

FRENCH REPUBLIC
ON BEHALF OF THE FRENCH PEOPLE

PARIS COURT OF APPEAL

**International Commercial Chamber
DIVISION 5 – CHAMBER 16**

JUDGEMENT OF 19 DECEMBER 2023

(no. 90 /2023, 9 pages)

General directory entry number: **No. RG 22/03773 – No. Portalis 35L7-V-B7G-CFJ2K**

Decision referred to the Court: final award rendered in Paris, on 23 November 2021, under the Rules of Arbitration of the International Chamber of Commerce, in the case registered under reference ICC 22137/ZF/AYZ.

APPLICANT:

Company GURIS INSAAT VE MUHENDISLIK A.S.

a company incorporated under Turkish law,
having its registered office at [Adress 1] (TURKEY)
in the person of its legal representatives,

*Represented, as counsel with right of audience, by Luca DE MARIA of SELARL
PELLERIN - DE MARIA - GUERRE, of the Paris Bar, locker: L0018
Represented, as trial counsel, by Thomas CLAY and Taha ZAHEDI VAFA, of CLAY
ARBITRATION, Avocats, Paris Bar, locker: G0408*

RESPONDENTS:

STATE OF LIBYA

a legal entity under public international law, acting through the Chairman of the State
Litigation Department on behalf of the State of Libya

[Address 2] (LIBYA)

*Represented, as counsel with right of audience and trial counsel by Carole SPORTES
LEIBOVICI of SELARL HAUSSMANN ASSOCIES- SQUIRE PATTON BOGGS, of the
PARIS Bar, locker: P0443*

COMPOSITION OF THE COURT:

The case was heard on 03 October 2023, in open court, before the Court composed of:

Mr. Daniel BARLOW, President
Ms. Fabienne SCHALLER, President
Ms. Laure ALDEBERT, Judge

who ruled on the case.

A report was presented at the hearing by Ms. Laure ALDEBERT under the conditions provided for by Article 804 of the French Code of Civil Procedure.

Court Clerk at the hearing: Ms. Najma EL FARISSI

JUDGEMENT:

- adversarial

- judgement 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 French Code of Civil Procedure.

- signed by Daniel BARLOW, President, and by Najma EL FARISSI, Court Clerk to whom the judgement's original was delivered by the signatory judge.

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I/ FACTS AND PROCEDURE

1. The Court is seized of an action for annulment of a final arbitration award rendered in Paris on 23 November 2021, under the Rules of Arbitration of the International Chamber of Commerce (hereinafter the "ICC"), in a dispute between Güriş Insaat Ve Muhendislik A.S. (hereinafter "Güriş") and the State of Libya.

2. Güriş is a Turkish company which has been awarded a series of contracts by the State of Libya, including the construction of a public park in Tripoli. Work began in 2009.

3. Libya experienced two episodes of war in 2011 and 2014, during which work was suspended and not resumed for reasons that are disputed.

4. In 2015, Libyan citizens claimed ownership of parts of the land allocated to the Public Park Project in Tripoli. On 18 March 2015, the National Anti-Corruption Committee and the Committee for the Census of Affected Persons agreed in principle to the restitution of these plots.

5. On 22 November 2016, Güriş employees who were still on site were violently attacked by an armed militia.

6. It was against this backdrop that Güriş, considering that the restitution decision of 18 March 2015 constituted an expropriation and that the State of Libya had breached its international obligations, initiated arbitration proceedings on 21 July 2016 on the basis of Article 8 of the Bilateral Investment Treaty between the Great Socialist People's Libyan Arab Jamahiriya (now the State of Libya) and Turkey dated 25 November 2009 (hereinafter the "BIT"), under the 2012 ICC Rules of Arbitration.

7. Güriş sought compensation for all the damage suffered as a result of the Libyan State's breaches of the BIT.

8. In a partial award rendered on 4 February 2020, the arbitral tribunal ruled as follows:

"For the reasons set forth above, the Arbitral Tribunal decides the following:

Claimants claim concerning the breach of the standard of full protection and security under Article 2(2) of the Turkey-Libya BIT is partially granted in relation to the incident that occurred on 22 November 2016.

Claimants claim concerning the violation of Article 4 of the Turkey-Libya BIT is partially granted in relation to the expropriation of the Tripoli Public Park Project, which is considered established.

All other claims are dismissed, with the exception of the damages claimed by Claimant in relation to the incident that occurred on 22 November 2016 and the expropriation of the Tripoli Public Park Project, which will be determined in a subsequent award. The Parties will have further opportunity to set out their positions with respect to these claims.

The Arbitral Tribunal will, together with the Parties, determine the next procedural steps in order to quantify the damage suffered by Claimant due to the above-mentioned violations of the Turkey-Libya BIT.”

