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PARIS COURT OF APPEAL

Division 5 – 16 International Commercial Chamber

JUDGMENT OF 23 MARCH 2021

Proceedings for setting aside an arbitral award
(No /2021, 17 pages)

General Directory Entry Number: **RG No 18/05756 – Portalis No 35L7-V- B7C-B5JUM**

Decision referred to the Court: Arbitral award rendered on in Paris, under the aegis of the International Court of Arbitration of the International Chamber of Commerce , under the number (...) , by the Arbitral Tribunal composed of the Judge A, President and Dr. B and Professor C., co-arbitrators

APPLICANT

STATE OF LIBYA

Having its offices at Courts Complex, Al Saydi Street, Third Floor, Tripoli (LYBIA)
Represented by the Director of the Department of Litigation Affairsof the Supreme Judicial Council, domiciled in this capacity at the said address.

Represented by and with an address for service at the office of ( ) lawyer , member of the Paris Bar - Having as pleading lawyer ( ), lawyer member of the Paris Bar ,

DEFENDANT

D.S. CONSTRUCTION FZCO
A Company governed by Emirati Law,
Having its head office at LOB 2, BG 02, Jebel Ali Free Zone, Dubaï (UNITED ARAB EMIRATES)
Reprsented by its legal representatives,

Represented by ( ) lawyer member of the Paris Bar- Having as pleading lawyer ( ), lmember of the Paris Bar,

COMPOSITION OF THE COURT

The case was heard on 26 January 2021, in open Court, before the Court composed of:

Mr. François ANCEL, President

Ms. Fabienne SCHALLER, Judge
Ms. Laure ALDEBERT, Judge

who ruled on the case. A report was presented at the hearing by Ms. Fabienne SCHALLER in accordance with Article 804 of the Code of Civil Procedure.

Clerk at the hearing: Ms. Clémentine GLEMET

JUDGMENT :

- ADVERSARIAL
- judgment made available at the Clerk's office of the Court, the parties having been notified in advance under the conditions provided for in the second paragraph of Article 450 of the Code of Civil Procedure.
- signed by François ANCEL, President and by Clémentine GLEMET, Clerk to whom the minute was delivered by the signatory judge.

I- STATEMENT OF FACTS AND PROCEEDINGS

1. DS Construction FZCO (hereinafter referred to as "DS Construction") is a company registered in the United Arab Emirates which has invested in Libya and which, following a dispute with the State of Libya, sent it on 25 May 2016 a notification of dispute, in accordance with the provisions of the Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference (hereinafter "the OIC Treaty"), signed on 5 June 1981 and entered into force on 23 September 1986, to which Libya is a party.

2. As the dispute could not find an amicable solution, DS Construction initiated on 19 October 2016 arbitration proceedings against the State of Libya, under the UNCITRAL Rules of 2010 and article 17 of the OIC Treaty, and appointed Mr. B as arbitrator.

3. Although having a period of sixty days to appoint an arbitrator in application of Article 17 (2) (b) of the OIC Treaty, the State of Libya, considering that this article does not provide a standing offer of arbitration to ground jurisdiction of an arbitral tribunal, did not appoint an arbitrator within this period.

4. On 2 January 2017, DS Construction, referring to Article 17 (2) (b) of the OIC Treaty, requested the OIC Secretary General to proceed with the appointment of an arbitrator in lieu of the State of Libya.

5. The OIC Secretary General did not respond to the appointment request of DS Construction.

6. On 26 January 2017, t DS Construction informed the OIC Secretary General that, in the absence of appointment of the second arbitrator before 3 February 2017, it "would have no other choice" than to bring the matter before the Secretary General of the Permanent Court of Arbitration (PCA) to appoint an arbitrator on behalf of the State of Libya, in application of Article 6 (4) of the UNCITRAL Arbitration Rules of 2010 and also argued that the parties had "agreed" on the application of these Rules to the dispute.

7. On 8 February 2017, DS Construction brought the matter before the Secretary General of the

Permanent Court of Arbitration for the designation of an appointing authority to proceed to the appointment of an arbitrator on behalf of the State of Libya, under the provisions of the UNCITRAL Arbitration Rules of 2010.

8. On 17 February 2017, the State of Libya objected to the Request of DS Construction, indicating to the PCA that it had neither the power nor the legitimacy to proceed with the designation of an appointing authority or to act in any other capacity in these proceedings, since the State of Libya had never consented to the application of the UNCITRAL Rules in this case.

9. On 23 February 2017, DS Construction maintained that the PCA was competent to designate an appointing authority on the grounds in particular of the consent of the State of Libya to the UNCITRAL arbitration could be "imported" from article 11 of the Bilateral Treaty concluded between the State of Libya and Austria, under the Article 8 of the OIC Treaty, qualified by DS Construction as a most-favored-nation clause (hereinafter referred to as "MFN clause").

10. On 9 March 2017, the State of Libya challenged the existence of any consent to arbitration and in particular to UNCITRAL arbitration in the OIC Treaty, and asked the PCA to acknowledge that it had no power to intervene in this matter.

11. On 20 March 2017, the Secretary-General of the PCA asserted that the request for arbitration could be assessed pursuant to the UNCITRAL Arbitration Rules of 1976 and not to the UNCITRAL Arbitration Rules of 2010, what DS Construction accepted.

12. On 27 March 2017, the Secretary-General of the PCA designated Professor L as the appointing authority, pursuant to Article 7 (2) of the UNCITRAL Rules of 1976.

13. On 29 March 2017 and 12 April 2017, the State of Libya informed the PCA that it maintained its objections to the constitution of the Tribunal and its absence of consent to this appointment process.

