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PARIS COURT OF APPEAL

Division 5 – Chamber 16
International commercial chamber

DECISION DATED OCTOBER 20, 2020
(no. /2020, 12 pages)
REMEDY FOR THE ANNULMENT OF THE ARBITRAL AWARD

Registration no. on the general roll: **RG no. 19/05231 – Portalis no. 35L7-V-B7D-B7POM**

Decision deferred before the Court: arbitral award rendered on in Paris under the aegis of the international court of arbitration. by the arbitral tribunal comprised of Mr. , President (arbitration no.).

CLAIMANT:

SOCIETE NATIONALE D'ELECTRICITE DU SENEGAL (SENELEC)
A public limited company
With its registered office located at: 29, rue Vincent – BP93 – Dakar (SENEGAL)
Represented by its legal representatives

Represented by Me. of attorney at the PARIS Bar, court registration:
Represented for the submissions by Me
attorney at the PARIS Bar, court registration:

DEFENDANT:

INTERNATIONAL TRADING OIL AND COMMODITIES CORPORATION (ITOC)
A public limited company,
With its registered office: 2 place de l'indépendance-Immeuble SDIH -9th floor-BP 500 Dakar (SENEGAL)
Represented by its legal representatives

Representd by Me and Me of the
attorney at the PARIS Bar, court registration:

COMPOSITION OF THE COURT:

The matter was heard on September 14, 2020, in open court, before the Court, comprised of:
Mr. François ANCEL, President
Mrs. Fabienne SCHALLER, Judge
Mrs. Laure ALDEBERT, Judge

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who deliberated and a report was presented at the hearing by Mr. François ANCEL under the conditions provided by Article 804 of the French Code of Civil Procedure.

Court clerk, during the proceedings: Mrs. Clémentine GLEMET

DECISION:

- IN ADVERSARIAL PROCEEDINGS
- upon availability of the decision to the court registry, with the parties having been previously informed under the conditions provided in the second paragraph of Article 450 of the French Code of Civil Procedure
- signed by François ANCEL, President and Clémentine GLEMET, Court clerk, who received the minutes of the decision by the signatory judge.

1 – THE FACTS AND PROCEDURE

1-SENELEC is a public limited company governed under the laws of Senegal, the principal activity of which is the electrification of the urban areas of Senegal.

2-ITOC is a public limited company governed under the laws of Senegal, the principal activity of which is the trading of crude oil produced in Africa and the Middle East, petroleum products and cereal products.

3-On March 1, 2010, a fuel supply agreement, governed under the laws of Senegal, was entered into between SENELEC (purchaser) and ITOC (supplier). This agreement included an arbitration clause (Article 11.2).

4-Having suffered dysfunctions in its plants, which it attributes to the fuel purchased from ITOC, SENELEC referred the matter as an interlocutory claim before the upper regional court in Dakar, on August 6, 2010, which designated Mr. (A) for an expert appraisal, who rendered his report on December 29, 2014.

5-On November 30, 2017, ITOC initiated arbitration proceedings to have it held that it had duly performed the agreement.

6-SENELEC filed a counterclaim on January 11, 2018, for ITOC to be declared liable for the damages that it had suffered.

7-Having acknowledged a disagreement between the parties on the issue of the interview of witnesses and on the individual capacity for such status, the tribunal rendered a procedural order no.2 dated pursuant to which it was decided that Mr (B) could be heard during the hearing dated November 6, 2018 (for ITOC) and, at SENELEC's discretion, MM. (A)&(C) could also be interviewed according to "*symmetrical*" conditions.

8-The interviews were held on the 6th and 7th of November 2018.

9-In an arbitral award rendered on under the aegis of the international chamber of commerce, the arbitral tribunal, located in Paris, set forth as follows:

-Held that, for both the loading and unloading stages and for the compliance of the goods delivered according to the contractual specifications, ITOC had fulfilled its obligations,

-Dismissed SENELEC's counterclaim for the acknowledgment of a hidden defect,

-Accordingly, dismissed the claims for compensation of its prejudices filed by SENELEC,

-Held that SENELEC shall assume 2/3 of the arbitration expenses set by the Court, i.e., 433,332 USD and ordered it to pay ITOC the amount of 108,332 USD,

-Dismissed the claims by each of the parties for the other party to assume it costs of defence.

