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PARIS COURT OF APPEAL
International Commercial Chamber

DIVISION 5 - CHAMBER 16
JUDGMENT OF 14th FEBRUARY 2023

(No. **20** /2023, 15 pages)

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Decision referred to the Court: Final international arbitral award rendered in Paris on 12th April 2021 (ICC no. 24091/JPA)

APPELLANTS

CAPITAL ENERGY PROYECTOS ENERGETICOS, S.L.U.
Spanish company registered in the Mercantile Registry of MADRID volume 37509,page 210, sheet M-668655 under number B-87996336
with registered office at: Paseo Club Deportivo 1, [Address 2] (SPAIN)
represented by its legal representatives,

CAPITAL ENERGY SOLAR EOLICA, S.L.
a Spanish company registered in the Commercial Register of MADRID, volume 20623, page 210, sheet M-668655 under number B-84125400
with registered office at [Address 3] (SPAIN)
represented by its legal representatives,

GREEN CAPITAL POWER, S.L.
Spanish company registered in the Mercantile Registry of MADRID volume 27791, page 72, sheet M-500825 under number B-85945475
having its registered office at: Paseo Club Deportivo 1, [Address 1] (SPAIN)

Represented by Mr Bernard GRELON of AARPI LIBRA AVOCATS, a lawyer at the Bar Council of Paris, bar number: E0445

DEFENDANT TO THE APPEAL:

ALFANAR COMPANY
A Saudi company registered in the Commercial Register under number 10100057263 with its registered office at: [Address 4] (SAUDI ARABIA)

Represented by Mr Luca DE MARIA of SELARL PELLERIN - DE MARIA - GUERRE, a counsel with right of audience at the Bar Council of Paris, bar number: L0018
Assisted by Ms Marianne KECSMAR, a trial counsel of the Bar Council of PARIS

COMPOSITION OF THE COURT:

The case was heard on 12th December 2022, in a public hearing, before the Court composed of:

Mr Daniel Barlow, President
Ms Fabienne SCHALLER, judge
Ms Laure ALDEBERT, judge

who deliberated thereon.

A report was presented at the hearing by Mr [S] [R] under the conditions provided in by Article 804 of the French Code of Civil Procedure.

Court Clerk at the hearing: Ms Najma EL FARISSI

JUDGMENT:

- in adversarial proceedings

- stated publicly upon availability of the judgement to the Court Clerk's Office, the parties having been notified thereon in advance under the conditions referred to in the second paragraph of Article 450 of the French Code of Civil Procedure

- signed by Daniel BARLOW, President and Najma EL FARISSI, Court Clerk in charge to whom the minutes of the decision were handed down by the judge signatory.

I/ FACTS OF THE CASE AND PROCEEDINGS

1. An action has been brought before the Court to set aside a final arbitral award made inParis on 12th April 2021, under the aegis of the International Court of Arbitration of the International Chamber of Commerce ("ICC"), in a dispute between:

- On the one hand, the Spanish Group of Companies : Capital Energy Proyectos Energéticos SLU, Capital Energy Solar Eólica SL and Green Capital PowerSL (hereinafter referred to as "the Capital Energy Group"), which own a portfolio of wind farms that they develop and sell to companies interested in building and operating them;

- On the other hand, the Saudi-based Alfanar Company (hereinafter referred to as Alfanar), which operates as an independent producer of renewable energy.

2. The dispute arises from the execution of a Sale and Purchase Agreement ("SPA") entered into on 25th July 2017. By this agreement Alfanar undertook to purchase from the Capital Energy Group stakes in companies owning 23 wind farms located in Spain if its bid in the auction organised by the Spanish Government for the grant of renewable energy production and development rights was successful.

3. In order to participate in this call for tenders, Alfanar provided a

bank guarantee of €43,200,000 which was subsequently reduced to €32,049,000.

4. On 21st February 2018, the Capital Energy Group and Alfanar entered into a "Novation Agreement", amending certain provisions of the SPA and reducing the number of wind farms to be purchased to seven.

5. On 5th October 2018, Alfanar notified the Capital Energy Group of its decision to terminate the SPA, as amended by the novation agreement. The termination was based on the grounds that the Capital Energy Group had failed to prove that the wind farms had acquired "ready to build" status in accordance with the novation agreement. It demanded that the Capital Energy Group return the sums paid and reimburse the bank guarantee in the case in which the Spanish authorities were to enforce it.

