Granville Wesley Fields
Translator Certified by the
Court of Appeals of Paris
37-39 rue Saint Sebastien - 75011 Paris, France
info@cabinetfields.com
SIRET: 398 383 836 00036 • URSSAF: 755 761244100001003

(Translated from French)

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THE REPUBLIC OF FRANCE
IN THE NAME OF THE PEOPLE OF FRANCE

COURT OF APPEALS OF PARIS
Section 5 - Chamber 16
International Commercial Chamber

RULING OF DECEMBER 1, 2020

ACTION FOR THE ANNULMENT OF AN ARBITRATION AWARD
(No.)

Docket number: **19/08691 - Portalis No. 35L7-V-B7D-B7ZWA**

Decision on appeal before the court: An arbitration award handed down in Paris on January 31, 2019 under the aegis of the International Court of Arbitration of the International Chamber of Commerce by the Arbitration Tribunal composed of the President, and and , the Arbitrators (Case).

Application of the agreement dated February 7, 2018 relating to the procedure in this chamber.

CLAIMANT IN THIS ACTION:

X. represented by the and

Offices:
Represented by its legal representatives

Represented by Esq., Attorney-at-Law admitted to the Paris Bar Association of the law firm of

Represented by trial attorneys Esq., Esq., Esq., from the law firm Attorneys-at-Law admitted to the Paris Bar Association (Bar Membership

RESPONDENT IN THIS ACTION:

Y.
A company organized and existing pursuant to the laws of Singapore
Represented by its legal representatives
Registered office:

Represented by , Attorney-at-Law admitted to the Paris Bar Association (Bar Membership)

Represented by trial attorneys Esq., and , from the law firm Attorneys-at-Law admitted to the Paris Bar Association (Bar Membership).

Visa NE VARIETUR sous le n° 2020 - 2874
Fait à PARIS, le 31 décembre 2020

MEMBERS OF THE BENCH:

Pursuant to the provisions of articles 804 and 805 of France's Civil Procedure Rules, the case was tried on October 12, 2020 at a hearing open to the public with two justices presenting a report to the Court, the lawyers not being opposed thereto, before the Honorable François Ancel, Presiding Justice, charged with the report and the Honorable Fabienne Schaller, Associate Justice.

The following justices reported on the trial hearing during the deliberations of the Court:

The Honorable François Ancel, Presiding Justice
The Honorable Fabienne Schaller, Associate Justice
The Honorable Laure Aldebert, Associate Justice

Clerk: at the appellate hearing: Clémentine Glemet.

RULING:

The ruling was handed down by after due process of law and made available at the Administrative Office of the Court, the parties having previously been notified as required by virtue of the second paragraph of article 450 of France's Civil Procedure Rules. The official copy of the ruling was signed by the Honorable François Ancel, Presiding Justice and Karine Abelkalon, the clerk to whom the official copy of the ruling was given by the justice who signed it.

I. STATEMENT OF FACTS AND PROCEEDINGS

1. Y. (hereinafter referred to as Y.) is a company organized and existing pursuant to the laws of Singapore involved in the field of environmental technologies and services, and in particular waste management.

2. In September 2006, Y. won a tender launched by the X. for a project consisting of the design, construction, operation and maintenance of a domestic solid waste management center that includes separation and recycling facilities, an integrated waste center, a compose plant and a waste incineration facility, located near in municipality.

3. On October 17, 2006, the X. and Y. entered into a contract for the design and construction of the waste management center and waste transfer stations as well as for the future operation and maintenance of the center.

4. The project was launched starting on November 17, 2006 and the design and construction work was carried out until 2011.

5. There were challenges during the project execution and Y. made requests for payment to the X. and/or the (who, starting in June 2008, was the representative of the Ministry in charge of the project), as the case may be, for the design and construction works. These requests were denied.

6. Given these circumstances, on April 15, 2015 Y. brought arbitration proceedings against the X. to have it ordered to payment 364,839,693.75 and 613,216.13 dollars. During the arbitration proceedings, on August 3, 2016, the X. made a partial payment in the amount of 96,726,897.10 (corresponding to the release of the second half of the guarantee deduction), which was one

of the claims made by Y. in the arbitration proceedings against the X.

7. The X. sought the dismissal of the claims made by Y. contesting notably the admissibility of certain claims and, for some of them, the jurisdiction of the arbitration tribunal to rule on them, on grounds of the violation, according to it, of clause 20.1 and 20.5 of the general conditions of contract (C1) relating to the construction.

8. In an award handed down on the Arbitration Tribunal constituted pursuant to the Rules of Arbitration of the International Chamber of Commerce in ICC Case No. and composed of Professor , President, and , and , arbitrators, in particular dismissed *"the claim of the [X.] to dismiss the claims of Y. for lack of jurisdiction and inadmissibility"* and granted the majority of the claims made by Y., ordering the X. to pay a total amount in principal of over 123 million (which is added to the amount that was already paid by the X. r in connection with the release of the guarantee deduction), and about 3.4 million USD in arbitration costs.

9. On April 17, 2019, the X. filed an action with the Court of Appeals of Paris for the partial annulment of the Award and more specifically the annulment of paragraphs 898.1, 898.2 (a) to (l), or 12 of the decision items of the Arbitration Tribunal.

10. The case was examined based on the procedural agreement dated February 7, 2018 with the chamber and accepted by the parties as per section 4.1.