10. On March 6, 2019, SENELEC filed a remedy for annulment before the Paris Court of Appeal against the procedural order no. 2 dated rendered by the President of the Arbitral Tribunal and the arbitral award dated

11. The close of the proceedings was pronounced on September 8, 2020.

II- THE PARTIES' PLEAS

12. According to its latest submissions notified electronically, on April 15, 2020, SENELEC requested of the court as follows:

-to declare it admissible and founded;

-to hold and judge that the arbitral tribunal had not complied with its mission resulting in the invalidity of the order dated and the arbitral award dated by virtue of Article 1520 3° of the French Code of Civil Procedure, by interviewing Mr. (B) and (D) as witnesses despite the rules stipulated in the mission statement; by ignoring the claims which had been filed by ITOC and on which it should decide in accordance with its mission; by deciding on an equitable basis and not in law, despite the applicable arbitration clause;

-to hold and judge that the arbitral tribunal had failed to comply with the adversarial principle and the international public policy rules during Mr. (B) and Mr (D) 's interviews, resulting in the invalidity of the arbitral award dated and the order dated by virtue of Article 1520 4 and 5° of the French Code of Civil Procedure;

-it being recalled that each of these grounds constitutes, *per se*, a ground of invalidity of the arbitral award dated

-accordingly, and insofar as one of the aforementioned grounds is retained, annul both the final arbitral award dated and the procedural order no. 2 dated

IN ANY EVENT,

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-hold ITOC's claims inadmissible, and at least ill-founded, and dismiss the latter's claims;

-dismiss all of ITOC's claims, pleas and submissions;

-order ITOC to pay SENELEC the amount of 35,000 euros, in accordance with Article 700 of the French Code of Civil Procedure and all the costs.

13. **According to its latest submissions notified electronically on July 30, 2020, ITOC requested of the court, in particular under Article 1520 of the French Code of Civil Procedure, as follows:**

1.Concerning the witnesses' interviews:

-DECLARE inadmissible the invalidity claim of the arbitral award formulated by SENELEC and based on the witnesses' interviews and, in particular, the procedural order no. 2;

-If, in the unlikely event, the Court did not declare the invalidity claim inadmissible, concerning the validity of the witness interviews;

-DECLARE unfounded SENELEC's claims to obtain the cancellation of an arbitral award;

In any event, concerning the respect of the adversarial principle by the arbitral tribunal and the international public policy rules during the arbitration:

-HOLD and JUDGE that the arbitral tribunal had not failed to comply with the adversarial principle and the international public policy rules during the arbitration;

-DECLARE ill-founded SENELEC's claims to obtain the cancellation of the arbitral award;

2. Concerning the mission accomplished by the arbitral tribunal

-DECLARE inadmissible the invalidity claim of the arbitral award based on an alleged omission to rule;

If, in the unlikely event, the Court did not declare the invalidity claim inadmissible, concerning the absolute compliance of the arbitral award to the claims filed by ITOC;

-DECLARE ill-founded SENELEC's claims to obtain the annulment of the arbitral award;

If, in the unlikely event, the Court did not declare the invalidity claim inadmissible, concerning the absence of reversal of the burden of evidence;

-HOLD and JUDGE that SENELEC had the burden of evidence for the formulation of its counterclaims;

Accordingly,

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-DECLARE ill-founded SENELEC's claims to obtain the annulment of the arbitral award;

3. Concerning the absence of *amiable compositeur* (under equity)

-HOLD and JUDGE that the arbitral tribunal decided in law in accordance with the laws of Senegal, in particular Article 99 of the Senegal Code of Civil and Commercial Obligations;

-ACKNOWLEDGE the absence of probative elements communicated to the court in support of the statements made by SENELEC and allegedly attributed to the President of the arbitral tribunal;

Accordingly,

-DECLARE inadmissible the statements made by SENELEC;

-DELCARE ill-founded the claims made by SENELEC to obtain the annulment of the arbitral award.

4. Concerning the expenses

-ORDER SENELEC to pay ITOC the amount of 34,800 euros in accordance with Article 700 of the Code of Civil Procedure and all the costs.