14. Professor L appointed on 26 April 2017, Professor C as co-arbitrator for the State of Libya, pursuant to article 7 (2) (b) of the UNCITRAL Rules of 1976.

15. On 23 May 2017, Messrs; B and C appointed Mr. A as president of the Arbitral Tribunal.

16. On ( ), the Arbitral Tribunal sent to the Parties a draft procedural order No. 1 (Terms of reference) and invited them to submit their comments about it.

17. By letter of 20 June 2017, the State of Libya reminded the members of the Arbitral Tribunal that the Tribunal was constituted despite its objections and requested the Arbitral Tribunal to rule, as a preliminary point, on the question of the irregularity of its constitution under the UNCITRAL Rules of 1976.

18. On 13 July 2017, DS Construction accepted that the question of regularity of the constitution of the Arbitral Tribunal in application of the UNCITRAL Rules of 1976 be decided by it, as a preliminary point.

19. On 20 July 2017, the State of Libya submitted its comments on the draft procedural order

No. 1, and accepted the application of the UNCITRAL Rules to enable the arbitral tribunal to judge this preliminary issue, without prejudice of its objection to the constitution of the Tribunal and reiterated its absence of consent to the application of the UNCITRAL Rules.

20. On ( ), the Arbitral Tribunal issued a procedural order fixing in particular the seat of the arbitration in The Hague (Netherlands) and appointing the PCA as Clerk's office.

21. This order was amended by the procedural order of ( ) to set the seat of the arbitration in Paris, in agreement with the parties.

22. On ( ), the Arbitral Tribunal made a partial award on the preliminary question relating to the regularity of its constitution, under the terms of which it rejected the objection of the State of Libya concerning the irregularity of its constitution.

23. On 15 March 2018, the State of Libya brought an action seeking the setting aside of this award.

24. On ( ), the State of Libya requested the Arbitral Tribunal to suspend the arbitral proceedings pending the decision of the Court in these proceedings, which was refused by the Arbitral Tribunal on ( ).

25. The arbitration continues and hearings have been planned for the week of ( )

26. The closure of the pre-trial phase has been ordered on ( ).

II– CLAIMS OF THE PARTIES

27. **According to its submissions sent electronically on 17 August 2020, the State of Libya** requests the Court in particular under Articles 1520, 2 °, 4 ° and 5 ° of the Code of Civil Procedure, to:

- REJECT the bar to the proceedings raised by DS construction as inadmissible and ill-founded ;

- RULE that the Arbitral Tribunal was irregularly constituted;

- RULE that the principle of contradiction has not been complied with;

- SET ASIDE the challenged arbitral award rendered in Paris on by the Arbitral Tribunal composed of Messrs. B, C and A (President) in the case;

- DISMISS DS Construction FZCO of its claim that the State of Libya be ordered to pay 50,000 euros in damages for abusive proceedings;

- DISMISS DS Construction FZCO of all of its claims and submissions;

- ORDER DS Construction FZCO to pay the State of Libya the amount of 250,000 euros under the provisions of Article 700 of the Code of Civil Procedure;

- ORDER DS Construction FZCO to pay all the costs of the proceedings to be recovered by Counsel ( ), pursuant to the provisions of Article 699 of the Code of Civil Procedure.

28. **According to its submissions sent electronically on 2 December 2020, DS Construction** requests the Court in particular under articles 559, 700, 1520, 2 °, 4 ° and 5 ° of the Code of Civil Procedure and 1240 of the civil code, to:

- FIND inadmissible the applicant's first plea based on the irregularity in the constitution of the Arbitral Tribunal, and in the alternative,

- DISMISS the applicant's first plea based on the irregularity of the constitution of the Arbitral Tribunal;

- DISMISS the applicant's second plea based on the violation of the adversarial principle;

In the further alternative,

- Directly re-appoint the current members of the Arbitral Tribunal.

Therefore:

- DISMISS Libya from all of its demands and claims;

- UPHOLD the award undertaken

- ORDER Libya to pay the amount of 50,000 euros as damages under Articles 559 of the Code of Civil Procedure and 1240 of the Civil Code for abusive proceedings;

- ORDER Libya to pay the amount of 150,000 euros pursuant to the provisions of article 700 of the Code of Civil Procedure.

III- REASONS FOR THE DECISION

On the grounds for setting aside based on the irregularity of the constitution of the arbitral tribunal (article 1520, 2 ° of the Code of Civil Procedure.)

On the inadmissibility of the plea based on the irregularity of the constitution of the arbitral tribunal;

On the inadmissibility of the bar to the proceedings;

29. **DS Construction** raises the inadmissibility of the plea based on the irregularity of the constitution of the arbitral tribunal.

30. It claims that the State of Libya refused to exercise its right to participate in the constitution of an arbitral tribunal in application of Article 17 (2) of the OIC Treaty and its right to choose the procedural rules applicable to the arbitral proceedings, for the only purpose of avoiding its international obligation to submit the litigation to arbitration.

31. It maintains that the behavior of the State of Libya is characterized by bad faith and that it constitutes an abuse of rights since it deliberately obstructed the arbitral proceedings, and it emphasizes that this behavior is recurrent in the arbitrations in which it participates. It explains that it is well known that the OIC Secretary-General does not agree to appoint an arbitrator instead of an OIC Member State and that it is thus in full knowledge of the facts that the State of Libya refused to appoint an arbitrator, allowing it to block the constitution of the arbitral tribunal. It judges that the objection of the State of Libya as regards the existence of an offer of arbitration in the OIC Treaty does not justify the refusal to appoint an arbitrator since the constituted tribunal is intended to rule on this question, in application of the principle of competence-competence.