II. CLAIMS OF THE PARTIES

11. In its latest briefs served electronically on October 2, 2020, the X. asked in substance the Court, on the basis of articles 1520(1), 1520(3) and 1520(4) of France's Civil Procedure Rules, to:

- Dismiss the objection of admissibility pleaded by Y. d;

- Find that the Arbitration Tribunal failed to state the reasons upon which it based its decision to find that it had jurisdiction to rule on the claims of Y. for which a motion to dismiss for lack of jurisdiction was pleaded and therefore it failed to comply with its terms of reference;

- Find that the Arbitration Tribunal failed to comply with its terms of reference by disregarding the limits of the dispute resolution clause stipulated in the Contract;

- Find that the Arbitration Tribunal wrongly concluded that it had jurisdiction to rule on the claims of Y. made in violation of the dispute resolution clause stipulated in the Contract;

As a consequence, to:

- Partly annul the Award on the basis of articles 1520(1) and 1520(3) of France's Civil Procedure Rules, and more precisely the following decisions:

(i) the decision items contained in paragraph 898.1 of the Award;

(ii) the decision of the Arbitration Tribunal relating to and unnecessary design work for the waste collection/transfer stations, which is contained in paragraph 898.2 (a) of the Award for an amount of 2,866,500 .304;

(iii) the decision of the Arbitration Tribunal relating to the . waste transfer station, which is contained in paragraph 898.2 (b) of the Award for an amount of 4,553.82 .305;

(iv) the decision of the Arbitration Tribunal relating to the supply of an . system, which is contained in paragraph 898.2 (c) of the Award;

(v) the decision of the Arbitration Tribunal relating to the supply of water, which is contained in paragraph 898.2 (e) of the Award;

(vi) the decision of the Arbitration Tribunal relating to the construction of a temporary access road, which is contained in paragraph 898.2 (f) of the Award;

(vii) the decision of the Arbitration Tribunal relating to the construction of the Wimax tower, which is contained in paragraph 898.2 (g) of the Award;

(viii) the decision of the Arbitration Tribunal relating to the construction of the entrance area buildings, which is contained in paragraph 898.2 (h) of the Award;

(ix) the decision of the Arbitration Tribunal relating to technical proposal concerning the 5,000 waste processing facility, which is contained in paragraph 898.2 (i) of the Award;

(x) the decision of the Arbitration Tribunal relating to financial losses, which is contained in paragraph 898.2 (l) of the Award;

- Find that the Arbitration Tribunal ruled ultra petita concerning the claim of relating to the works carried out in the entrance area by awarding it compensation of an amount greater than that claimed and, as a consequence, annul paragraphs 661 to 668 of the Award as well as the decision item 898-2 (h) on the basis of article 1520(3) of France's Civil Procedure Rules;

- Find that the Arbitration Tribunal failed to comply with its terms of reference by arrogating to itself the power to rule in equity and, as a consequence, annul the passages of the Award and the following decisions on the basis of article 1520(3) of France's Civil Procedure Rules;

(i) paragraph 158.b and the decision item contained in paragraph 898.1 of the Award;

(ii) the decision of the Tribunal relating to the unnecessary design work for the waste collection/transfer stations, which is contained in paragraph 898.2 (a) of the Award for an amount of 2,866,500 206;

(iii) the decision of the Tribunal relating to the supply of an which is contained in paragraph 898.2 (c) of the Award;

(iv) the decision of the Tribunal relating to the claim pertaining to diesel and

and the diesel generators, which is contained in paragraph 898.2 (d) of the Award for an amount of 2,871,410 ;

(v) the decision of the Arbitration Tribunal relating to the supply of water, which is contained in paragraph 898.2 (e) of the Award;

(vi) the decision of the Arbitration Tribunal relating to the construction of a temporary access road, which is contained in paragraph 898.2 (f) of the Award;

(vii) the decision of the Arbitration Tribunal relating to the construction of the which is contained in paragraph 898.2 (g) of the Award;

(viii) the decision of the Arbitration Tribunal relating to the construction of the entrance area buildings, which is contained in paragraph 898.2 (h) of the Award;

(ix) the decision of the Arbitration Tribunal relating to technical proposal concerning the waste processing facility, which is contained in paragraph 898.2 (i) of the Award;

(x) the decision of the Arbitration Tribunal relating to financial losses, which is contained in paragraph 898.2 (l) of the Award;

- Find that the Arbitration Tribunal acted in violation of the adversarial principle and, as a consequence, annul the following decisions, on the basis of article 1520(4) of France's Civil Procedure Rules;

(i) paragraphs 240 to 242 of the Award and the decision item that is contained in paragraph 898.2 (a) of the Award for an amount of 2,866,500 307 relating to the unnecessary work for the waste transfer stations;

(ii) paragraphs 588 to 591 of the Award as well as the decision item that is contained in paragraph 898.2 (f) of the Award relating to the access road;

(iii) paragraphs 631 to 637 of the Award as well as the decision item that is contained in paragraph 898.2 (g) of the Award relating to the construction of a

(iv) paragraphs 691 to 695 of the Award as well as the decision item that is contained in paragraph 898.2 (i) of the Award relating to the design work for the waste processing facility;

(v) paragraphs 534 to 536 of the Award as well as the decision item that is contained in paragraph 898.2 (d) of the Award, for an amount of 2,871,410 , which relates to the claim pertaining to diesel and the diesel generators;

- Order Y. to pay the Claimant the amount of 200,000 Euros by virtue of France's Civil Procedure Rules as well as all costs.

12. In its latest briefs served electronically on October 6, 2020, Y. is asking the Court, on the basis of articles 700, 1466 and 1520 of France's Civil Procedure Rules, to:

- Declare inadmissible the claims of X. , based on the alleged failure by Y. to comply with clauses 20.1 et seq. of the general conditions of contract (C1), seeking the partial annulment of the Award handed down on January 31, 2019 by the Arbitration Tribunal;

- Dismiss all the claims of X. seeking the partial annulment of the Award handed down on by the Arbitration Tribunal;

- Dismiss, as a consequence, the action for annulment of the ;

- Dismiss all actions, claims and arguments o

- Order the X. to pay Y. Ltd the amount of 580,000 Euros by virtue of France's Civil Procedure Rules;

- Order the X. to pay all costs.

13. The end of the pretrial phase was ordered on October 6, 2020.

14. The Court refers, for further details about the facts, claims and defenses of the parties, to the abovementioned briefs, pursuant to the provisions of article 455 of France's Civil Procedure Rules.