III-THE PARTIES' GROUNDS

14. SENELEC asserted that the procedure followed for interviewing the witnesses is a ground for the invalidity of the arbitral award on the ground that, on the one hand, the arbitral tribunal had reached its decision without complying with its mission (Article 1520 3° of the French Code of Civil Procedure), and, on the other hand, that the arbitrators had breached the adversarial principle and the international public policy rules (Article 1520 4° of the French Code of Civil Procedure).

15. Firstly, it asserted the annulment of the procedural order no.2 and recalled the admissibility of this remedy on the ground that it is based on the respect of the adversarial principle.

16. It added that ITOC may not assert that it had waived raising these claims whereas the waiver is only valid if it results from an unequivocal expression of intent and that the exhibits produced establish that it objected to the interview of the witnesses, Mr. (B) and Mr. (D) which results from both the order no. 2, the email sent by its counsels on October 30, 2018 and the arbitral award. It added that the adversarial principle and the principle of equality of arms are protected by the European convention on human rights and are governed by international public policy, and, accordingly, they may not be subject to waiver or be objected to by a party before the judge deciding on the annulment.

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17. Concerning the merits, SENELEC considered that the arbitral tribunal had restricted its mission by rendered an order no. 2 that directly contradicts the terms of its mission and, furthermore, by accepting Mr. (B) and (D) 's interviews for ITOC and by so applying, the status of witness, whereas the procedure provided under the terms of the mission had not been respected.

18. SENELEC added that the tribunal had failed to comply with the adversarial principle and that of the equality of arms insofar as it had accepted to interview Mr. (B) as witness without the latter firstly filing any written certificate, and on October 25, 2018, at 15 days from the hearing, and Mr. (D) 's interview, also without any written certificate and without this being provided for in the Order no. 2, and, accordingly, given these circumstances, SENELEC was deprived of the possibility of duly preparing its questions to ITOC's "*witnesses*", as the latter had not filed any written certificate. It added that in the absence of any time period, SENELEC was deprived of the possibility of identifying witnesses which could contradict Mr. (B) and Mr. (D) 's statements and request their interview.

19. SENELEC also considered that the tribunal had not decided on ITOC's claim relating to the acknowledgment of a due and loyal performance of the agreement, but had decided on the fact that the latter had fulfilled its obligations "*for both the loading and unloading or the compliance of the goods with the contractual specifications*". It considered that, by doing so, the tribunal had not respect the terms of its mission, by deciding on the issue of the loading, unloading and the compliance of the goods delivered. It considered that by ignoring ITOC's claim, the tribunal had exempt the latter from providing evidence of the quality of the products sold.

20. It specified that if the tribunal had respected its mission and had decided on SENELEC's claim, it could not rule that the latter had been inactive and that, by not responding to ITOC's claim and, accordingly, by not performing its entrusted mission, the tribunal had exempt ITOC from having to provide the evidence of the quality of the products delivered to SENELEC and the existence or not of any hidden defect.

21. Finally, SENELEC added that whilst the arbitration clause provided in Article 11.1 of the Agreement provided that the arbitrators must decide in law, it is evident upon reading the arbitral award that the tribunal did not decide in law, but reached its decision upon equity, insofar as it was not vested with such an *amiable compositeur* mission. It considered that this was the case whereas the tribunal acknowledged that the agreement was not respected given the facts, but paradoxically, it ruled that ITOC had respected its obligations with regard to the loading and unloading.

22. In response, ITOC asserted that the claim for annulment of an arbitral award must, evidently, relate to the annulment of an arbitral award and not on procedural order, and accordingly, in this case, this claim is not admissible. The claim formulated by SENELEC relates to the annulment of the procedural order no. 2 for the interviewing of witnesses, which does not by any means settle the dispute.

23. It added that as rightly recalled in the arbitral award, SENELEC did not raise this ground during its various submissions and, in particular, it submissions dated September 7, 2018 or

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during the pleadings during which it even acknowledged not to have any grievances relating to this procedure, and, accordingly, it is no longer admissible to make any such assertions in this regard.
24. It asserted that the arbitral tribunal did not fail to comply with its mission, and that it complied in all aspects with the stipulations mentioned in the mission statement, as it acknowledged that the formalities relating to the interviewing of witnesses had not been respected, that the tribunal had organized the witnesses' interviews by specifying the capacity of each of these persons (witnesses, parties or experts), and specified that the parties had waived asserting any remedy for an alleged non-respect of the formality relating to these interviews, in accordance with Article 40 of the ICC Regulation 2017.