32. It considers that the behavior of the State of Libya is contrary to public international law and to the maxim that no one can take advantage in law from its own wrong (nemo ex propria turpitudine commodum capere potest), and that the State of Libya cannot rely on a breach of a condition emanating from it, knowing that in customary international law, an objection based on the breach coming from the subject appealing to it constitutes an abuse of rights resulting in inadmissibility.

33. It adds that by refusing to participate in the constitution of the Arbitral Tribunal, the State of Libya has failed in its obligation to execute the arbitration clause in good faith, so that for this reason as well, its plea for setting aside is also inadmissible .

34. It emphasizes that the Court of Cassation has already created an inadmissibility of a plea from an action seeking to set aside an awrd by application of the rule of estoppel, which stems - like the theory of abuse of rights - from the principle of good faith, so that a party is inadmissible to maintain, before the annulment judge, a ground incompatible with the argument developed before the arbitral tribunal being observed that in both cases, the rule of law aims to prevent that a party can rely on its own wrongdoing.

35. Finally, it states that in any event, the State of Libya has no interest to initiate an action on the ground that its right not to appoint an arbitrator was no longer available when DS Construction asked the OIC Secretary-General to appoint an arbitrator in its place, so that only the latter could if necessary have an interest in challenging the appointment of the arbitrator for Libya by the appointing authority designated by the Secretary-General of the PCA.

36. DS Construction judges, in response to the inadmissibility opposed to the State of Libya concerning its bar to the proceedings, that its plea of inadmissibility is based not only on the behavior of the State of Libya before and during the preliminary arbitration stage, but also in the present judicial proceedings, so that the ground of inadmissibility raised by the State of Libya, according to which it has refrained from raising this issue during the arbitral proceedings, is not relevant and does not take into account the renewal of the argument.

37. **In response, the State of Libya** maintains that the bar to the proceedings raised by DS Construction is itself inadmissible on the grounds that it had not been raised during the arbitration procedure. It states that DS Construction accepted for the the State of Libya to challenges the application of the UNCITRAL Rules of 1976 to the constitution of the arbitral tribunal and did not raise this bar to the proceedings during the arbitral proceedings.

38. The State of Libya asserts that in any event, it has not committed any abuse of law and that Article 17 (2) of the OIC Treaty does not provide any sanction in case of failure of a party in appointing an arbitrator, providing in this case the possibility of appointment of this arbitrator by the OIC Secretary-General.

39. It emphasizes that the blockage in the constitution of the Arbitral Tribunal results, not from its act but from the lack of appointment by the OIC Secretary-General and that facing the inaction of an institution, DS Construction could have seized a judge ("juge d'appui") to overcome this blockage, rather than asking the Secretary-General of the CPA.

40. It considers that it is admissible to challenge the irregular conditionsin which the arbitral tribunal was constituted, especially since these conditions contravene the will expressed by the Member States of the OIC Treaty which have not agreed to the application of the UNCITRAL rules nor to seizing the Secretary-General of the PCA in the event of inaction of the OIC Secretary-General.

41. For the sake of completeness, the State of Libya emphasizes that there is no unwritten rule of international law allowing to conclude that its plea is inadmissible due to an abuse of law. It maintains that DS Construction confuses abuse of process and abuse of rights, abuse of process can only result in damages and in the inadmissibility of claims deemed abusive.

42. It finally adds that the reference to the principle of estoppel is inoperative in the present case because it is irrelevant as the State of Libya never contradicted itself and contested from the beginning the regularity of the constitution of the arbitral tribunal.

Thereupon,

On the inadmissibility of the bar to the proceedings raised by DS Construction;

43. Under the terms of Article 1466 of the code of civil procedure, applicable in matters of international arbitration and in the present case, since the seat of the disputed arbitration was fixed in Paris, "The party who knowingly and without a legitimate reason refrains from invoking an irregularity in right time before the arbitral tribunal is deemed to have waived the right to invoke it".

44. In the present case, it is well-established that by letter of 8 February 2017, DS Construction requested the Secretary-General of the Permanent Court of Arbitration to designate, in application of the UNCITRAL Arbitration Rules of 2010, an appointing authority for the purpose of constituting an arbitral tribunal in the dispute between it and the State of Libya.

45. By letter of 17 February 2017, the State of Libya objected to this request, arguing that it had not consented to the application of the UNCITRAL Arbitration Rules in the letters exchanged with DS Construction, its silence could not amount to consent, and that the OIC Treaty does not contain any reference to the UNCITRAL Arbitration Rules such that the Permanent Court of Arbitration did not have neither the power nor the legitimacy to proceed with the designation of an appointing authority.

46. On 20 March 2017, the Secretary-General of the Permanent Court of Arbitration judged that the request of DS Construction could be considered, not under the 2010 UNCITRAL Regulation but under the 1976 UNCITRAL Regulation.

47. By letter of 20 June 2017, the State of Libya reminded the members of the Arbitral Tribunal that the Tribunal had been constituted despite its objections and requested the Arbitral Tribunal to rule, as a preliminary point, on the question of the irregularity of its constitution under the UNCITRAL Rules of 1976.

48. On 13 July 2017, DS Construction accepted that the question of regularity of the constitution of the Arbitral Tribunal in application of the UNCITRAL Rules of 1976 be decided by it, as a preliminary issue.

49. It should be noted that during the proceedings on this preliminary issue, DS Construction did not, at any time, raise a plea of inadmissibility based on abuse of right from the State of Libya or based on the lack of legal interest in bringing proceedings, having even adopted a reverse procedural attitude by expressly accepting that the arbitral tribunal rules on the regularity of its constitution pursuant the State of Libya's request.

50. Thus, DS Construction is no longer admissible to invoke before the annulment judge an abuse of right or a lack of legal interest in bringing proceedings, as the facts alleged in its support pre-existed these proceedings and that it was therefore its duty to raise this plea from the beginning of the arbitral proceedings, which it refrained from doing.