III. CLAIMS OF THE PARTIES AND GROUNDS FOR THE DECISION

The ground for annulment based the lack of jurisdiction of the arbitration tribunal (article 1520(1) of France's Civil Procedure Rules)

15. X. : asserts in substance that the Award faces partial annulment on the basis of article 1520(1) of France's Civil Procedure Rules on grounds that the arbitration tribunal wrongly concluded that it had jurisdiction to rule on the claims made by Y. that were not the subject, before the proceedings, of dispute resolution as stipulated in clause 20 of the general conditions of contract (C1) that the parties agreed to enter into as a condition of their consent to the jurisdiction of the arbitration tribunal to adjudicate the dispute.

16. It thereby contests that the parties had intended to confer upon the arbitration tribunal the broadest possible jurisdiction and explains that the notion of "disputes" referred to in the arbitration clause must be construed as referring only to the claims having been dealt with in conformance with the provisions of clause 20 of the general conditions of contract (C1) and considers that the interpretation by Y. of the scope of the arbitration clause would amount to depriving clause 20 of any useful effect.

17. X. argues that, as a consequence of this lack of jurisdiction, the decision item contained in paragraph 898.1 of the award must be annulled, as well as the passages of the award and the decision items mentioned in paragraph 53 where the

arbitration tribunal concluded that it had jurisdiction to rule on the claims made by

18. It explains that this ground is admissible, with respect to motion to dismiss for lack of jurisdiction and not only a question of the admissibility of the claims of Y., on grounds that the parties, by agreeing to such a clause, intended to limit the scope rationae materiae of the arbitration tribunal.

19. In response, Y. argued that the ground pleaded by X. does not concern the jurisdiction of the arbitration tribunal but the admissibility of the claims of Y. and, therefore, does fall within the cases in which the proceedings provided for in article 1520 of France's Civil Procedure Rules may be used. It explains, in this regard, that jurisdiction raises a question of a division of the power to adjudicate a dispute between the arbitration tribunals and state-run courts and the ground based on the failure to comply with the prerequisites for bringing arbitration proceedings do not affect the willingness of the parties to submit their disputes to the jurisdiction of an arbitration tribunal as a matter of preference instead of a state-run court.

20. Y. maintains in any case that the arbitration tribunal had jurisdiction to rule on its claims which are well within the scope of the arbitration agreement. It argues that the interpretation of the arbitration clause defended by X. runs counter the interpretation rules that led to a determination of the common intention of the parties, using the legal principle of effectiveness and maintains that based on the clear and unambiguous terms of clause 1.3 "Agreed Amendments to the General Conditions of Contract," the parties intended to give the arbitration tribunal the broadest possible jurisdiction to adjudicate all disputes liable to arise between them in the execution of the Contract and in the implementation of the Project.

Wherefore:

21. Pursuant to article 1520(1) of France's Civil Procedure Rules, action for annulment is available if the arbitration tribunal wrongly concluded that it had jurisdiction or lacked jurisdiction.

22. In this connection, it is up to the judge ruling on the annulment to review the decision of the arbitration tribunal regarding its jurisdiction, regardless of whether it concluded that it had jurisdiction or lacked jurisdiction, seeking legal and factual information necessary to determine the scope of the arbitration agreement.

23. In the case in point, based on evidence produced, the contract that X. and Y. entered into on October 17, 2006 contains a cross-reference to the general conditions of contract relating to the construction (C1), to the general conditions of contract relating to the operation (C2) dated April 3, 2005 and special terms and conditions entitled "Agreed Amendments to the General Conditions of Contract."

24. In the case in point, clause 20 of the general conditions of contract (C1) entitled "Claims and Disputes" provides as follows:

> "*20.1 Procedure applicable to claims*
>
> *If the Contractor intends to claim an additional payment by virtue of any clause of*

the present conditions or otherwise, it must notify of this as soon as possible and, in any case, within 28 days after the occurrence of the event that gave rise to the claim.

The Contractor must maintain all contemporaneous records that may be necessary to justify any claim, either onsite or at any other place deemed acceptable by . Without recognizing any liability of , shall, upon receipt of any such notification, inspect said records and may instruct the Contractor to maintain other contemporaneous records. The Contractor shall enable to to inspect all such records and shall (in case of instructions to this effect) submit copies of them to

Within 28 days from the date of such notification, or within any other period of time that may agree to, the Contractor must address to a detailed statement of the amount and the basis of the claim. If the effects of the event that gave rise to the claim continue, said statement will be considered to be provisional. The Contractor shall then, on the frequency that may reasonably determine, address other provisional statements indicating the aggregate amount of the claim and anu other relevant details. If the provisional statements are addressed to , the Contractor shall address a final statement within 28 days after the end of the effects of the event.

If the Contractor fails to comply with this subclause, it will not be entitled to any additional payment.

20.2 Payment of claims

The Contractor shall be entitled to include in any Certificate of Intermediary Payment the amount of any claims that will consider due and payable. If the details provided are insufficient to justify the entire claim, the Contractor will be entitled to the payment of the part of the claim that has been justified.

20.3 Differences: settlement by

If a difference or a dispute occurs between X. or the and the Contractor relating to the Contract of the execution of the Works (during the course of the Works, before the termination or the abandonment of the Contract), it must first be, for purposes of its resolution, submitted to who shall within a period of ninety days after being invited to do so by either of the parties, notify the X. and the Contractor of its decision in writing. Subject to the following provisions, such a decision on all issues thus submitted will be final and binding for the X. and the Contractor until the completion of the Works and must be immediately applied by the Contractor which shall continue the Works diligently, regardless of whether or not the Contractor or the X. asks to submit such a difference or dispute to the courts, in the manner provided hereinafter.

20.4 Differences: no settlement by

If fails to give notice of its decision in writing, as per subclause 20.3, within ninety days, or if X. or the Contractor has reasons to contest the decision of , the X. or the Contractor may then submit the dispute to the court of with jurisdiction, subject to giving fifteen days' written notification to .