6. By letters dated on 10th and 11th October 2018, the Capital Energy Group expressed their disagreement with the consequences of this termination of contractual relations.

7. It is in these circumstances that Alfanar, on 29th November 2018, brought arbitration proceedings before the International Court of Arbitration of the International Chamber of Commerce pursuant to the arbitration clause provided in Article 14 of the SPA and Article 7 of the novation agreement, the terms of which are identical.

8. In a final award rendered on 12th April 2021, the arbitral tribunal decided that:

> Alfanar has validly terminated the SPA and the Novation Agreement;
>
> The Capital Energy Group must return and pay Alfanar all the amounts received under the SPA and the Novation Agreement, up to the sum of 7,138,901 euros, with interest at the Spanish legal rate from the date of notification of the arbitration award to the defendants to the arbitration ;
>
> The Capital Energy Group must indemnify the Spanish authorities for 75% of anycollection of the bank guarantee issued in connection with the 7 wind farms identifiedunder the Novation Agreement, with a capacity of 158.7 MW, up to the amount of 5,713,200 euros (corresponding to 75% of the amount of the guarantee not releasedby the Spanish authorities, i.e., 7,617,600 euros), with interest at the Spanish legal rate until the amount due is paid in full ;
>
> The Capital Energy Group must pay Alfanar the sum of (i) 747,326.25 euros corresponding to the legal fees and costs incurred by the latter in the arbitration and the sum of (ii) 226,447.50 euros corresponding to the sum paid by Alfanar to the ICC with interest.

9. The Capital Energy Group filed an action for annulment of this arbitration award with theParis Court of Appeal on 3rd June 2021.

10. The investigation was closed on 22nd November 2022 and the case was called for the hearing on 12th December 2022.

II/ CLAIMS OF THE PARTIES

11. In accordance with the latest submissions (n°2) notified electronically on 15th September 2022, the Capital Energy Proyectos Energeticos, Capital Energy Solar Eolica and Green Capital Power request the Court, pursuant to Articles 1520(3), 1520(4) and 1520(5) of the French Code of Civil Procedure, to:

- hold that the action for annulment was well founded on the basis of articles 1520(3),1520(4) and 1520(5) of the French Code of Civil Procedure,

Accordingly,

- set aside the award for the breach of Article 1520(3), with the arbitral tribunal having failed to comply with its terms of reference ;

- set aside the award for the breach of Article 1520(4), with the arbitral tribunal having failed to comply with the principle of contradiction and the principle of equality of arms ;

- set aside the award for the breach of Article 1520(5), with the award not being in accordance with international public policy ;

In any event,

- reject all of Alfanar's claims,

- order Alfanar to pay Capital Energy Proyectos Energéticos SLU, CapitalEnergy Solar Eólica SL and Green Capital Power SL the sum of 40,000 euros pursuant to Article 700 of the French Code of Civil Procedure and to pay all the costs of the proceedings.

12. In accordance with the latest submissions (n°2) notified electronically on 14th November 2022, pursuant to Articles 1520, (3), (4) and (5 of the French Code of Civil Procedure Alfanar requested the Court to:

- Dismiss the claims of Capital Energy Proyectos Energeticos SLU, Capital Energy Solar Eolica SL and Green Capital Power SL in full;

- Dismiss the action for annulment brought by Capital Energy Proyectos Energeticos SLU, Capital Energy Solar Eolica SL and Green Capital Power SL;

- recall that the dismissal of the action for annulment gives rise to exequatur (order for enforcement of a decision) on the award rendered on 12 April 2021 by the arbitral tribunal composed of Ms [D] [H], Mr [X] [I] and Mr [G] [U] ;

- order Capital Energy Proyectos Energeticos SLU, Capital Energy Solar Eolica SL and Green Capital Power SL to pay EUR 200,000 under Article 700 of the French Code of Civil Procedure and the costs of these proceedings.

III/ GROUNDS OF THE RULING

13. The Capital Energy Group propose three arguments for annulment based on the arbitral tribunal's breach of its terms of reference (A), failure to comply with the principle of contradiction (B) and the award's conflict with international public policy (C).

A. The first argument alleging breach of its terms of reference by thearbitral tribunal

14. The Capital Energy Group complains that the arbitral tribunal did not comply with the terms of reference assigned to it because it failed to rule on legal grounds and that it departed from the procedural rules governing arbitration proceedings without the agreement of all the parties.