25. It added that SENELEC may not assert that as a result of the interviews of the ITOC witnesses, the adversarial principle and international public policy was not respected for its witnesses. insofar as the latter benefited from the same conditions for its witnesses (Mr. (A) and Mr. (C) 's interviews, without a prior written certificate), and that it does not provide the evidence of a grievance, it being specified that supposing that the formality required for the witness interviews had not been respected, the argument, pursuant to which SENELEC was not able to prepare its cross-examinations is misleading, insofar as Mr. (B) and Mr. (D) 's interviews were asserted as from July 6, 2018, i.e., more than four months before the witness interviews, and were enforced by the procedural order no. 2 dated i.e., more than fifteen days prior to the witness interviews. It mentioned that ITOC had also accepted these rules as it benefited from the same preparation time concerning Mr. (A) and Mr. (C) 's interviews and as already mentioned, waived asserting any grievance for the witness interview procedure.

26. It asserted that the claim for the annulment of the arbitral award formulated by SENELEC on the grounds that the arbitral tribunal had allegedly not respected its mission by retaining that "*both during the loading and unloading stage or for the compliance of the goods delivered with the contractual specifications, the Claimant ITOC had fulfilled its obligations*", whereas ITOC requested in its written submissions that the arbitral tribunal may "*acknowledge that the Claimant had duly and loyally enforced the agreement*" is inadmissible, as, by doing so, SENELEC considered that the arbitral tribunal had failed to decide on all the claims and whereas the omission by the arbitrator to rule on a head of claim may be compensated by the arbitrator and does not constitute a case for opening a remedy for annulment and that the remedy for annulment may not be initiated against an arbitral award having ruled *infra petita*,
with the cases for opening this remedy to be interpreted restrictively, all the more so as the impossibility for the arbitral tribunal to sit again to complete the arbitral award, as the case maybe, is not evidenced.

27. It added that the arbitral tribunal had not reversed the burden of proof by having SENELEC assume the obligation of proving the existence of a hidden defect. It specified to have duly provided the evidence for the proper performance of the agreement and recalled that the claims formulated for the hidden defects constitute counterclaims by SENELEC, and, accordingly it is for the latter to provide the evidence in support of its subsequent claims.

28. ITOC also asserted that SENELEC may not assert that the arbitral tribunal would have ruled as an *amiable compositeur* by basing its argument on the fact that the arbitral tribunal

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had acknowledged that certain formalities under the agreement had allegedly not been respected. It considered that the arbitral tribunal had duly complied with its mission by deciding in law and not as an *amiable compositeur*, insofar as it had applied the principle under Article 99 of the Senegalese Code of Civil and Commercial Obligations, according to which besides the wording of the agreement, the judge must seek the parties' common intent to qualify the agreement and define the effects, and by retaining that the parties tacitly agreed and approved the terms applied, and ruling, in law, and without disagreement, that ITOC's obligations, such as mutually agreed between the parties, had duly been respected.

IV-THE GROUNDS OF THE DECISION

Concerning the inadmissibility of the annulment remedy initiated against the procedural order no.2

29. Having acknowledged that the parties had differing opinions with regard to the interviewing of persons other than the parties' counsels, in the procedural order no.2 rendered on , relating to the "*Settlement of the issue relating to 'witnesses'*", the arbitral tribunal decided that Mr. (B) could be heard during the hearing, along with Mr. (A) and/or (C) , according to symmetric conditions and organized according to the conditions for holding these interviews.

30. It must be considered that this decision, pursuant to which the arbitrators pronounce on the interviews likely to be organized does not by any means settle all or part of the dispute on the merits in this case, the competence or a procedural plea ending the proceedings.

31. Accordingly, this "*procedural order*" does not constitute an arbitral award but only an administrative arbitration measure without any possibility of remedy.

32. Whilst, under French law, the existence of an *ultra vires* action is likely to render admissible an invalidity action against a court administration measure, the grievance formulated against the disputed measure must enable such an *ultra vires* action to be characterized.

33. In this case, SENELEC asserts that this remedy is admissible due to the violation of the adversarial principle.

34. Nonetheless, the mere violation of the adversarial principle does not constitute any non-compliance by the arbitrator of the extent of his powers, and, accordingly, it shall not constitute the basis for an *ultra vires* action.