20.5 Differences: limitation

The Contractor may only submit the dispute to a court by no later than six months after the date of issue of the Certificate of Execution, or of termination, abandonment or violation of the Contract, the first date being retained."

25. It should be noted that clause 20 of the general conditions of contract does not contain any arbitration agreement but confers jurisdiction on the courts of in case of a dispute.

26. However, the parties amended these general conditions and the document entitled "Agreed Amendments to the General Conditions of Contract" contains in clause 1.3 the following arbitration clause:

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

27. X. considers that this arbitration clause is not intended to replace the procedural obligations mentioned in clauses 20.3 to 20.5 such that only disputes for which the procedure described in these clauses was followed first are liable, in the event of an unresolved dispute, to fall within the jurisdiction of the arbitration tribunal.

28. Analyzed in these terms, this ground is indeed admissible.

29. However, the terms of the arbitration clause contained in the aforesaid clause 1.3, about which it is not at all specified in the agreement that contains it that it is intended to be included inserted in the aforementioned description and to supersede only clause 20.4 of the general conditions conferring jurisdiction on the courts of , are general and unambiguous since this clause covers "all disputes" arising out of or in connection with the contract.

30. In so doing, even though this clause is not intended to eliminate the previous process that the parties had put into place in clause 20 of the general conditions of contract to attempt to resolve disputes, the failure to comply with this process may not result in limiting, given the generality of the terms of the arbitration clause, the jurisdiction of the arbitration tribunal, without prejudice to its determination of the admissibility of claims that are not made in adherence to said process, with the understanding that this latter question does not in any case affect the jurisdiction of the tribunal and can therefore not serve as a basis for grounds to annul based on article 1520(1) of France's Civil Procedure Rules.

31. As a consequence, it should be considered that the arbitration tribunal rightly concluded that it had jurisdiction and to deny the ground for annulment.

The ground for annulment based on the failure of the arbitration tribunal to comply with its terms of reference (article 1520(3) of France's Civil Procedure Rules)

32. X. is seeking the partial annulment of the Award on the basis of article 1520(3) of France's Civil Procedure Rules, arguing, on the one hand, a failure to state the reasons for the jurisdiction of the arbitration tribunal, on the other hand, that it ruled ultra petita and, lastly, that it wrongly arrogating to itself the powers of an amiable compositeur.

33. With respect to the failure to state the reasons upon which its decision was based, X. explains that if the arbitration tribunal concluded that it had jurisdiction to rule on the claims made by Y. of which the X. maintained that they were not within the scope of the arbitration agreement agreed by the parties, the tribunal totally refrained from justifying its decision on this question, merely discussing the objection of admissibility without addressing the issue of its jurisdiction.

34. With regard to the ultra petita, X. maintains that the tribunal disregarded its terms of reference by granting Y. compensation of an amount greater (2,591,892.98) than that claimed by (2,572,826.64) for the claim related to the work done in the entrance area.

35. X. lastly contends that the arbitration tribunal failed to comply with its terms of reference by arrogating to itself the powers of an amiable compositeur instead of applying the legal rules selected by the parties. It explained by precluding the strict application of the contractual provisions and by moderating the effects thereof, given the factual circumstances at stake, the tribunal ruled based on equitable principles and not on the law and, as a consequent, violated its terms of reference.

36. In response, Y. maintains that the arbitration tribunal did comply with its terms of reference by justifying its decision regarding jurisdiction, contrary to what X. maintains. Y. indicates in this regard that the arbitration tribunal devoted 33 pages of the award to the comprehensive analysis of the objections of X. relating to its jurisdiction in a section entitled "*Questions of Admissibility and Jurisdiction*" and finally concluded by denying the jurisdiction and admissibility objections pleaded by X.

37. Y. adds that the lack of justification of an award does not constitute a case eligible for action for annulment under French international arbitration law and the review of the existence of grounds is thus a restricted purely "material" review that precluded as assessment of the content and the relevance of the grounds given by the arbitration tribunal and review as to the substance of the award undertaken.

38. With respect to the ground according to which the arbitration tribunal ruled ultra petita, Y. underscored that it had asked the arbitration tribunal to order X. to pay to pay the amounts that it would deem appropriate and the amount awarded for the additional work done in the entrance area of the Center was determined based on a joint evaluation of the experts of the parties, uncontested by X. in the arbitration proceedings. It adds that the exceeding of the amount of a claim does not fall

within ultra petita when the amount does not exceed the amount of the total claim and, in the case in point, the arbitration tribunal awarded it an amount (123 million ;) less than its claims.

39. On the claim of X. relating to the amiable composition, Y. argues that an award cannot be annulled on this basis, insofar as it is justified in law and it maintains that, in the case in point, the arbitration tribunal adjudicated its claims, pursuant to the provisions of the Contract and law application to the substantive issues and it did not "disregard" these provisions.

Wherefore:

40. Pursuant to article 1520(3) of France's Civil Procedure Rules, action for annulment is available if the tribunal ruled without complying with the terms of reference given to it, which is primarily limited to the subject of the dispute as determined by the claims of the parties.

The claim based on the lack of justification in the award of the jurisdiction of the arbitration tribunal

41. In the case in point, the arbitration clause provides that the seat of the arbitration is Paris and according to the rules of the International Chamber of Commerce (ICC).

42. Under article 25.2 of the ICC Rules of Arbitration (1998 version, reproduced in article 31 (2012 ICC version) and article 32 (2017 ICC version), the award shall state the reasons upon which it is based.

43. It was thus well within the purview of the arbitrators to state the reasons upon which the award is based.

44. However, it should be noted that is not within the purview of the judge adjudicating the annulment to review the content of the reasons upon which the arbitration decision is based, or whether they are persuasive, but only that they exist, with the understanding that the arbitrators are not obliged to follow the parties in the details of the argumentation.