15. On the first point, they argue that:

- As the parties had not provided the Arbitral Tribunal the authority to rule as amiable compositeur or to decide ex aequo ex bono (according to what is equitable and good), it had to rule in accordance with the rules of law chosen by the parties, i.e., Spanish law in accordance with Article 12 of the SPA and Article 6 of the Novation Agreement ;

- by rejecting the application of article 1124 of the Spanish Civil Code only in relation to the causes of the breach of contract and applying it instead in relation to the consequences of that breach, namely the repayment to Alfanar of the sums received by the Capital Energy Group, the arbitral tribunal selected arbitrarily, instead of applying a legal or contractual framework in full ;

- the arbitral tribunal thus ruled as amiable compositeur and did not comply with its duty to rule on legal grounds ;

- it also departed from the rules of Spanish law to declare the Capital Energy Group liable to pay Alfanar 75% of the sums collected by the Spanish authorities under the bank guarantee, replacing the application of the rule of law,providing for the retroactive annulment of the contract after termination, based on its own subjective assessment, in order to ensure that the contractual obligation to repay the bank guarantee survives against the Capital Energy Group after termination and for an unlimited period of time, thus imposing on them a perpetual commitment.

16. On the second point, they argue that by conducting one of the evidentiary hearings virtually, even though they had objected, the arbitral tribunal breached the procedural rules governing the arbitral proceedings:

- The 2017 ICC Rules of Procedure, which were the only ones applicable, did not provide for such a possibility ;

- the parties had agreed in principle to hold a face-to-face hearing ;

- Alfanar has unilaterally changed its position ;

- by reneging on the parties' initial agreement, the court departed from the procedural rules that it was required to follow.

17. In response, Alfanar replied, on the first point, that:

- to rule on the breach of the contractual stipulations, the arbitral tribunal relied on an interpretation of articles 1124, 1255 and 1091 of the Spanish Civil Code in the light of Spanish case law on the subject and did not apply the said law selectively so that it ruled on the basis of fairness and complied with its duty to rule on legal principals ;

- the claimants request in fact the Court to interfere in the arbitrators' reasoning and to review the merits of the dispute in order to authorise an alleged selective application of the rule of law, thereby disregarding the limited scope of the review exercised by the annulment judge ;

- the court's decision regarding the bank guarantee was based on article 1124 of the Spanish Civil Code and on the contractual stipulations so that the arbitrators ruled in application of Spanish law and in full compliance with their mission.

18. On the second point, it argues that:

- the arbitral tribunal provided grounds for its decision to hold the evidentiary hearing by videoconference because of the unpredictability of the situation relating to Covid-19 and its obligation to conduct the proceedings expeditiously and efficiently after the hearings had been adjourned on several occasions, having regard to the various provisions of the 2017 ICC Rules and the ICC's interpretation of them ;

- it has not departed from the ICC Rules of Arbitration since, in accordance withAppendix IV of the Rules, the Secretariat Guide to ICC Arbitration and the ICC Note on Possible Measures to mitigate the effects of the Covid-19 Pandemic, the arbitral tribunal may interpret Articles 25(2) and 26 of the Rulesas permitting the use of videoconferencing techniques, which are accepted solutions in practice and do not constitute a breach of the arbitral mandate ;

- in any event, it does not fall within the powers of the annulment judge to sanction the incorrect application of procedural rules.

THEREUPON:

On legal grounds

19. Under Article 1520(3) of the French Code of Civil Procedure, an action for annulment may be brought if the court has ruled without complying with the terms of reference entrusted to it.

20. This mission, defined by the arbitration agreement, is delimited mainly by the subject matter of the dispute, which is determined by the claims of the parties, without there being any need to focus solely on the statement of issues contained in the Terms of Reference.

21. It is therefore for the arbitral tribunal to decide within the limits of the requests delivered to the tribunal so that if it grands more redress than was

requested, its award may be set aside for failure to comply with its terms of reference.

22. Amiable composition is a contractual waiver of the effects and benefit of the rule oflaw, with the parties losing the prerogative to demand its strict application and the arbitrators receiving the correlative authority to modify or moderate the consequences of the contractual stipulations whenever equity or the common and well-understood interest of the parties so requires.

23. The arbitrator does not deviate from their mission if they enjoy the freedom granted to them by the law applicable to the dispute; the use by an arbitral tribunal of a discretion conferred on thereon by the applicable procedure to rule on a claim is not sufficient to qualify this authority as amiable composition.