51. Consequently, it should be judged that the bar to the proceedings raised by DS construction, even if it is likely to ground an inadmissibility in public international law, is no longer admissible before the annulment judge.

On the substantive examination of the plea alleging irregularity in the constitution of the arbitral tribunal

52. The State of Libya states that the arbitral tribunal could not, in order to apply Article 7 of the UNCITRAL Arbitration Rules of 1976 as regards the conditions of its constitution, rely on Articles 8 and 17 of the OIC Treaty, as in doing so, it distorted the stipulations of the OIC Treaty and the consent of the defending State to arbitration, and violated the general principles of international arbitration.

53. It argues that Article 17 (2) (c) of the OIC Treaty does not contain any reference to the UNCITRAL Arbitration Rules of 1976, so that in the absence of agreement by the parties on its application, precondition to the constitution of the arbitral tribunal, the UNCITRAL Arbitration Rules could not be retroactively applied. It stresses that, in the absence of agreement between the parties, the power to determine the rules of the proceedings can only belong to a tribunal vested with this power by the parties and therefore regularly constituted.

54. It adds that Article 1 of the UNCITRAL Arbitration Rules of 1976 makes the application of the Rules conditional on the existence of a written agreement between the parties and that such agreement does not exist in the present case, so that the Arbitral tribunal wrongly relied on these provisions to declare itself validly constituted.

55. The State of Libya also argues that the UNCITRAL Arbitration Rules of 1976 could not be applied by reference to the law of the seat of the arbitration, as did the arbitral tribunal under Article 1509 of the Code of Civil Procedure, since at the time of the litigious appointment of

the arbitrator on its behalf on 26 April 2017, the parties had not yet chosen the seat of the arbitration, which has been set on 3 August 2017. It adds that in any event, the law of the seat does not allow an arbitral tribunal to replace the will of the parties and to set itself the rules relating to its own constitution.

56. It also challenges that Article 17 (2) of the OIC Treaty is a "pathological" clause, as maintained by DS Construction in support of the existence of a risk of denial of justice, emphasizing that the blockage in the arbitral tribunal constitution was not resulting from its personal actions but from the OIC Secretary-General. It argues that the arbitral tribunal distorted the terms of Article 17 (2) (b) of the OIC Treaty by adding the possibility to refer to the Secretary-General of the PCA, as the clause is clear and does not provide this possibility in the event that the OIC Secretary does not make the requested appointment.

57. It argues thatDS Construction has not demonstrated that the circumstances of the present case amount to a denial of arbitral justice, as it did not justify in particular that it was impossible for it to refer the issue to the Libyan judge (judge of the defending State in the arbitration) or to the United Arab Emirates judge (judge of the State of which the company is a national) or even to the Saudi judge (judge of the OIC General Secretariat) for them to appoint an arbitrator on behalf of the State of Libya. It judges that in any event, the existence of a denial of justice should have led the Arbitral Tribunal to find that it was irregularly constituted and to send DS Construction to refer to the French judge ("juge d'appui") for it to appoint an arbitrator on behalf of the State of Libya.

58. The State of Libya argues that the Arbitral Tribunal could not further rule that DS Construction could invoke Article 8 of the OIC Treaty to rely on the UNCITRAL arbitration rules of 1976, holding that this clause could be qualified as a "most-favored-nation clause" and allowed DS Construction to import, into the OIC Treaty, the consent to UNCITRAL arbitration that the State of Libya expressed in Article 11 of the Libya-Austria Bilateral Investment Treaty of 2002.

59. It challenges in the principal the qualification of "most-favored-nation clause" of Article 8 of the OIC Treaty, on the ground in particular that this clause does not fall into any of the six categories provided in the investment treaties identified by the International Law Commission in its Study Group Final Report of 2015.

60. In the alternative, the State of Libya maintains that the interpretation of Article 8 of the OIC Treaty in the light of Article 31 of the Vienna Convention of 1969 did not allow, as ruled the arbitral tribunal, the application of dispute settlement clauses provided in other treaties. First, it emphasizes that a most-favored-nation clause can only be invoked to allow its beneficiary to claim a more advantageous substantial treatment, granted by the State conceding to a third State in a bilateral investment treaty, but cannot be implemented to seek the incorporation of procedural rules more favorable to the investor, pursuant to the case law of the Paris Court of Appeal KCI c. Gabon of 25 June 2019.

61. The State of Libya adds, for the sake of completeness that it results from the terms of the OIC Treaty that the treatment referred to in the Article 8 of this Treaty does not cover the procedural provisions provided in other investment protection treaties and only a clear and unequivocal intention of theStates parties to the OIC Treaty would allow the application of dispute resolution clauses provided in other treaties.

62. It argues that the tribunal's interpretation of Article 8 is flawed, given the the material limitation of treatment under Article 8.1 of the OIC Treaty to the sole “context of economic activity” where the investors” will have made their investments” and that in doing so, Article 8 of the OIC Treaty excludesextending the scope of this provision to procedural rules that are not directly linked to the operation of its economic activity. It adds that the exclusion of dispute settlement provisions from the scope of Article 8.1 of the OIC Treaty is also confirmed by the territorial limitation that this article provides, its geographical implementation being limited to treatments granted "in the territory of another contracting party" while international arbitration is not a treatment that can be traced to the investment host State’s territory.

63. The State of Libya adds that regarding the multilateral nature of the Treaty and of the negotiations which preceded its conclusion, it must be admitted that in the absence of a clear treaty provision providing the possibility of replacing the dispute settlement procedure stipulated in Article 17.2 of the Treaty by a procedure provided in another Treaty, it must necessarily be accepted that the Member States did not wish such a replacement, especially since the OIC treaty members wanted to create a specific, uniform, centralized and internal OIC dispute settlement system.