Free translation:

“*[translation into French of the above text]*”

9. In a final award rendered on 23 November 2021, the arbitral tribunal ruled that:

“Güris Insaat ve Miihendislik A.S.’s claim for damages for the breach of Article 4 of the Turkey-Libya BIT is rejected.

Güris Insaat ve Miihendislik A.S.’s claim for moral damages is rejected.

Güris Insaat ve Miihendislik A.S. shall bear 70% of the arbitration costs fixed by the ICC Court at USD 1,322,500 (i.e. USD 925,750). In light of the fact that the State of Libya did not pay any advances on costs to the ICC, it shall reimburse USD 396,750 (or EUR 342,676) to Güris Insaat ve Muhendislik A.S. Giiris Insaat ve Miihendislik A.S. shall bear 70% of the State of Libya’s costs related to the arbitration proceedings, which represent EUR 1,800,778.53. As a consequence, Giiris Insaat ve Muhendislik A.S. is ordered to pay EUR 1,458,102.53 to the State of Libya for its costs incurred in relation to the arbitral proceedings with interest at €STR plus 1%, which shall start running 30 days after the notification of the Final Award and until the date of effective payment.

All other claims are dismissed”.

Free translation:

“*[translation into French of the above text]*”

10. Güriş lodged an action for annulment of the final award with the Paris Court of Appeal on 18 February 2022.

11. The parties have agreed to the protocol of the International Commercial Chamber of the Paris Court of Appeal.

12. The proceedings were closed on 26 September 2023 and the case was called for oral argument on 3 October 2023.

II/ CLAIMS OF THE PARTIES

13. According to their latest submissions, sent electronically on 28 April 2023, Güriş asks the Court to:

- GRANT ANNULMENT of the arbitral award dated 23 November 2021;
- ORDER the State of Libya to pay it the sum of 200,000 euros under Article 700 of the French Code of Civil Procedure;
- ORDER the State of Libya to pay all the costs.”

14. According to their latest submissions, sent electronically on 28 July 2023, the State of Libya asks the Court to:

- DISMISS Güriş Insaat Ve Muhendislik A.S.’s action for annulment of the arbitral award rendered on 23 November 2021, pursuant to Article 1520 of the French Code of Civil Procedure;
- ORDER Güriş Insaat Ve Muhendislik A.S. to pay all the costs of the proceedings and the sum of 200,000 euros to the State of Libya on the basis of Article 700 of the French Code of Civil Procedure”.

III/ REASONS FOR THE DECISION

15. In support of its action, Güriş puts forward three grounds for annulment, alleging that the arbitral tribunal failed to comply with its terms of reference (A), that it breached the adversarial principle (B) and that the recognition or enforcement of the contested award was contrary to international public policy (C).

A. The first plea alleging that the arbitral tribunal failed to comply with its terms of reference

16. Güriş argues that the arbitral tribunal refused to exercise the powers entrusted to it by the parties.

17. It criticizes the arbitrators for not ruling on its claim for compensation for the expropriation of the Tripoli Public Park Project, even though the illegality it had found in the previous award required it to do so, and for refusing to assess its loss on the grounds that it did not have sufficient evidence, leaving open the possibility for Güriş to assert its claim on the basis of different evidence in future proceedings.

18. It argues that the arbitral tribunal had all the necessary information, in particular five expert reports assessing the Tripoli Public Park Project, to decide on the quantum, and that failing this, it was within its power to carry out the necessary investigative measures pursuant to Article 1467 of the French Code of Civil Procedure.

19. It adds that by concluding that it would be possible to bring a new case if there were new elements, the arbitral tribunal clearly departed from its mission, that it did not render a final award on the dispute submitted to it, characterizing a denial of justice, this last grievance also constituting a breach of international public policy and a ground for bringing an action for annulment of the award that it also opposes.

20. It further contends that by rejecting the claim in its entirety, merely stating that it was not in a position to assess the value of the Tripoli Public Park Project, the arbitral tribunal failed to give reasons for its decision to reject its claim for compensation for consequential loss in the amount of 12.9 million euros, which appeared in a section separate from that dealing with the value of the Tripoli Public Park Project contracts.

21. In this respect, it underlines that it is not accusing the arbitral tribunal of failing to rule on this ground of claim for compensation for consequential loss resulting from the unlawful acts of the State of Libya, but rather of failing to state the reasons, thus characterizing a failure by the arbitral tribunal to comply with its terms of reference, which must lead to annulment of the award.

22. In reply, the State of Libya concluded that the Tribunal had not breached its terms of reference.

23. It maintains that the arbitral tribunal did not commit a denial of justice when it concluded in a motivated manner that there was no actual and present damage in connection with the breach of the BIT.