24. The arbitral tribunal deviates from its mission if it does not comply with the procedural rules agreed by the parties. Nevertheless, such deviation, insofar as it relates to aprocedural rule, can only result in the award being set aside if it is established that it may have caused a party a grievance or that it had an impact on the outcome of the proceedings and if the procedural irregularity had previously been raised before the arbitral tribunal.

(i) <u>The first part of the argument</u>

25. Articles 12 of the SPA and 6 of the novation agreement stipulate that these types of agreements are governed by Spanish law. The arbitration clauses contained in articles 14 and 7 do not provide the arbitral tribunal called upon to settle any dispute the authority to rule as amiable compositeur.

26. Within this framework, Alfanar lodged a claim to the arbitral tribunal for repayment by the Capital Energy Group of the sums it had received under the SPA, as amended by the novation agreement, after Alfanar had notified the companies of its intent to terminate the contracts for breach of their contractual obligations. On the basis ofthe SPA clauses and the novation agreement, Alfanar also sought reimbursement of 75% of the losses suffered in the event of enforcement of the bank guarantee.

27. The Capital Energy Group dismissed these claims, arguing in essence that the default attributed to them by the claimant was in fact due to the claimant's conduct. Furthermore, they considered that Alfanar could not claim any reimbursement under the guarantee since it had not been established that the guarantee had been executed and that the contractual relationship between the parties had been resolved retroactively.

28. After reviewing the respective positions and arguments of the parties, the arbitral tribunal ruled that Alfanar's termination of the contractual relationship was justified, considering that Alfanar was entitled to rely on the contractual provisions to terminate the SPA and the novation agreement. To this end, the court ruled out the application of Article 1124 of the Spanish Civil Code, taking the view, based on Spanish legal doctrine, that this article applies by default when the parties have not agreed on the causes and consequences of the termination of their contractual relationship. It points out that this position results from the application of the principle of party autonomy established by article 1255 of the same Code, as interpreted by the Spanish Supreme Court (contested sentence, §§ 489 to 491).

29. The arbitral tribunal ruled that Alfanar was entitled to claim restitution of the sums paid to the Capital Energy Group on the basis of Article 1124 of the Spanish Civil Code, as interpreted by the Spanish Supreme Court. In this regard, it noted that the defendants had not achieved "ready to build" status by the deadline set out in the contract. It concluded that the clause set out in Article 3.2(9) of the novation agreement should apply. Furthermore, it stated that this clause was not contrary to Article 1256 of the Spanish Civil Code and that it was binding on the Capital Energy Group, which had consented to it, pursuant to Article 1091 of the same Code (contested award, §§ 506, 522 and 523).

30. Interpreting the clauses of the SPA and the novation agreement, the arbitral tribunal upheld, regarding the bank guarantee, the fact that the obligations arising from those stipulations remained in force after the termination of those contracts and that their effect was not limited in time and held that the defendants would be required to repay the sums collected by the Spanish authorities, up to a limit of 75% of the guarantee ceiling, following receipt of a payment notice (contested award, §§ 537 to 541).

31. Contrary to what the Capital Energy Group maintain, it cannot be inferred from this reasoning that the tribunal determined itself as an amiable compositeur to rule in equity. On the contrary, the very terms of the award demonstrate that it endeavoured to apply Spanish law, as interpreted by doctrine and case law, without seeking to depart from it.

32. The distributive application of the contractual regulations, concerning the causes of the termination, and of the legal rules of procedure, as regards its consequences, as notified by the Capital Energy Group, results from the considerations drawn from the interpretation of such law by the arbitral tribunal. The considerations do not refer to equity and such considerations should not be assessed by the court, in its capacity as an annulment judge, unless it enters into a process of review of the award which does not fall within its function.

33. Similarly, the solution adopted by the arbitral tribunal in relation to the bank guarantee is based on an interpretation and application of Spanish law and the contractsat issue. The relevance or validity thereof should not be assessed by the court since the review of the "strict application of the law" requested by the Capital Energy Group is to a review of the award on the merits. The same applies to the alleged error relating to the failure to take into consideration the prohibition of perpetual commitments under the law, which is a matter for the arbitral tribunal to assess on the merits of the case.