64. The State of Libya argues further that in any event, Article 17.2 of the OIC Treaty does not amount to a “lower” treatment within the meaning of Article 8 of the same Treaty, on the grounds that this Article and Article 11 of the Libya-Austria Bilateral Investment Treaty of 2002 grant the same right of access to arbitration for protected investors. It argues that the difficulty of constituting a tribunal due to the OIC General Secretariat’s deficiency could not, in itself, be assimilated to "more or less favorable" treatment since, under Article 17 (2) of the treaty, the referral to a judge (“juge d'appui”) to complete the constitution of the Arbitral Tribunal would have enable him to complete its composition (in particular the French judge (“juge d'appui) in application of the Article 1505 4 ° of the Code of Civil Procedure).

65. **In response**, DS Construction explains that Libya ignores the scope of the reports issued by the International Law Conference (hereinafter “ILC”) as well as the State practice which do not draw up an exhaustive list of all the most-favored-nation clauses. It argues that Article 8 meets the definition of a “most-favored-nation” clause in general international law, in that it targets “investors belonging to any Contracting Party”, which means persons having the beneficiary State’s nationality, and in that the clause would grant “a treatment which shall not be inferior to that granted to investors from another non-member State ”, which corresponds to treatment no less favorable than that granted to the third country.

66. It maintains that there is no general impediment to the importation of dispute resolution clause through a MFN clause. It challenges the distinction made between substantive and procedural rights, arguing that a MFN clause does not a priori have specific, “material”, “substantial” or “non-material” content as they are "treatment by reference or indirect treatment clauses" that are "devoid of specific concrete content" and that the only issue in the present case is whether the "conditions of access" invoked by the applicant fall within the “treatment” category. It stresses in particular that it is accepted by several arbitral tribunals that the term "investment" includes procedural rights. It adds that it is wrong to claim that “to prevail itself” of the MFN clause, the investor must first “initiate an arbitration procedure” and underlines that the OIC Treaty allows the host State to initiate arbitration by simple notification without having to obtain acceptance of its alleged

“arbitration offer” from the investor and vice versa.

67. It states that both the ILC and the Member States of the United Nations have remind that the importation of more favorable procedural treatment is a question of treaty interpretation, and that this interpretation must be dealt with on a case-by-case basis, strictly observing the rules on the subject codified by the Vienna Convention.

68. It maintains that the interpretation of Article 8 (1), which refers not only to the "treatment" enjoyed by third country investors but also to "rights and privileges", necessarily extends to recourse to arbitration which is considered a right pursuant to Article 17 of the OIC Treaty, and a privilege given that "the possibility to refer to an arbitral tribunal only exists in the presence of a treaty providing this possibility ", which constitutes a privilege granted to investors.

69. DS Construction considers that the tribunal did not depart from the arbitral tribunal’s constitution specific rules provided in Article 17 by means of Article 8; that it implemented Article 17 in all its terms and only had recourse to Article 8 as a complementary modality to overcome the shortcomings of the Article 17mechanism.

70. It clarifies that the “specific, uniform, centralized and internal OIC dispute resolution system” provided in the chapeau of Article 17 of the OIC Treaty is not part of the useful context ofo of Article 8 of the OIC Treaty since the applicant does not prove that the chapeau ofArticle 17 of the OIC Treaty is part of the useful context to be interpreted for the understanding of Article 8 of the Treaty. It adds that the creation of a dispute resolution Court resulting from this treaty has nothing to do with the will of the Member States to refer their disputes to arbitration and that this will exists separately and independently and subsists "until an Organ for the settlement of disputes arising under the Agreement is established”.

71. Interpreting Article 8 of the OIC Treaty in the light of Articles 31 and 32 of the Vienna Convention, DS Construction maintains that the ordinary meaning of the terms "within the context of economic activity in which they have employed their investments ” does not exclude the provisions relating to the dispute resolution clauses because the mechanisms for settling disputes arising during the economic activity to which investors may have recourse, are part of the“ context of the economic activity ".

72. It considers that the applicant cannot claim that when the OIC Treaty was concluded, in 1981, the possibility of relying on an MFN clause to import a procedural provision from another treaty had never been admitted, given that Article 23 of the OIC Treaty is providing for an indefinite term for the Treaty, so that the conditions for the application of an evolving interpretation of the MFN clause’s terms are met

73. Finally, tDS Construction asserts that the treatment granted by Article 17 (2) (b) of the OIC Treaty was much lower than that granted by Article 11 of the Austria-Libya BIT since the inferior treatment does not result only from a factual blocking situation specific to the case circumstances, but also from an objective inferiority of the mechanism provided for in Article 17.2 of the OIC Treaty. It explains that the superiority lies, on the one hand, in the intervention of the Secretary-General of the PCA (versus the OIC Secretary-General’s inactivity in principle) and, on the other hand, in the fact that the UNCITRAL arbitration will have a seat (and therefore a judge - “juge d'appui” and an annulment judge), while

OIC arbitration is intended to be delocalized. It also maintains that any intervention of the judge ("juge d'appui") is excluded in OIC arbitration because in the context of an arbitration organized under the aegis of an international organization, the judge's role in the Ad hoc arbitration is precisely assumed by the institution in question. It also disagrees with the universal jurisdiction in matters of denial of justice of the president of the Paris Court of first instance.

74. In the alternative, DS Construction argues that the State of Libya does not explain how Article 17 (2) of the OIC Treaty would not allow the arbitral tribunal to rely on the UNCITRAL Rules of 1976 for its constitution, especially as this article does not refer to any agreement between the parties.