45. In the case in point, based on the disputed award, and specifically paragraph 78 contained in section III of the award entitled "*Summary of Claims*," the tribunal took into consideration the claim of X. : contesting the jurisdiction of the arbitration tribunal since it is indicated in this paragraph that "*The Respondent , X. principally contested the admissibility of the claims or the jurisdiction of the Arbitration Tribunal to rule comprehensively, and then relative to each claim, all the while examining them as to the substance in the alternative.*"

46. The tribunal then explicitly dealt with this question in section IV of its award, precisely entitled "*Questions of Admissibility and Jurisdiction*" by laying out its opinion in paragraphs 122 to 158 of the award before concluding in its operative part in paragraph 898.1 that "*the claim of the Respondent seeking the dismissal of all of the claims of the Claimant for lack of jurisdiction or inadmissibility is denied.*"

47. In this regard, based on the justification of the tribunal on the question of "*admissibility and jurisdiction*" it elected to address it by examining as it explains it in paragraph 122 in the first place "*the argument of Y. according to which the modifications agreed were*

entirely replaced by subclauses 20.3 to 20.8, then the validity of the different time periods provided in these provisions with regard to law." The arbitration tribunal then adds that it wishes to examine "*also the behavior of the parties concerning the applicability of the provisions of the disputed provisions*" and thereby "*concludes that it is impossible to rule that the claims of Y. are outright inadmissible on grounds that one or more of the provisions of clause 20, or clause 8.3, have not been adhered to.*"

48. While the choice to address and therefore to state the reasons upon which its decision is based with respect to the question of "*admissibility and jurisdiction*" according to this arrangement does not contribute in an obvious way to facilitating the distinction between the questions of admissibility and jurisdiction, all the more so because the tribunal also engages, in this section, in an assessment of whether or not Y. complied with the stages prior to bringing arbitration, it does not however lead to the consequence that the X. intends for it to have aimed at considering that there is no reason stated on the question of jurisdiction, insofar as the arbitration tribunal chose to address both notions together and, with no possible ambiguity, the object of these paragraphs based on the title of this section was indeed to respond to these two questions simultaneously and comprehensively.

49. Moreover, by engaging in an interpretation of clause 20 at the end of paragraphs 130 to 141, the tribunal necessarily concluded that it had jurisdiction since it indicated "*Consequently, this tribunal will examine the defenses pleaded by the Respondent [X.] in connection with clause 20 in the context of each claim whenever necessary and, as the case may be, it shall draw therefrom the appropriate consequences in regards of contract law.*"

50. Likewise, by recalling in paragraph 158 (d) that "*the submission of a dispute to the decision of the engineer pursuant to clause 20.3 constitutes a procedural condition that, in general, must be satisfied (unless it was waived or is found to be unlawful) before a dispute can be submitted to arbitration,*" the arbitration tribunal swept aside the argument that the procedural prerequisites are a question of jurisdiction and, in so doing, responded to the argument claiming lack of jurisdiction.

51. Based on the foregoing, and while it is not within the powers of the court to verify whether the case was properly or improperly judged, the claim invoked should be dismissed.

The Claim Based on the Ultra Petita:

52. It is up to the arbitration tribunal to rule within the limits of the claims that are put before it such that if it grants more than was claimed, its award is liable to be annulled for disregarding its terms of reference.

53. In the case in point, it is well established that, before the arbitration tribunal as reflected in paragraph 638 of the award (but also in annex A of this award), sought in connection with the work done in the entrance area (relating to a fire hall and a prayer room) an order for X. to pay the amount of 2,572,826.64 of which 2,144,022.20 only for the work and 428,804.44 for financial costs.

54. Ruling on this claim, the arbitration tribunal ordered X. to pay the amount of 2,591,892.98 (see paragraph 898.2 (h) of the operative part of the award), of

which 2,253,819.98 concerning only the value of the additional work and 338,073 for financial costs.

55. It is well established that, in so doing, the tribunal awarded in connection with this head of damage an amount greater that what was expressly claimed by Y., even though this amount corresponds to the joint evaluation of the experts of the parties.

56. In this regard, Y. cannot usefully invoke the fact that in its June 30, 2016 Statement of Claim, it had asked the Tribunal to order X. to pay as determined by it *"and/or any other amounts that the Tribunal may assess"* when this wording in no way authorizes the tribunal to go beyond the amounts claimed but only to grant, as the case may be, a different amount within the limit of this maximum amount.

57. Likewise, if the accumulation of the claims for additional work (claims *"unrelated to a time period"*) by Y. against X. amounted to 243,903,608.50 (and the total amount of the awards finally handed down by the arbitration tribunal is lower since it totals 123,185,650.58 , it is well established, on the one hand, that the arbitration tribunal did made a comprehensive award but item by item. On the other hand, itself elected to make separate claims for the different items and sought an award for each of the items for a specific amount, the items having each separate causes since they relate to the cost of additional wok borne by this company and related to the design of waste collection/transfer stations, the supply of a telemetry system, the supply of water, the construction of a temporary access road and the construction of a ( ) tower, as much work that was different in nature.

59. It should therefore be considered that, on this point, the arbitration tribunal disregarded its terms of reference and the partial annulment of the operative part of the award relating to the construction of the buildings in the entrance area, and more specifically, paragraph 898.2 (h) should be ordered with no need to annul the reasons stated therefor.

The Claim Based on Amiable Composition

60. Amiable composition is a contractual foregoing of the effects and benefit of legal rules whereby the parties forfeit the prerogative to demand the strict application thereof and the arbitrators receive correspondingly the power to modify or to moderate the consequences of the contractual provisions whenever equity or the well understood common interest of the parties requires it.

61. In the case in point, based on the terms of reference, the arbitration tribunal did not have the power to rule as an amiable compositeur and was supposed to rule in accordance with the legal rules, as agreed in clause 1.3 of the amended conditions of contract.

62. Under article 1.3 of the Rules of Arbitration of the International Chamber of Commerce (2012), the *"arbitral tribunal shall take account of the provisions of the contract, if any, between the parties and of any relevant trade usages."*

The allegation that the arbitration tribunal chose not to apply clause 20.1 of the general conditions of contract

63. In substance, [X] reproaches the arbitration tribunal for having failed to apply clause 20.1 of the general conditions of contract when this clause is unambiguous and it provides that, failing notification to [ ] of claim for an additional payment within a period of 28 days, the contractor forfeits the right to an additional payment.