34. It follows that the first part of the argument cannot be upheld.

(ii) <u>The second part of the argument</u>

35. The exhibits submitted to the court demonstrate that:

- the procedural timetable drawn up by the arbitral tribunal initially provided forevidentiary hearings to be held on 25th and 27th March 2020 ;

- These hearings could not take place due to the state of health emergency declared by the Spanish authorities as a result of the Covid-19 pandemic ;

- In this context, after hearing the respective positions of the parties, the arbitral tribunal decided that a hearing should take place, as requested by the Capital Energy Group, but that it could be held in a city other than the one initially planned. Furthermore, it drew the parties' attention to the fact that this hearing could, depending onthe restrictions put in place, be held on a remote basis wholly or partly (Procedural Order 21) ;

- After a number of postponements and exchanges on the timetable and location of the hearings, the arbitral tribunal set new dates, specifying that the hearings would be held either in person or remotely (in whole or in part), depending on sanitary restrictions. It requested that the parties consult on the arrangements to be made to ensure that the hearings could be held in a safe and secure manner, and invited them to discuss a protocol for the eventuality that the hearings would have to be held remotely (Procedural Order 23) ;

- As the health situation required further postponements, the parties disagreed on the possibility of organising remote hearings. The Capital Energy Group refused to do so, and requested that the hearing be postponed to a date no earlier than March 2021 while Alfanar argued that the hearing could not be postponed indefinitely ;

- Noting this disagreement, the arbitral tribunal set new dates and invited the parties to reach agreement on the possibility of holding a hybrid hearing, specifying that, failing agreement, the hearing would entirely take place on a remote basis (Procedural Order 26) ;

- The Capital Energy Group's request for a review of this decision was rejected by the arbitral tribunal (Procedural Order 27) ;

- The hearings were ultimately held by videoconference on 14th and 17th December 2020, in accordance with a protocol agreed by the parties and adopted by the Court (Procedural Order 28).

36. It is established that the arbitration proceedings were governed by the 2017version of the ICC Rules of Arbitration.

37. Article 22 of these Rules, relating to the conduct of the arbitration, states in particular that:

> 1 The arbitral tribunal and the parties shall make every effort to conduct the arbitration proceedings expeditiously and cost-effectively, having regard to the complexity and stakes of the dispute.
>
> 2 In order to ensure the efficient management of the proceedings and after consulting the parties, the arbitral tribunal shall adopt such procedural measures as it considers appropriate and which do not conflict with any agreement of the parties. [...]

38. Under the terms of Article 25 relating to the hearing of the case:

> 1 The arbitral tribunal shall hear the case as soon as reasonably practicable by any appropriate means.
>
> 2 After considering the written submissions of the parties and all

> documents raised in support, the arbitral tribunal may hear the parties together in person if any of them so requests or, in the absence of such a request, it may on its own initiative decide to hear them. [...]

39. And, according to Article 26 on hearings:

> 1 Where a hearing is held, the arbitral tribunal shall summon the parties to appear before it, within a reasonable time, on the day and at the place fixed by it.
>
> 2 If one of the parties, although duly summoned, fails to appear without a valid excuse, the arbitral tribunal, nevertheless, has the power to hold the hearing.
>
> 3 The arbitral tribunal regulates the conduct of hearings at which all parties areentitled to be present. Unless agreed by the arbitral tribunal and the parties, hearings are not open to persons not involved in the proceedings.
>
> 4 The parties appear in person or through duly authorised representatives. They may also be assisted by counsels.

40. Within the framework thus defined, the arbitral tribunal considered, in its Procedural Order 26, that neither the ICC Rules of Arbitration nor the lex arbitrii (law of arbitration) precluded the taking of evidence by virtual means, noting in this respect that:

> Although Article 25(2) of the ICC Rules provides that "... the arbitral tribunal may hear the parties together in person if any of them so requests...", the ICC Guidance note on possible measures aimed at mitigating the effects of the COVID-19 Pandemic clarifies that "this language can be construed as referring to the parties having an opportunity for a live, adversarial exchange and not to preclude a hearing taking place "in person" by virtual means if the circumstances so warrant".