24. It added that since Güriş had simply been invited to submit not the same claim, but different elements that would make it possible to characterize its loss, the possibility of pursuing other proceedings mentioned by the arbitral tribunal in the award had no bearing on the execution of its terms of reference, which had been completed.

25. Lastly, it argues that the arbitral tribunal, for the reasons given in the award, dismissed the claim for compensation for the expropriation of the Tripoli Public Park Project in all its direct and indirect consequences, pointing out that the claim for failure to state reasons, even if established in respect of the consequential damage, would fall within the scope of *infra petita* and would not constitute a ground for bringing an action for annulment of the award that it also opposes.

ON THIS MATTER:

26. Article 1520, 3°, of the French Code of Civil Procedure provides that an action for annulment may be brought if the arbitral tribunal has ruled without complying with the terms of reference entrusted to it.

27. These terms of reference, defined by the arbitration agreement, are delimited primarily 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.

28. In this case, the action for annulment lodged before the appeal court relates solely to the final award. The partial award, by which the arbitral tribunal decided to defer to its final award the fixing of damages and the determination of the procedural steps relating thereto, is not challenged.

29. Güriş argues that the arbitral tribunal disregarded its terms of reference by failing to rule on its claim relating to the expropriation of the Tripoli Public Park Project, which had been deemed unlawful in the partial award. It points to the arbitrators' refusal to rule on the quantum of its loss as a breach of Article 4 of the BIT, by referring the task assigned to them to another tribunal.

30. In this respect, it is undisputed and established by Güriş's written submissions to the arbitral tribunal that its claim for compensation included "the value of the Tripoli Public Park Contracts" of which it had been deprived by the expropriation and its financial consequences, for a total amount of 117,800,000 euros, in compensation for the loss and damage suffered by its investments in Libya.

31. It should be underlined that arbitrators do not have to respond to all the parties' arguments.

32. It is clear from the contested award that, having set out the respective positions of the parties (§ 58 to 131), determined the issues that needed to be addressed in order to rule on the claim (§ 146-152) - namely the analysis of the security situation in Libya, the contractual dispute between the Claimant and ODAC - and giving reasons on several pages for its answers to the questions thus posed, the arbitral tribunal dismissed the Claimant's claim for compensation for breach of Article 4 of the BIT (§ 193 to 200) and dismissed the claim for moral damages (§ 215 to 220).

33. Thus, it appears clearly from the award that the arbitral tribunal did not refuse to rule, but dismissed the claims on the grounds of insufficient evidence as part of its assessment of the elements in the case file falling within its jurisdictional powers.

34. By arguing that the arbitral tribunal ruled "contrary to all logic and against all expectations" and "failed to establish the value of the Tripoli Public Park Project", even though the existence of compensation in principle was established and the arbitral tribunal had the necessary elements or should in any case have carried out the investigative measures required to obtain them, Güriş is contesting the merits of the case, as well as the manner in which the arbitral tribunal motivated its award and settled the dispute. All of these elements fall outside the jurisdiction of the annulment court, who cannot review the award.

35. The fact that the arbitral tribunal gave its opinion as to whether the claimant can "pursue its claim" with new documents with another action, which is superfluous, does not call into question the final nature of the award which, in accordance with its operative part, dismissed Güriş' claim and, in so doing, executed its terms of reference.

36. Lastly, the claim that the arbitral tribunal failed to give reasons for its dismissal of part of Güriş's claim for compensation, apart from the fact that the annulment court is not empowered to review the reasons given by the arbitrators, is unfounded since the arbitral tribunal dealt in the award with "Güriş's claim for damages as submitted to the arbitral tribunal" (section 4.4), including both "the value of the Tripoli Park Projects due to unlawful expropriation" and "consequential losses" according to Güriş's submissions and calculation sheet (exhibit C 294), this latter head of loss being only one component of the same claim corresponding to the loss resulting from the expropriation, the amount of which has been added to the valuation of the contractual rights to form a single claim of 117,800,000 euros - in accordance with the terms of the operative part of its submissions, to which the arbitral tribunal has, for the reasons set out above, responded in a reasoned manner enabling the parties to know the reasons for its choice, which apply to both components of the loss.

37. The legal argument is therefore rejected.

B. The second plea alleging breach of the adversarial principle

38. Güriş, reiterating its arguments under the first plea, maintains that the arbitral tribunal twice disregarded the adversarial principle:

- by rejecting its claim on the pretext of an alleged lack of information to quantify the loss, whereas it was its task to pursue its investigations and request additional information, which it had moreover proposed to the arbitral tribunal on several occasions. In so doing, the applicant argues that the decision was rendered on the basis of its own shortcomings, depriving it of the opportunity to put forward its legal and factual arguments.

- by rejecting its claim for compensation for the value of consequential loss without explaining why it had made this choice, the arbitral tribunal having thus failed to provide it with the facts and law on which it based its decision.