75. It maintains that the Arbitral Tribunal's possibility to choose on its own account the UNCITRAL Rules is justified by the terms of Article 17 (2) (c) of the OIC Treaty - which allows it to rule on any parties' dispute falling within its jurisdiction and adds that the application of the UNCITRAL Rules of 1976 was not conditioned on the parties' written agreement because, notwithstanding the terms of Article 1 of these Rules, an arbitral tribunal has the authority to decide the applicable proceedings rules, in particular pursuant to the lex arbitrii.

76. It further argues that the arbitral tribunal's possibility to apply the 1976 UNCITRAL Rules without the parties' prior written consent is justified by the application of Article 1509 of the Code of Civil Procedure. It states that there was an agreement between the parties to give the Arbitral Tribunal the power to rule on the question of the validity of its constitution by means of a preliminary question. It adds that the mechanism provided for in Article 17 (2) (b) of the OIC Treaty was a clause comparable to a pathological clause insofar as it does not provide anything in the event that the OIC Secretary-General does not appoint an arbitrator to make up for the inaction of one the party. It concludes that the Arbitral Tribunal's decision to apply the UNCITRAL Rules complies with French arbitration law, whose constant case law provides that the uncertainties arising from a pathological arbitration clause cannot defeat the parties' willingness to be governed byinternational arbitration rules and thus to deprive the arbitration clause of effects.

77. DS Construction finally explains that the State of Libya's reference to the judge ("juge d'appui") is irrelevant on the grounds that the choice of Paris as the seat of the arbitration, and therefore the jurisdiction of the judge, was the result of the application of Article 16 of the UNCITRAL Rules of 1976 and not of the OIC Treaty. It adds that the French judge had no jurisdiction because of the lack of any connection to France.

Thereupon,

78. Pursuant to article 1520, 2 ° of the Code of Civil Procedure, an action for setting aside can be brought if the arbitral tribunal has been unlawfully constituted.

79. In this case, the Court must appreciate whether, in order to resolve the blocking position resulting from the failure of the OIC Secretary-General to appoint an arbitrator in place of Libya, the recourse to the secretariat of the PCA for the designation of an authority appointing arbitrators, constitutes, in the light of the parties' will and the OIC Treaty, a lawful way of constituting the arbitral tribunal.

80. In this regard, it is not up to the annulment judge, who is not the appeal judge , to overturn or upheld the reasons for the award made on this issue but only to assess the regularity of the arbitral tribunal constitution in the light of the parties' will and the arbitration agreement.

81. In the present case, the arbitration agreement is provided for in Article 17 of the OIC Treaty and stipulates that:

« Until an Organ for the settlement of disputes arising under the Agreement is established, disputes that may arise shall be entitled through conciliation or arbitration in accordance with the following rules and procedures:
1. Conciliation (…)
2. Arbitration

a) If the two parties to the dispute do not reach an agreement as a result of their resort to conciliation, or if the conciliator is unable to issue his report within the prescribed period, or if the two parties do not accept the solutions proposed therein, then each party has the right to resort to the Arbitration Tribunal for a final decision on the dispute.

b) The arbitration procedure begins with a notification by the party requesting the arbitration to the other party to the dispute, clearly explaining the nature of the dispute and the name of the arbitrator he has appointed. The other party must, within sixty days from the date on which such notification was given, inform the party requesting arbitration of the name of the arbitrator appointed by him. The two arbitrators are to choose, within sixty days from the date on which the last of them was appointed arbitrator, an umpire who shall have a casting vote in case of equality of votes. If the second party does not appoint an arbitrator, or if the two arbitrators do not agree on the appointment of an Umpire within the prescribed time, either party may request the Secretary General to complete the composition of the Arbitration Tribunal".

82. It is undisputed that the aforementioned Article 17 does not provide any rule in the event of failure of the OIC Secretary-General in appointing an arbitrator following the party's refusal to appoint one, nor does it expressly provides recourse to another arbitration rule and in particular the UNCITRAL arbitration rules to deal with this difficulty.

83. Consequently,DS Construction could not entrust this mission to the Secretariat of the PCA by relying on this article alone, in the absence of express consent from the State of Libya on these terms.

84. It can no longer rely on Article 1509 of the Code of Civil Procedure. If this article allows the arbitral tribunal, in the silence of the arbitration agreement, to regulate proceedings either directly or by reference to an arbitration rule, the tribunal must however have been lawfully constituted, which is precisely the subject of the dispute in this case.

85. It must be assessed however whether the referral to the PCA to proceed with the arbitral tribunal constitution can find a basis on Article 8 of the OIC Treaty which stipulates that:

"1. The investors of any contracting party shall enjoy, within the context of economic activity in which they have employed their investments in the territories of another contracting party, a treatment not less favourable than the treatment accorded to investors belonging to another State not party to this Agreement, in the context of that activity and in

respect of rights and privileges accorded to those investors.

2. Provisions of paragraph 1 above shall not be applied to any better treatment given by a contracting party in the following cases:

a) Rights and privileges given to investors of one contracting party by another contracting party in accordance with an international agreement, law or special preferential arrangement.
b) Rights and privileges arising from an international agreement currently in force or to be concluded in the future and to which any contracting party may become a member and under which an economic union, customs union or mutual tax exemption arrangement is set up.
c) Rights and privileges given by a contracting party for a specific project due to its special importance to that state."

86. The merits of this option implies that Article 8 can be qualified as a Most Favored-nation (MFN) clause and that it can allow the import of dispute resolution proceedings included in another treaty to which the State of Libya is a party, assuming that this mechanism is also qualified as more favorable.