41. In so doing, the arbitral tribunal interpreted the arbitration rules by referring to the solutions acceptedin practice and to the procedures followed before the ICC, without disregarding the terms of its mission:

- Contrary to what the Capital Energy Group assert, the aforementioned regulations do not formally provide for the principle of "face-to-face" hearings, and their argument on this point is based on an interpretation of the said provisions that they oppose to that adopted by the arbitral tribunal ;

- in the absence of a formal rule that would be breached by the decision taken by the arbitral tribunal, it is not for the annulment judge setting aside the award to rule on the merits of its interpretation and the reasoning behind it ;

- the parties' initial agreement to hold physical hearings cannot be relied uponby the claimants in this action, as this agreement was called into question by Alfanar, which objected to indefinite postponements in a particularly constrained context ;

- The Court noted that the length of the hearings concerned, and the complexity of the issues addressed did not constitute an obstacle to the use of videoconferencing facilities, which the Capital Energy

Group does not dispute ;

- it took into account the uncertainties linked to the health situation as well asthe need for the procedure to be swift and efficient, which was also required ofit under the same Rules of Procedure.

42. It follows that the second part of the argument cannot be upheld.

B. The second argument alleging failure to comply with the principle ofcontradiction and equality of arms

43. The Capital Energy Group that the arbitral tribunal failed to comply with the principle of contradiction and equality of arms by conducting the arbitration proceedings in such a manner as to systematically harm its interests and by granting unjustified prerogatives to Alfanar, in that:

- the arbitral tribunal rejected its request for Alfanar to disclose documents relating to the bank guarantee - in particular its exchanges with the Spanish authorities - in order to be able to discuss the merits of Alfanar's request onthis point ;

- the arbitral tribunal did not authorise the company's delayed communications ;

- the arbitral tribunal imposed a hearing on a remote basis despite the opposition of the Capital EnergyGroup thereto to the detriment of their procedural rights ;

- the arbitral tribunal selectively applied the rule of law derived from Article 1124 of the Spanish Civil Code to the detriment of the Capital Energy Group.

44. Alfanar replies that:

- it did not conceal any documents issued by the Spanish authorities concerning the bank guarantee during the arbitration proceedings ;

- The Capital Energy Group have not established how the Court failed to comply with the principle of contradiction and equality of arms even though the parties had the opportunity to discuss the request for additional documents and the question ofthe collection of the guarantee ;

- the same applies to all decisions relating to the disclosure or rejection of documents, which the court has justified by procedural orders without either party being placed at a distinct disadvantage in relation to the other ;

- the fact of holding hearings by videoconference does not in itself constitute a prejudice to the parties' right to be heard in accordance with the principles of contradiction and equality;

- each party was able to fully develop and discuss all of its factual and legal arguments that were used in the arbitral tribunal’s decision on the application of Article 1124 of the Spanish Civil Code; an alleged

breach of equality in the application of the rule of law does not constitute a claim for the annulmentof Article 1520 4° of the French Code of Civil Procedure.

THEREUPON:

On legal grounds

45. Article 1520 4° of the French Code of Civil Procedure provides for an action for annulment where there has been a failure to comply with the principle of contradiction.

46. The principle of adversarial proceedings requires only that the parties have been given the opportunity to debate the arguments and documents issued, and that they have been able to state their factual and legal arguments, and discuss those of their opponent so that nothing on which the arbitrators' decision was based has escaped theiradversarial debate.

47. Equality of arms, which is an element of fair trial protected by international public policy, implies the obligation to offer each party a reasonable opportunity to present its case – including the evidence – under conditions that do not place it at a substantial disadvantage compared with its opponent.

(i) <u>The first part of the argument</u>

48. The exhibits submitted to the court demonstrate that:

- The Capital Energy Group requested that the arbitral tribunal order Alfanar to disclose documents relating to its dealings with the Spanish authorities in order to determine whether the bank guarantee provided by Alfanar had been enforced;

- Since Alfanar replied that it did not possess these documents, the arbitral tribunal, in its Procedural Order No. 7 of 16th December 2019, took note of this statement and rejected the request for disclosure of documents made by the Capital Energy Group;

- The latter disagreed with the reasoning behind the order, arguing that Alfanar had not confirmed whether, since October 2018, the competent Spanish authorities had taken any decisions or issued any resolutions and/or communications regarding the withdrawal of the wind farms from the Capital Energy companies or the enforcement of the bank guarantee ;

- Alfanar reaffirmed that it had no additional documents, arguing in particular that the defendants had not identified the documents requested or even proved that they had existed ;

- The arbitral tribunal therefore upheld its procedural order.

49. In order to conclude that there has been a breach of the principle of contradiction and equality of arms, the Capital Energy Group maintain that document 17 issued by Alfanar in the context of the present proceedings establishes the existence of exchanges between such company and the

Spanish authorities concerning the bank guarantee, which the defendant in the appeal did not mention during the arbitration proceedings.