35. It shall be considered that the remedy for annulment, insofar as it is managed solely against the procedural order no. 2, is inadmissible.

Concerning the remedy for annulment against the arbitral award dated , based on the ground relating to the non-respect of the adversarial principle or the equality of arms.

Concerning the respect of the adversarial principle:

36. In substance, SENELEC contested that the arbitral tribunal had not complied with the adversarial principle and the equality of arms, having accepted Mr. (B) 's interview as witness, without the latter having previously filed any written certification, and the court pleadings on , at 15 days from the hearing and that of Mr. (D) , also without any written certification and without this having been provided in the procedural order no. 2.

37. Nonetheless, the adversarial principle only requires that the parties were able to assert their claims in fact and in law and discuss those of the opposing party, and, accordingly, nothing that could have based the arbitrators' decision would have been exempt from the adversarial discussions. Accordingly, it implies that the parties had debated the grounds asserted and the exhibits produced pursuant to the adversarial principle.

38. In this case, it is well-established that SENELEC was represented during the pleadings before the arbitral tribunal and that it had been able to assist at Mr. (B) and Mr. (D) 's interviews, and ask all its questions during the cross-examinations. Accordingly, the arbitral tribunal had mobilized the parties, who were aware of their respective pleas, to be debated in adversarial principles and, by doing so, the adversarial principle had been respected.

39. Accordingly, this grievance shall be dismissed, notwithstanding the absence of any communication of a prior written declaration.

Concerning the respect of the equitable process and more specifically, the equality of arms:

40. The equality of arms implies the obligation to offer each party a reasonable opportunity to present its cause – including evidence – under conditions that does not place it in a situation that is substantially disadvantageous compared to that of the opposing party.

41. SENELEC asserted in this regard that given the circumstances that led the tribunal to authorize Mr. (B) and Mr. (D) 's interviews, it had allegedly been deprived of the possibility of duly preparing its questions to ITOC's "*witnesses*" as the latter had not filed a written certificate and that in the absence of any time period, it was deprived of the possibility of identifying the witnesses that could contradict Mr. (B) and Mr. (D) 's statements.

42. Nonetheless, it is well-established that Mr. (B) 's interview request, which should relate to the "*terms of performance of the agreement*" was made in the submissions produced by ITOC dated July 6, 2018, as acknowledged by the arbitral tribunal in its procedural order no. 2, and, accordingly, SENELEC may not assert not to have had due preparation time, even although the arbitral tribunal's decision on the principle of this interview, and that of Mr.(D) , was taken on , pursuant to this procedural order no.2.

43. In this regard, contrary to SENELEC's assertions, Mr. (D) 's interview had been accepted as from this date whereas in its order the arbitral tribunal, after having considered that the parties "*have an absolute right to assist at the hearing*" and that, with regard to the legal entities "*each of them may decide to delegate the employee or corporate officer at its own*

discretion", having specified in this order that "*both Mr.* (B) *and other persons working for ITOK (Mr.* (D) *)..."* could be "*these delegates*".

44. Furthermore, whilst the arbitral tribunal decided that Mr. (B) could be heard during the hearing dated November 6, 2018, it also added that if SENELEC wished, (A) and (C) could also be heard "*symmetrically*", according to the conditions, thereby establishing that an equality of treatment had been observed between the parties who had been able to benefit from the same period to prepare the persons' interrogatories, whose interviews had been authorized by order dated , for a hearing scheduled on November 6, 2018.

45. It results from these elements that SENELEC was not placed in a substantively inconvenient situation compared to its opposing party, and, accordingly, the violation of Articles 1520 4° and 5° of the French Code of Civil Procedure is not established and that the alleged grievance shall, accordingly, be dismissed.

Concerning the ground relating to the arbitral tribunal's non-respect of its mission:

Concerning the non-respect of the mission due to Mr. (B) *and Mr.* (D) *'s interviews:*

46. In accordance with Article 1520 3° of the French Code of Civil Procedure, the remedy for annulment is admissible if the arbitral tribunal decided in non-compliance with its mission.

47. It may be considered that the arbitral tribunal is not in compliance with its mission, if it fails to respect the procedural rules settled by the parties.