On the qualification of Article 8 of the OIC Treaty as a Most-Favored-nation clause;

87. A Most-Favored-Nation clause is defined by the United Nations International Law Commission (in its final report on the Most-Favored-Nation clause of 2015) as "the treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relation with that State, not less favourable than the treatment grated by the granting State to a third State or to persons or things in the same relation to that third State".

88. In the present case, the fact that the clause provided for in Article 8 of the OIC Treaty was not expressly qualified as a MFN clause in this report is not such as to exclude it from this qualification, which is a matter for the sole interpretation of the Treaty. Moreover it is stated in paragraph 58 of this report that "Notwithstanding the common obligation of MFN treatment in bilateral investment treaties, the way in which that obligation is expressed varies" and that while this report identifies" Six types of obligations ", it also states that "some agreements may mix the different types of obligation within a single MFN clause".

89. It also emerges from the draft articles comment on the Most-Favored-Nation clause published in the Yearbook of the International Law Commission 1978 (Vol. II part two) that "the fact of assuming the obligation to grant Most-Favored-Nation treatment is a requirement of any Most-Favored-Nation clause "(§12).

90. The aforementioned comment thus states that "the question of whether a provision falls within the most-favoured-nation framework is a matter of interpretation. Most-Favored-Nation clauses may be worded in very different ways (...) In other words: "Strictly speaking, the Most-Favored-Nation clause does not exist as such: it is necessary to study each treaty separately [. . .]. There are countless Most-Favored-Nation clauses, but there is only one standard of Most-Favored-Nation treatment" (§ 13).

91. In the present case, it should be observed that Article 8 of the Treaty lays down the principle that investors "shall enjoy (...) a treatment not less favorable than the treatment

granted to investors belonging to another State not party to this Agreement" and that in doing so it implies that the parties assume the obligation to grant a treatment no less favorable than that granted to a third State, which is characteristic of an MFN clause.

92. Article 8 of the OIC Treaty can therefore be qualified as a Most-Favored-Nation clause.

On the possibility for Article 8 of the OIC Treaty as a Most-Favored-Nation clause, to include in its scope dispute resolution procedures

93. It is a question of whether it is possible to import, pursuant to Article 8 of the OIC Treaty, the agreement expressed by the State of Libya to the application of the UNCITRAL Arbitration Rules in the bilateral investment treaty concluded with Austria on 18 January 2002 and in force since 1 January 2004.

94. In this regard, unless express reference in this sense, the possibility for an MFN clause to include the import of dispute settlement proceedings cannot be ruled immediately when the "treatment" of an investor may potentially include not only the benefit of a substantive right but also the benefit of procedural treatment guaranteeing a dispute resolution mechanism appropriate to the object and purpose of the Treaty.

95. Under these conditions, an interpretation of the Treaty should be carried out based on the rules of the Vienna Convention of 23 May 1969 and in particular its Article 31 which stipulates on this point that:

"1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose" and that "The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes :
(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:
(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
(c) any relevant rules of international law applicable in the relations between the parties.
4.A special meaning shall be given to a term if it is established that the parties so intended."

96. In the present case, it stands out from Article 17 of the OIC Treaty, that on the date of the conclusion of this Treaty, the parties specifically considered the creation of a specific body for the settlement of disputes since it is indicated, without this being excluded from the "context" within the meaning of the aforementioned article 31, that any disputes which may arise shall be settled by conciliation or by arbitration in accordance with the rules provided for in this Article 17 *Pending the creation of a body for the settlement of disputes arising*

from this Agreement” .

97. In doing so, the mechanism provided for in Article 17 of the OIC Treaty must be interpreted in the light of this context and this purpose, from which it stands out that the intention of parties to the OIC Treaty was clearly not to depend on a dispute resolution procedure imported from another treaty, but on the contrary to provide, pending the creation of a specific body with its own rulesThis is irrespective of the fact that such a Court was not established in the end. .

98. This is, moreover, also the object of Article 17 since it provides an autonomous mechanism, pending the creation of this dispute settlement body, to allow, in the event of a dispute, the constitution of an arbitral tribunal without having to recourse to a third-party dispute settlement procedure since precisely on this point it was entrusted to the OIC Secretary General to proceed with the arbitrator's appointment in the event of failure by one of the Parties.

99. Thus, it emerges from this Article 17 that once constituted, *"The Tribunal will decide on the venue and time of its meetings as well as other matters pertaining to its functions*" being observed that it appears from the English version of the treaty that on this last point, it is not only for the arbitral tribunal to rule on questions of jurisdiction in the legal sense of the term but also to rule on all questions relating to its functioning, which also includes the question of the procedure applicable before it.

100. It should therefore be considered that both the context and the object and purpose of Article 17 of the OIC Treaty have been to add to the substantial protection of investments granted by the Treaty procedural protection by the implementation of a specific dispute resolution procedure.

101. The wording of Article 8 of the Treaty does not make it possible to invalidate such an interpretation since it does not contain any reference to the benefit of more favorable procedural treatment and that the equivocal references to “the context of the economic activity ”and to “ rights and privileges ”do not allow to judge that they can be extended to the procedural advantages of dispute settlement provided in other investment protection treaties and in particular the one provided in Article 11 of the Bilateral Treaty investment concluded by the State of Libya with Austria on 18 January 2002.

102. Similarly, there is no evidence allowing one to rely, within the meaning of Article 31 of the aforementioned Vienna Convention, on a subsequent agreement between the parties concerning a treaty interpretation accordingly or on the application of its provisions and even of a subsequent practice in the treaty application by which the agreement of the parties with regard to the treaty interpretation is established.