50. This document is an order from the Directorate-General for Energy Policy and Mining of the Spanish Ministry for Ecological Transition and the Demographic Challenge. Dated 29th November 2021, it states, in particular, that:

> On 15th October 2018, 5th April 2019 and 30th December 2019, ALFANAR CO filed applications with the Directorate General for Energy Policy and Mines requesting thatit be removed from the register of the specific remuneration scheme in pre-allocation status for 712,125.00 kW of power registered under code ERP-000106-2017-E, and that the guarantees relating to the said registration be released.
>
> The Directorate General for Energy Policy and Mines responded to these requests in its decision of 18th November 2021. It acknowledged the withdrawal requested by ALFANAR CO and rejected the request to release the guarantee relating to the registration of the specific remuneration scheme in the register in pre-allocation status.

51. Contrary to the assertions of the claimants in this action, it cannot be inferred from this evidence that Alfanar "concealed the truth from the arbitral tribunal and the Capital Energy Group through a deliberately inaccurate statement" since:

- It is not disputed that the applications of 5th April and 30th December 2019 do not relate to the wind farms in dispute and that the application of 15th October 2018 was communicated during the arbitration proceedings, so that the parties were able to discuss it regularly ;

- Document n°17 does not mention any exchange of information between Alfanar and the Spanish authorities between this request and 18 November 2021, the date of the response to it ;

- This reply, as well as the order which refers to it, was provided after the arbitration proceedings, so that Alfanar cannot be criticised for not having referred to it ;

- Alfanar issued a document 14.23 during the arbitration, on 13th December 2019, confirming the identification by the Spanish authorities of the Capital Energy Group's wind farms withdrawn from the public auction ;

- the parties were thus able to discuss both the issuing of the documents available and the documents themselves, and the Capital Energy Group did not demonstrate any breach of the principles of contradiction and equality of arms with regard to the bank guarantee.

52. The argument in law developed on this ground, which is in fact insufficient, will therefore be rejected.

(ii) <u>The second part of the argument</u>

53. The Capital Energy Group claim that the arbitral tribunal did not dismiss Alfanar's delayed filing of applications and documents.

54. While it is not disputed that the submissions in question were provided with the delays of 7 and 22 minutes, respectively, in relation to the timetable prescribed by the arbitral tribunal, the claimants in this action have not established any breach of the principle of contradictionsince the parties were given the opportunity to discuss these documents and these requests, both as regards their admission and their content in relation to the claims and arguments exchanged. No prejudice has been shown as a result of the delaysobserved.

55. Nor can they claim that there has been a breach of equality of arms since it is clear from the proceedings that they themselves benefited from the arbitral tribunal's admissionof the delayed issuing of witness statements and an expert's report to which Alfanar had objected.

56. Lastly, the arbitral tribunal's admission, during an evidentiary hearing initiated in order to hold the hearing of a witness, of an email cited by the witness in witness' statement and which had not previously been included in the proceedings, did not constitute a breach of the principle of contradiction. Alfanar rightly argued on this point that it had been issued before the closing of the proceedings and that the parties had been able to discuss the document in question.

57. As the argument is inoperative, it will be rejected on these grounds.

(iii) <u>The third part of the argument</u>

58. While it is common ground that the Capital Energy Group opposed the principle of using videoconferences for the evidentiary hearings, they have not demonstrated how the organisation selected by the arbitral tribunal for the conduct of the proceedings and the holding of these hearings would have undermined the principle of contradiction and equality of arms.

59. On this point, the Court noted that:

- the claimants in this action do not establish, or even allege, that the parties were not treated equally at those hearings held by the arbitral tribunal on the basis of a protocol agreed with the parties, to which they provided their consent ;

- Nor has it been demonstrated that they were not able to maintain their arguments and claims or to gain access to the arbitral tribunal under conditions which ensured that their arguments were heard and that the parties complied with the principles of equality of arms ;

- Upon request by the arbitral tribunal to comment on this point, the parties indicated that they had no objections or restrictions concerning the conduct of the proceedings, as can be seen from the transcript of the hearing of 17th December 2020 produced at the hearing ;

- they cannot therefore rely on any breach on this ground before the

annulment judge.

60. It follows that this part of the argument must be rejected.

(iv) The fourth part of the argument

61. The claimants in the action complain that the arbitral tribunal based its decision on the "dissociation of the applicability of Article 1124 of the Spanish Civil Code depending on whether it is applied to the Capital Energy Group or Alfanar", a dissociation which they regard as revealing an unequal treatment in the application of the rule of law.