48. Nonetheless, this discrepancy concerning a procedural rule shall only result in the annulment of the arbitral award, if the procedural inconsistency had previously been raised before the arbitral tribunal and if it is established that it caused a grievance to a party or that it had an impact on the outcome of a dispute.

Concerning the admissibility of this grievance:

49. In this case, it is well-established that the arbitral tribunal proceeded with Mr (B) and Mr. (D) 's interviews for ITOC and Mr. (A) and Mr. (C) for SENELEC, without a prior presentation of a written declaration required, in accordance with Article XII (Communications and submissions) of the mission statement.

50. Nonetheless, it is noteworthy to mention that in accordance with the procedural order no.2 mentioned above, relating expressly to the "*regulation of the "witness" issue*", the arbitral tribunal specifically acknowledged that the parties had differing opinions with regard to the interview of persons other than the parties' counsels and that it was "*evidently aware, like the Parties, of both the content of the stipulation of the mission statement and the fact that neither Party had respected the latter"*, querying whether "*the provision of the mission statement prohibited it from interviewing any relevant party*".

51. Based expressly upon Article 26 (4) of the ICC Regulation, pursuant to which "*The parties attend in person or through their duly empowered representatives"* but also

considering that the parties had an absolute right to assist at the hearing, and that in addition to the counsels representing the parties, the latter could, being legal entities, each delegate the employee or corporate representative of its choosing, the arbitral tribunal decided that "*both Mr.* (B) *and other persons working for ITOC (Mr.* (D) *), SENELEC's legal director or other SENELEC employees may be these delegates*".

52. In order to prevent the procedural impediment provided by the mission statement, which provides that the witnesses must produce a statement, the tribunal considered that "*the request for Mr.* (B) *'s attendance was made in ITOC's submissions dated July 6, 2018 and that the Defendant had not reacted in its Submissions dated the following 7th September. Symetrically, when the Defendant SENELEC requested Mr.* (A) *and Mr.* (C) *'s attendance, ITOC did not raise any objection in its latest Submissions dated October 4, 2018*". Accordingly, in accordance with Article 40 of the ICC Regulations, both parties had deviated from the provisions of the mission statement and, accordingly, they had evidently waived raising any objections in the due time periods.

53. Furthermore, in any event, Article 25.3 of the ICC Regulation sets forth that "*the arbitral tribunal may decide to listen to witnesses, experts designated by the parties, or any other person, in the presence of the parties, or in their absence, upon condition that the latter had been duly convened*". Accordingly, as expressly mentioned by the arbitral tribunal in its order, the latter could order "*in the context of its procedural management powers*", the presence of any relevant party.

54. Finally, if, after this order on October 30, 2018, SENELEC "*reiterated its opposition to Mr.* (B) *'s hearing as a witness (...),* it results from the final arbitral award and, in particular, its paragraph 25, that "*during the hearing dated November 7, 2018, the tribunal interrogated the parties to establish whether they had reserves to formulate on the procedural progression to date. The parties mentioned that they did not have any reserves, with the defendant [SENELEC] specifying that the comments made during certain stages of the procedure were not relevant*", on the basis of the transcript dated November 7, 2018 (pages 212 and 213).

55. By doing so, the parties, and, in particular, SENELEC considered, after the occurrence of the disputed interviews in their presence and in which they were able to actively participate and in adversarial proceedings, that the reserves that they had previously issued were no longer relevant.

56. Given all of these elements, albeit initially objecting to the holding of these interviews, SENELEC, which finally participated in such interviews and which declared to the arbitral tribunal that it no longer had any reserves to assert on this issue, is no longer admissible, in the context of a remedy for annulment, to assert the arbitrators' non-compliance of their mission due to the failure to file any previous written declarations.

57. This grievance shall be dismissed.

Concerning the arbitral tribunal's non-respect of its mission due to the failure to pursue the claims formulated by ITOC

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58. SENELEC asserted that the tribunal had failed to comply with its mission as it had not exactly ruled on the claim by ITOC to acknowledge that it had duly and lawfully performed the agreement, which implies, according to SENELEC that ITOC should "*provide evidence that the products sold respected the expected quality*".

59. Nonetheless, to hold that ITOC had duly "*performed its contractual obligations*" the tribunal considered that it shall define "*firstly the content of each of the obligations*", then verify "*whether, and to what extent, the latter were performed*".