103. In this regard, if DS Construction invokes the position of certain Member States to the OIC Treaty having admitted the possibility of referring their dispute to the Permanent Court of Arbitration such as in the cases of Al Warraq v / Republic of Indonesia (award of 21 June 2012) and Kontinental Conseil Ingenierie SARL v. Gabon (award of 23 December 2016) relating to two arbitration requests based on the OIC Treaty, it should be noted that in these two cases, which did not concern Libya, there was no agreement between the parties to derogate from the application of Article 17 in the absence of arbitrators' appointment by the

States concerned. On the contrary, in these two cases, it was only once the arbitral tribunal had been lawfully constituted and the States concerned having agreed to appoint an arbitrator, that the parties agreed to apply the UNCITRAL rules, so that these precedents do not allow to draw the interpretative conclusion attributed to it by DS Construction within the meaning of the aforementioned Article 31.

104. Likewise, it cannot be concluded from the preamble of the OIC Treaty which states that the Member States "have agreed to consider the provisions contained therein as the minimum in dealing with the capitals and investments coming in from the Member States", that this must lead to the rejection of the interpretation of Article 17 as being a closed and self-sufficient system since such an interpretation conflicts with the purpose of Article 17 and does not either fall within the scope of Article 8, all the more so since such a broad interpretation would not guarantee a process of constitution of the arbitral tribunal invested with the confidence of the parties.

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105. It cannot therefore be considered that the treaty members, having expressly provided an ad hoc mechanism for settling disputes, intended to allow recourse to external procedural regulations, at least in the absence of consent of each party to the dispute, nor reasonably judged that the OIC Treaty members intended to implement a specific mechanism which would not work and above all which would allow the application of an arbitration rule emanating from another institution even though the mechanism proposed was intended to continue as long as the specific body for settling disputes was not constituted.

106. Finally, the constitution of the arbitral tribunal outside the conditions provided for in the OIC Treaty and against the will of one of the parties cannot be justified by the absence of demonstration by the other party of its right to refer to a judge while it was up to DS Construction to initiate the appropriate proceedings aiming, if necessary, to refer to a judge in order to settle the difficulty of constituting the tribunal, which the company has never done so that it cannot rely on mere hypothetical considerations as to the chances of success of such an action to be excused.

107. Therefore, in the absence of an express consent from the State of Libya to submit the constitution of the tribunal to the Secretary-General of the Permanent Court of Arbitration and to the UNCITRAL Rules of 1976, the arbitral tribunal thus constituted, notwithstanding this refusal, has been done unlawfully.

On the request of DS Construction for the Court to appoint the members of the arbitral tribunal

108. **DS Construction requests in the alternative**, in the event of the setting aside of the award, that the subsequent parties' agreement to designate Paris as the seat of the arbitration be giben effect and that Messrs C and A be reappointed by the Court, taken as the new judge ("juge d'appui"), for the sake of procedural efficiency in view of the current state of progress of the arbitration procedure before this same Tribunal.

109. It argues that the State of Libya had the time and the opportunity to raise its objections to the application of the UNCITRAL Rules and the regularity of the arbitral tribunal constitution, so that its procedural rights have been respected and therefore, nothing justifies giving Libya a new opportunity to appoint an arbitrator.

110. **In response, the State of Libya argues that** this request is groundless and misguided. It maintains, on the one hand, that the request for the appointment of three new arbitrators is not justified insofar as the validity of the appointment of Mr. B, arbitrator appointed by DS Construction, has not been challenged. It adds that the designation of Paris as the place of arbitration was made after the unlawful appointments of the other two arbitrators, so that this agreement could not survive the setting aside of the award. It also maintains that the Court has no jurisdiction to rule on this request, which is the responsibility of the president of the Court of first instance in application of Article 1505 of the Code of Civil Procedure.

Thereupon ;

111. The Court, having been seized of an action for setting asidean award rendered in international arbitration, has no jurisdiction to appointarbitrators after having set aside the said award.

112. This request shall therefore be dismissed.

On the request of DS Construction for abuse of procedure

113. **DS Construction maintains that** the present action is intended only to obstruct the arbitration proceedings resulting from Article 17 of the OIC Treaty. It emphasizes that the abusive nature of the proceedings results from the behavior of the State of Libya, which also obstructed the settlement of this dispute during the arbitral proceedings, in particular by not appointing an arbitrator.

114. In response, the State of Libya argues that it is only exercising its right to have its position recognized in Court, without committing any abuse and that DS Construction does not provide proof of the abuse of procedure.

Thereupon ;

115. Filing a legal action constitutes a right in principle and amount to an abuse which may give rise to damages only in the event of a fault likely to engage the civil liability of its author.

116. In this case, as the Court ruled for the action for setting aside brought by the State of Libya, and thus recognized the merits of its action, DS Construction's calim shall be dismissed .

On the other requests

117. DS Construction, the losing party, shall be ordered to pay the costs of the proceedings which shall be recovered pursuant to the provisions of article 699 of the Code of Civil Procedure.

118. In addition, it must be ordered to pay compensation to the State of Libya, which had to incur irreparable costs to assert its rights, under article 700 of the code of civil procedure, in an amount fairly set at 150,000 euros.

IV- OPERATIVE PART OF THE JUDGMENT

For these reasons, the Court hereby:

1. Finds inadmissible the bar to the proceedings raised by DS construction FZCO;

2. Sets aside the arbitral award rendered in Paris on in this case;

3. Dismisses DS Construction FZCO of its claim seeking the appointment of members of the arbitral tribunal and of its claim for damages for abusive proceedings;

4. Orders DS Construction FZCO to pay the State of Libya the amount of 150 000 euros pursuant to Article 700 of the Code of Civil Procedure;

5. Orders DS Construction FZCO to pay all the costs of the proceedings recevoverable by Maître D –, pursuant to the provisions of article 699 of the Code of Civil Procedure.

The Clerk **The President**
C. GLEMET **F. ANCEL**