64. Based, however, on the award, the arbitration tribunal failed to rule as an amiable compositeur on this point but based itself on [ ]

65. For instance, in paragraph 131 of its award, the arbitration tribunal explains that "*the contractual provisions adopted by the Parties produce their effect only by virtue of a specific domestic law; in the present case, [ ] law. Consequently, these provisions cannot violate the mandatory provisions of the applicable law*" and then cites articles 403 and 418 of the [ ] Civil Code ([ ] from which it infers that they institute a prescription regime as a matter of public policy.

66. It then relies on article 172 of the [ ] Civil Code mandating that the parties shall perform their obligations in good faith. Finding notably that in practice the engineer wears two hats—engineer and chairman of the steering committee—the lack of clarity between these two positions and that "*to the extent that the Steering Committee examined claims and decided about them as to the merits*," the tribunal considers that [ ]

"*cannot now maintain that the valid notification of the claims was not given under subclause 20.1 of the general conditions of contract or that the decision of the engineer was not sought, given that the Chairman of the Committee was also [ ]*." (§ 158 (f))

67. The tribunal further indicates in paragraph 154 of the award that it would be "*contrary to good faith for the [X,] to maintain now that these differences should have been submitted to [ ], as an independent decisionmaker, when he adjudicated these differences in favor of the Respondent.*"

68. Lastly, in paragraph 155 and "*On the basis of the foregoing findings*," the tribunal indicates that it "*rejects, as a matter of principle, the assertion that the claims of [Y,] that did not strictly comply with clause 8.3 or subclauses 20.1 and 20.3 must be rejected.*"

69. Based on the foregoing, the arbitration tribunal considered that clause 20.1 could as a matter of principle preclude the claims of [Y,], it relied on the principle of good faith enshrined in [ ] law, which cannot be likened to an assessment of the claim as an amiable compositeur.

70. This claim will consequently be dismissed on this point.

The allegation that the arbitration tribunal disregarded the contractual provisions regarding the claims relating to the costs incurred in connection with the preparation of technical proposals

71. In substance, [X,] maintains that the arbitration tribunal accepted the claims of [Y,] relating to the reimbursement of costs relating to the preparation, at the

request of the Project Owner, of a proposal concerning on the one hand, a waste processing facility, and, on the other hand, waste transfer stations, with the understanding that these proposals were finally accepts and this, even though, according the first, the price set in the contract was fixed in nature and could only be adjusted in case of a modification of the works, at the order of such that "*pursuant to the contractual provisions, Y. was not entitled to an additional payment for the preparation of proposals but only in case of a variation ordered by , which was confirmed by the wording of clause 14.2 providing that a proposal by the Contractor was to be prepared at its expense.*"

72. However, based on the arbitration award, the tribunal considered given the circumstances of the case that "the work done by Y. far exceeded the preparation of a proposal" and insisting on the fact that X. "*after having on numerous occasions encouraged Y. to do design work for the waste transfer stations, cannot in good faith claim entirely absolve itself from the cost of this work...on grounds that it did not given any instructions or demand any modification in due form pursuant to clause 14.3.*" (paragraph 237)

73. Furthermore, while the arbitration tribunal considered that Y. was entitled to compensation for the cost of unnecessary design work, the decision was made to apply article 263 of the , deeming that this company as a high-level professional business "should have avoided at least a part of the losses that it claimed by making reasonable efforts" which led it to reduce by 25% the amount of losses claimed.

74. Based on the foregoing, the tribunal applied the principle of good faith enshrined in article 172 of the Civil Code to interpret clause 14.1 of the contract as well as article 263 of the so it did indeed rule in law on this dispute that was submitted to it.

75. Moreover, assuming that the application of this principle of good faith in law can violate the very substance of the obligations agreed between the parties, it is not up to a judge adjudicating the annulment to review the interpretation of the contractual provisions done by the arbitration tribunal on the basis of said principle of good faith.

76. This claim should therefore be dismissed.

The allegation that the arbitration tribunal disregarded the contractual provisions regarding the claims of relating to the additional work undertaken with no variation order, preferring an equitable approach

77. In substance, X. maintains that the arbitration tribunal accepted the claims for compensation for the additional work undertaken during the construction phase relating to the system and an access road to the site when they had not been ordered and/or approved by , as mandated by clause 14.1 and on grounds that it considered a matter of equity.

78. However, it should be noted that with respect to the construction of the road, the tribunal engaged in an interpretation of the clauses of the contract and the tender to consider in paragraph 577 that a road was necessary and that Y. was entitled to compensation on the "*basis of article 709 of the or on the basis of article 256 of the*

given that the Project Owner breached its obligations by failing to provide a practicable road." (paragraph 586)

79. Based on the foregoing, the tribunal ruled in law on this claim.

80. With regard to supply of telecommunications facilities, the tribunal considered that Y. was entitled to damages and interest because X. breached an obligation that it was under and by expressly relying on article 256 of the Civil Code, which holds that where "*the obligor fails to perform the obligation in kind or delays such performance, he shall indemnify any damages suffered by the obligee, unless such non-performance or delay therein was due to a cause beyond his the control.*" (article cited in paragraph 542 of the award)

81. Thus, the arbitration tribunal considered that clause 14.1 of the contract did not apply as this claim of Y. could not be likened to a request for the modification of works. (paragraph 623)

82. On the sole basis of these elements, it shall be found that the arbitration tribunal ruled in law.

The allegation that the arbitration tribunal made up for the deficiency of [redacted] in order to secure compensation for the latter

83. In substance, X. maintains that with respect to certain claims of Y. the arbitration tribunal did not draw the appropriate legal consequences in light of the argumentation of Y. and in particular a finding that it had failed to prove the basis and/or the quantification of its claims related to the electricity, and it took the initiative to make up for the deficiency of Y. , considering that it should be compensated for the difference between the cost of producing electricity using diesel and the cost that it would have borne if electricity had been available.