60. It raised three different questions as follows (a) the respect of the stipulations relating to the loading, (b) the respect of those stipulated for the unloading and (c) the compliance (quality) of the fuel delivered and by doing so, had not distorted ITOC's principal claim, as asserted by SENELEC.

61. Furthermore, it shall be established that after having decided on the "*principal claim: the question of the performance of the agreement*" in paragraphs 28 to 102 of the arbitral award, the arbitral tribunal responded to SENELEC's counterclaim, by specifying in it paragraph 125 that the latter "*bases its argument on the existence of a guarantee of latent defects in addition to the contractual compliance guarantee*", and, accordingly, it had evidently distinguished this claim without confusing it with the principle claim to assert that the agreement had been duly performed by ITOC.

62. Moreover, the appreciation according to which "*the question of loading, unloading and fuel compliance with the specifications required shall not ipso facto result in the proper performance of the agreement*" and its consequences on any reversal of the burden of proof, shall not relate to any issue concerning the arbitrator's respect of his mission but on the merit of the arbitral award, which may not be assessed by the court during a remedy for annulment, it being observed that it results from paragraphs 146 *et seq.* of its arbitral award that the tribunal had attempted to establish if evidence had been provided concerning the latent defects and after having considered that SENELEC had not provided the evidence, dismissed its counterclaim.

63. It results from these observations that the arbitral tribunal had fulfilled its mission, as identified by the purpose of the dispute, defined by the parties' pleas.

64. Accordingly, this grievance shall be dismissed.

Concerning the ground based on the non-respect of its mission by the arbitral tribunal insofar as the latter had ruled as an amiable compositeur.

65. It shall be acknowledged that under the pretext of this ground, SENELEC contests, as results, incidentally, from its own submissions that the arbitral tribunal had made an "*evident argumentation error*", as "*throughout the arbitral award*" it had acknowledged that "*the Agreement had not been performed, in particular, with regard to the loading and unloading, to finally deduce that ITOC "in both the loading and unloading stages (...), had fulfilled its obligations"* and that, by doing so, it had ruled in equity "*as, in law, its analysis should evidently have caused it to decide on the contrary*".

66. Nonetheless, an argumentation error, if characterized, shall not suffice to characterize the fact that the arbitral tribunal had ruled as an *amiable compositeur* in the absence of any other mention in the arbitral award enabling in this case for it to be characterized that the decision had been rendered in equity.

67. In this regard, the fact that the President of the arbitral tribunal had recalled to the parties at the end of the hearing that the latter could still envisage a settlement and that the arbitrators "*shall assist the parties if they intend to reach (...) a settlement*", shall not result in it being considered that the arbitral award finally rendered was ruled as an *amiable compositeur*, whereas it is by no means justified that such a request was made to the arbitrators following this observation.

68. It results from all these elements that the argument based on the arbitral tribunal's failure to respect its mission shall be dismissed.

Concerning the expenses and costs;

69. SENELEC, the unsuccessful party, shall be ordered to pay the costs.

70. Furthermore, SENELEC shall be ordered to pay ITOC an indemnity, which incurred unrecoverable expenses to assert its rights, under Article 700 of the French Code of Civil Procedure, for which it is equitable to fix at the amount of 34,800 euros.

V-ON THESE GROUNDS

The court,

1-Declared the remedy for annulment inadmissible filed against the procedural order no. 2 dated ;

2-Declared inadmissible the ground based on the arbitral tribunal's non-respect of its mission due to Mr. (B) and Mr. (D) 's interviews;

3-Dismiss the remedy for annulment against the arbitral award dated (no.) rendered under the aegis of the International Chamber of Commerce;

4- Order SENELEC to pay ITOC the amount of 34,800 euros under Article 700 of the French Code of Civil Procedure;

5-Order SENELEC to pay the costs.

The court clerk
C. GLEMET

The President
F. ANCEL

Expert traducteur près la Cour d'appel
Jane KOCHANSKI
Anglais
05/11/2020

Paris Court of Appeal
Section 5 – Chamber 16

Decision dated October 20, 2020
No. RG 19/05231 - Portalis no.
35L7-V-B7D-B7POM

Vu ne varietur
Traduction conforme à l'original en langue française
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