62. In so doing, they questioned the reasoning followed by the arbitrators and the grounds of the award, which is not for the annulment judge to assess.

63. This part of the argument, which is inoperative, will also be rejected.

C. The third argument alleging that the award is contrary to international public policy

64. The Capital Energy Group argue that the recognition or enforcement of the arbitral award wouldbe contrary to international public policy:

- due to the prejudice to their procedural rights by the arbitral tribunal as previously stated ;

- due to the recognition of a perpetual commitment by their order to compensate 75% of the guarantee that would be collected by the Spanish authorities from Alfanar without any time limit, such a sanction breaching boththe French concept of international public policy and the Spanish law applicable to the dispute.

65. Alfanar replies that:

- the arbitral tribunal conducted the arbitration proceedings in compliance with the procedural rights of each of the parties, with the claimants in this action having waived their right to rely on the alleged procedural irregularities and therefore on a breach of procedural public policy before the annulment judge ;

- the mere alleged breach of a Spanish Police Act cannot in itself lead to the annulment of an arbitration award. The obligation to compensate 75 % of the guarantee is not unlimited in time.

THEREUPON:

On legal grounds

66. It follows from Article 1520 5° of the French Code of Civil Procedure that the court hearing the annulment must determine whether the recognition or enforcement of the award is compatible with international public policy.

67. The international public policy in relation to which the annulment judge implements the review shall comply with the concept of the public policy of

the French legal system, i.e., the values and principles with which the judge should be familiar, upholding even in an international context.

68. The review implemented by the annulment judge in defence of international public policy is limited to examining whether the implementation of the provisions adopted bythe arbitral tribunal expressly, completely and concretely breaches the principles and values included in international public policy.

(i) The first part of the argument

69. Where equality of arms between the parties is a crucial part of fair trial protected by international public policy, it follows from the foregoing findings and grounds that there has been no breach of that principle in the present case, nor any breach of the principle of contradiction, which has not been upheld. Therefore, the arguments and claims developed in that regard by the Capital Energy Group, which are merely a repetition of those presented in support of the second argument, examined above, in fact, appear to be insufficient.

70. This argument cannot therefore succeed.

(ii) The second part of the argument

71. The contested award orders the Capital Energy Group, jointly and severally, to compensate thedefendant for 75% of any bank guarantee cashed by the Spanish authorities in respect of the 158.7 MW corresponding to the seven wind farms under contract, with Alfanar being liable for providing proof of cashing of the guarantee by the Spanish authorities when it submits its claim for reimbursement.

72. Contrary to what the claimants in this action maintain, these provisions of the operative part do not constitute a "perpetual commitment", but an order to compensate for losses relating to the implementation of a guarantee. Such implementation, which does not dependsolely on the Alfanar's intent, but on the recovery of that guarantee by the competent authorities, is subject to a limitation period under Spanish law.

73. The means, which appear to be insufficient, are therefore once again inoperative.

74. It follows from the foregoing that none of the complaints made by the Capital Energy Group are such as to render the contested award void. The claimants' action for annulment will therefore be dismissed.

D. Costs and expenses

75. The Capital Energy Group, which are unsuccessful, will be ordered to pay the costs of the proceedings. Their claim under Article 700 of the French Code of Civil Procedure will be dismissed.

76. They will also be ordered to pay Alfanar the sum of 50,000 euros in respect of irreducible costs incurred by the latter and not included in the costs, on the basis of the same article.

IV/ PROVISIONS

On these grounds, the Court:

1) Dismisses the action for annulment brought by Capital Energy Proyectos Energeticos SLU, Capital Energy Solar Eolica SL and Green Capital Power SL against the final arbitral award made on 12th April 2021 under the aegis of the International Chamber of Commerce of the International Court of Arbitration in case no. 24091/JPA ;

2) Orders Capital Energy Proyectos Energeticos SLU, Capital Energy Solar Eolica SL and Green Capital Power SL to jointly and severally pay Alfanar the sum of fifty thousand euros (50,000€) under Article 700 of the French Code of Civil Procedure ;

3) Orders Capital Energy Proyectos Energeticos SLU, Capital Energy Solar Eolica SL and Green Capital Power SL to jointly and severally pay the costs.

THE REGISTRAR, THE PRESIDENT,