84. Based on the arbitration award, Y. made compensation claims for additional costs related to the need to source electricity and to the consequences of the late supply of an electric connection.

85. The arbitration tribunal refused to grant certain claims of after finding that there was an "*overlapping*" of the claims concerning electricity and that such claims contained "*a lack of coherence.*" (paragraph 486)

86. Having taken into account the fact that the claim "*varied during the course of the different periods covered,*" the tribunal decided to "*analyze the key issues according to the periods*" that it identified. (paragraph 488)

87. It cannot be inferred from this approach, which consists for the tribunal in analyzing the facts in order to respond in law to the claims, any violation of its terms of reference or that the tribunal had not ruled based on the contract and/or the applicable law when the arbitration tribunal engages, in paragraphs 490 to 537, in an assessment of the claims of with regard to the contractual clauses and the evidence produced in the case.

88. In ruling against X. on some of these claims, the tribunal deemed,

after finding that the electrical connection "*was available only on May 24, 2017*," that the X. had "*violated the contract by failing to provide a usable connection at the required time.*" (paragraph 490).

89. It is notably indicated in paragraph 493 that Y. "*is entitled to the reimbursement of the additional costs that it can demonstrate that it incurred for the supply of electricity using diesel generators in addition to the cost of electricity from the external distribution network operated by . This period is between July 30, 2010 and May 24, 2011.*"

90. As a result of this, the claim alleged is not proven, with the understanding that it is not within the powers of the judge adjudicating the annulment to, under cover of a ground of annulment invoked, engage in an assessment of the grounds that led the tribunal to rule in this way.

91. Based on the foregoing, the ground for annulment based on the failure by the arbitration tribunal to comply with its terms of reference will be dismissed with respect to the award decision relating to the construction of buildings in the entrance area contained in paragraph 898.2 (h) of the Award.

The claim that Arbitration Tribunal acted in violation of the adversarial principle (article 520-4 of France's Civil Procedure Rules)

92. X. explains, on the basis of articles 1520-4 and 1510 of France's Civil Procedure Rules, that the arbitration tribunal disregarded the adversarial principle on several occasions by basing several of its decisions on arguments that were not asserted by the parties during the arbitration proceedings or by choosing to make up for the deficiencies of Y. in the establishment of its losses.

93. In response, Y. argued that the ground of annulment is inadmissible as the criticisms made by X. focus exclusively on the methods of evaluating the losses applied by the arbitration tribunal for some claims of Y., which it granted and the adversarial principle does not require that methods of evaluating losses be submitted to the parties to the extent that they are within the sole discretion of the arbitrator.

Wherefore:

The allegation that the tribunal rule on compensation due to Y. concerning the unnecessary design costs relating to the waste transfer stations on the basis of a quantification method not pleaded or discussed by the parties

94. X. maintains in substance that the arbitration tribunal ruled on the compensation due to Y. concerning the unnecessary design costs relating to the waste transfer stations "*on the basis of a quantification method not pleaded or discussed by the parties.*"

95. Based on the award on this point, this arbitration tribunal, all the while granting in principle the claim by Y. ompensation, considered that article 263 of the X. invoked by X. ɔe applied, making it possible to reduce the amount of the compensation due to the actions of the victim, considering that Y. , "*as a*

high-level professional business should have avoided at least a part of the losses that it claimed by making reasonable efforts."

96. Applying this statute, the arbitration tribunal chose to apply a 25% reduction to the amount of said losses.

97. Even though the X. had invoked article 263 of the in order to deny any compensation, and Y. intended to have this principle of attenuation dismissed, it cannot be considered that the arbitration tribunal, by opting for a 25% reduction of these losses, violated the adversarial principle.

98. In effect, on the one hand, it is well established that the question of the contribution by Y. o its own losses was subject to debate and debated before the arbitration tribunal and the tribunal raised no factual or legal defenses sue sponte bearing in mind that the debate did not require the tribunal, with respect to the evaluation of losses, to accept only one or the other of the proposals defended by the parties.

99. On the other hand, for the evaluation of losses, the arbitration tribunal is not required to submit to the parties, prior to the handing down of the award, details of its reasoning that led it to decide on a 25% reduction.

100. In light of the foregoing, this claim will be denied.

The quantification of the losses relating to the construction of a temporary access road at 15% of the general expenses of

101. X. maintains in substance that the arbitration tribunal quantified its losses relating to the construction of a temporary access road at 15% of the general expenses of Y. but the parties had not been able to discuss it, such that it based itself on a justification for its quantification never raised either by the parties or by the tribunal itself, in violation of the adversarial principle.

102. In this regard, based on the award, "*the parties and the experts differed on the amount of [general expenses and profits] that could be used to evaluate the percentage*" of these expenses and "*The tribunal has previously evaluated it at 15% (para. 322). The tribunal deems that this percentage represents also a reasonable evaluation of the compensation to which the [X.] is entitled for having been denied the opportunity to give its opinion on the conditions according to which the works were done and to get a lower price.*" (paragraph 591)

103. Thus, based on the foregoing, the tribunal merely proceeded with the evaluation of losses after having found a difference between the parties on this point, such that based on the same grounds set forth above, the adversarial principle was by no means violated.

The quantification of the losses relating to the installation of a system

104. X. maintains in substance that the arbitration tribunal unilaterally and arbitrarily proceeded with the evaluation of these losses without the parties having an opportunity to discuss it.

