. 5.23; Brown-Berset, *op. cit.*, p. 373; Geisinger and Voser, *International Arbitration in Switzerland*, 2nd ed., 2013, p. 327 *i.l.*; Marco Stacher, *Einführung in die internationale Scheidsgerichtsbarkeit der Schweiz*, 2015, n. 264). It goes without saying that the stay must be requested in *in limine litis* (Brown-Berset, *ibid*.). Furthermore, the arbitral tribunal must indicate the conditions under which the pending arbitration shall resume and give the parties a time limit within which the conciliation process must be concluded (except for exceptional circumstances) under penalty, so a recalcitrant party cannot unjustifiably deprive its opponent from obtaining an arbitral award on the merits within a reasonable time simply by extending the conciliation procedure as much as possible (Boog, *ibid*.).

2.4.4.2. In the case at hand, the Respondent unduly initiated arbitration proceedings against the Appellant when the ICC conciliation procedure was still pending. Having immediately reserved its right to raise a jurisdictional defense in this respect, the Appellant nonetheless participated in the constitution of the Arbitral Tribunal. Once operational, the latter issued the decision under appeal and the regularity of its composition was not questioned in the civil law appeal, submitted to the Federal Tribunal. The principle of procedural efficiency therefore requires that the Respondent's breach of the mandatory prerequisite to the arbitration be sanctioned in the case at hand not by a decision of inadmissibility for lack of jurisdiction of the Arbitral Tribunal *ratione temporis* as such a decision would put an end to *lis pendens* and compel the parties to repeat the process of appointing arbitrators called upon to decide the dispute between the parties. Consequently, a stay of the arbitral proceedings until completion of the conciliation procedure is the solution that should be adopted here and remains possible to adopt it as was previously stated above (see 1.2, above). Moreover, the arbitration is a type of private justice, in which the intervention of the state merely seeks to provide a framework for the autonomy of the parties to be implemented, the role of the state court called upon to oversee the good functioning of this type of justice consists of letting it run its course wherever possible. From this point of view, it appears more expedient to defer to the arbitral tribunal, which has the pending arbitral proceedings and better knowledge than anybody else of the whys and wherefores of the case submitted to its review, with a view to defining the terms of the stay and of the continuation of the arbitration and, in particular, the task to set an appropriate time limit for the stay. It may, for instance, find inspiration in this respect from the wording of the ADR clauses proposed by the ICC (brochure p. 5 *f*. and the "Mediation Clauses" published on the ICC website).

At paragraph 167 of the award, the Arbitral Tribunal issuing the operative part of the award:

> – accepts jurisdiction to address the dispute between the parties and rejects the jurisdictional defense raised by the defendant;
>
> – declares the claimant's claim admissible;
>
> – concludes that the issue of the costs and fees in connection with this award on jurisdiction shall be determined with the award on the merits.

In view of its wording, the dispositive part may correspond to reality because the jurisdiction of the Arbitral Tribunal and the admissibility of the Respondent's claim are accepted. However, in view of the reasons of the award under appeal, it is clear that the two issues were addressed only in connection with "the issue of the conciliation procedure being satisfied," to quote the title at 5.3 of the award and that this was erroneous for the reasons indicated above. Consequently, it is justified to annul the first two headings of the dispositive part of the award formally. As to the third heading, it must be annulled as well. Indeed, should the conciliation procedure result in an agreement between the parties, there would no longer be an award to be issued on the merits and the issue of the costs of the arbitration proceedings should be dealt with specifically by agreement between the litigants or otherwise in an *ad hoc* decision of the Arbitral Tribunal. Otherwise, the Arbitral Tribunal will have to decide if it intends to settle the fate of the costs concerning its jurisdictional award of October 13, 2015, by way of such a decision or to address the issue with the merits only, as it already did in the award at hand.

3.

This judgment renders moot the application for a stay by the Appellant, which is still pending and the Respondent's request to revoke the stay granted *ex parte* by decision of the presiding judge of November 24, 2015.

4.

The outcome of the appeal requires the judicial costs to be borne by the Respondent (Art. 66(1) LTF) and to order it to pay compensation to the Appellant (Art. 68(1) and (2) LTF).

Therefore, the Federal Tribunal pronounces:

1.
The appeal is admitted and the award under appeal is annulled.

2.
The arbitral proceedings pending between Y._____ S.p.A. and X._____ Ltd. are stayed until completion of the conciliation procedure in accordance with the ICC ADR Rules.

3.
The judicial costs set at CHF 20'000 shall be borne by the Respondent.

4.
The Respondent shall pay the Appellant an amount of CHF 22'000 for the federal proceedings.

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

Lausanne, March 16, 2016

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

Presiding Judge:	Clerk:
Kiss (Mrs.)	Carruzzo

Title: ***Mandatory pre-arbitration procedure not complied with results in annulment of the award***

Keywords: ***Jurisdiction of the arbitral tribunal***

Stars: *****