105. Based on the award, ruling on the claim of Y. relating to the installation of a Wimax wireless broadband communication system at the plant, the arbitration tribunal considered that was entitled to damages and interest "*as a matter of principle by virtue of article 256 of the* ." in connection with the contractual liability of X. (paragraph 623)

106. The arbitration tribunal however considered that Y. should have informed its contracting partner of the situation and asked it for its approval "*rather than wait for the system to be under construction (or even completed) to make a claim*" all the while considering that this conclusion did not deprive Y. of any right to reparation but that it can "*only have an impact on the amount of the reparation to which Y. is entitled.*" (paragraph 628)

107. The tribunal then ruled that "*even if the [X.] was not able to show that a solution other than the system was available, there is a doubt about the legitimate cost of the one that was supplied, given that the [X.] was denied, due to the actions of Y. , the opportunity to negotiate the prices of the installation of the permanent system. As for the claim concerning the road, the rejection of general expenses and profits on the amounts spent by Y. is also a means of compensation the [X.] in connection with this loss of an opportunity. For these reasons, the Tribunal will award Y. only the amount set above in paragraph 632.*" (paragraph 637)

108. Based on these grounds, notwithstanding reference to the loss of opportunity by the arbitration tribunal, based on these grounds, the tribunal did not, by this mere reference—the source of ambiguity—raised sue sponte a new defense insofar as it had indeed previously determined the conditions of the evaluation of the losses of Y. , indicating in the aforesaid paragraph 637 that it intended to take into account the actions of Y. to evaluate its losses such that it is indeed the contribution of Y. to its own losses that led the tribunal to determine its losses and not the claim based on a loss of opportunity of the X.

109. In light of the foregoing, this claim will consequently be denied.

The claim for reimbursement of the costs of a technical proposal concerning a waste processing facility made by Y. ;

110. X. maintains that this claim was granted on the basis of elements not pleaded or discussed by the parties.

111. Based on the award, on this point the tribunal, given the difference of positions of the parties on this head of damage, after performing an analysis of the evidence produced and the factual circumstances of the dispute in paragraphs 681 to 690, concluded that "*as [X.] maintained, Y. is in part responsible for the rejection of its proposal. However, the behavior of Y. constitutes only a contributing cause of its losses, competing with the behavior of [X.], as described above in paragraph 688. The tribunal concluded that the parties are liable for the losses sustained by Y. such that the cost of reparation of the technical plans of the waste processing facility must be borne in equal shares between them.*"

112. Likewise, proceeding with the evaluation of the losses of Y. on this account, the tribunal took into "*account the lack of proof showing that these expenses all related to this*

particular claim" and, in so doing, applied "*a 25% reduction*" to the amount claimed, plus a 15% reduction in the rate used for general expenses. (paragraph 637)

113. Thus, based on the foregoing, the tribunal, as it had been asked in particular by X. which maintained that Y. was partly responsible for the situation, interpreted the contractual provisions between the parties to determine the liability of each of them, then proceeded to evaluate losses based on the role of each of the parties, such that based on the same grounds set forth above, the adversarial principle was by no means violated.

114. In light of the foregoing, this claim will on this point be denied.

The quantification of claim # 8 concerning the electricity costs generated using the diesel generated between April 15, 2009 and May 30, 2011

115. X. maintains that this claim was evaluated based on a methodology that was not discussed by the parties.

116. Based on the award, Y. made several claims concerning the costs the supply electricity to the plant, the consequences of the late supply of an electrical connection, the late completion of a substation and the inability of the plan to expert electricity.

117. After having dismissed some of them, the tribunal considered that Y. was "*entitled to the reimbursement of the additional costs that it can demonstrate that it incurred for the supply of electricity using diesel generators in addition to the cost of the electricity from the external distribution network operated by I* (paragraph 493)

118. To quantify the losses of Y. , the tribunal explained in paragraph 530 of the award that the "*difference between the cost to produce electricity using diesel and the cost that would have been incurred of the electricity from the distribution network would have been available requires a comparison between, on the one hand, the cost to rent generators to produce electricity during the period considered and the cost of the fuel consumed and, on the other hand, the cost of the electricity over the period considered if the electricity from the distribution network had been available.*"

119. In paragraph 534 of the award, the arbitration tribunal indicates that it is up to it to identify "*the difference between the cost incurred by Y. in connection with the execution of the works during the period after the date on which a permanent supply of electricity should have been available and the cost that Y. would have incurred by importing electricity from the distribution network during this period.*"

120. The arbitration tribunal thus inferred that "*the calculation of the amount will therefore involve taking the average value of the generator rental and fuel costs... and reducing this value by 20%, its initial rate, to account for unrecoverable costs and other factors mentioned in paragraph 532 above. From the result obtained, a monthly amount of the cost of the electricity resulting from the cost actually incurred in connection with the operation of the plan during the period during which a permanent supply was available will then be deduced.*" (paragraph 534)

121. Based on the foregoing, the tribunal proceeded with the evaluation of the losses based on the evidence produced in court, such that based on the same grounds set forth above, the adversarial principle was by no means violated.

122. Based on all the foregoing, the claim based on a violation of the adversarial principle must be dismissed.

Expenses and Court Costs:

123 X. , the mostly defeated party, should be ordered to pay court costs.

124. Furthermore, X. must be ordered to pay Y. , which was forced to incur out-of-pocket expenses in order to vindicate its rights, compensation by virtue of article 700 of France's Civil Procedure Rules, that it is fair to set, given the terms of this decision, at 200,000 Euros.

ON THESE GROUNDS:

The Court,

1. Partly annuls the arbitration award handed down on January 31, 2019 under the aegis of the International Court of Arbitration of the International Chamber of Commerce in Case No. that it ordered X. to pay Y. s the amount of 2,591,892.98 (paragraph 898.2 (h)).

2. Dismiss the rest of the action for annulment.

3. Order the X. to pay Y. the amount of 200,000 Euros by virtue of article 700 of France's Civil Procedure Rules.

4. Order t X. to pay court costs.

The Clerk ***The Presiding Judge***

K. Abelkalon ***F. Ancel***

I, Granville Wesley Fields,
sworn translator,
French/English, certify that
the preceding is an exact
translation of the original
and of the attached copy
in French

This document is assigned
the number 2020-2874

Signed and stamped *ne varietur* in
Paris, France
on December 31, 2020