39. The State of Libya contests the relevance of the claims for the reasons already set out in support of the rejection of the previous plea, arguing further that Güriş never considered throughout the proceedings that the arbitral tribunal had failed to conduct the proceedings properly.

ON THIS MATTER:

40. Article 1520-4° of the French Code of Civil Procedure provides for an action for annulment if the adversarial principle has not been complied with.

41. For the reasons set out above, which respond to the same claims raised under the guise of the adversarial principle, this plea must be rejected, as it is lacking in fact, since the criticism brought forward by the applicant consists in inviting the court to review the manner in which the arbitral tribunal settled the case, which is not its task. The court notes that:

- it has not been shown that the tribunal ruled on matters of fact or law that were not part of the case file, since Güriş is in fact complaining that the arbitrators did not go beyond the information provided to them by the parties;
- the adversarial principle does not require arbitrators to compensate for the failure of the parties to provide evidence, and the first part of the plea is therefore inoperative;
- the dismissal of the claim for consequential loss is well-founded, as appears from the foregoing, and the claim in this respect, which is factually unsubstantiated, is not related to the adversarial principle.

C. The third plea alleging that recognition or enforcement of the award is contrary to international public policy

42. Güriş maintains that the arbitral tribunal breached Article 1520-5° of the French Code of Civil Procedure for the same reasons as those given above:

- by failing to motivate its decision to dismiss compensation for consequential loss, which constitutes a breach of Article 6§1 of the ECHR and an infringement of the principle of compliance with the rights of the defense constituting international public policy;
- by refusing to assess the quantum of compensation for the loss suffered as a result of the breach of its contractual rights, which constitutes a denial of justice; and
- by disregarding the authority of *res judicata* attached to the partial award by making a final award irreconcilable with it, in the course of the same arbitration proceedings.

43. In this respect, it argues that by recognizing in the first award the unlawful nature of the expropriation and the unlawful deprivation of its contractual rights without awarding damages in the final award, the arbitral tribunal rendered a final decision contrary to its first decision, which had opened the way to compensation.

44. In reply, the State of Libya maintains, for the reasons already set out, that the tribunal duly ruled on the claim, to which it responded with a reasoned final award.

45. It argues that there is no contradiction between the partial award, which recognizes the existence of a harmful event, and the final award, which concludes that there was no damage, since the arbitral tribunal's role is not simply to calculate damages and interest.

ON THIS MATTER:

46. Under Article 1520-5° of the French Code of Civil Procedure:

“An annulment action is only available if:

(...) 5° Recognition or enforcement of the award is contrary to international public policy”.

47. The first ground, relating to the failure to state reasons for dismissing the claim for compensation for consequential loss, which is lacking in fact for the reasons given above, does not constitute a breach of international public policy.

48. The same is true of the claim based on denial of justice, which, for the reasons set out above, was dismissed, the court holding that the arbitral tribunal did indeed rule on the claim for compensation, by dismissing it.

49. Lastly, the final award, the only award submitted to the annulment court, which did not grant the claim for damages, cannot be criticized on the ground of the partial award, which is not submitted to the court.

50. Indeed, while the partial award held that the decision dated 18 March 2015 constituted a breach of Article 4 of the BIT by the State of Libya, in that it amounted to the expropriation of the Tripoli Public Park Project from Güriş that could open the way to compensation, it did not compel the arbitral tribunal to order the State of Libya to pay a sum.

51. As far as *res judicata* is concerned, the arbitral tribunal, after examining and analyzing the documents in the case file, concluded in the final award that Güriş had not demonstrated that it had actually suffered any loss, and it therefore cannot incur the criticism that the award had violated international public policy, so that the claim that the partial award had failed to take account of *res judicata* is not established.

52. For these reasons, this legal argument is also dismissed.

53. Consequently, the annulment action shall be dismissed.

D. Costs and expenses

54. Güriş, which is unsuccessful, will be ordered to pay the costs, its claim for irrecoverable costs being dismissed.

55. It will also be ordered to pay the State of Libya the sum of 20,000 euros under Article 700 of the French Code of Civil Procedure.

IV/ DECISION

On these grounds, the court:

1) Dismisses the action for annulment lodged by company Güriş Insaat Ve Muhendislik A.S. against the arbitral award rendered on 23 November 2021 in Paris under the ICC Rules of Arbitration in case no. ICC 22137/ZF/AYZ;

2) Dismisses its request for condemnation under Article 700 of the French Code of Civil Procedure;

3) Orders company Güriş Insaat Ve Muhendislik A.S. to pay the State of Libya the sum of twenty thousand euros (€20,000) pursuant to the provisions of Article 700 of the French Code of Civil Procedure;

4) Orders Güriş Insaat Ve Muhendislik A.S. to pay all costs.

THE COURT CLERK,

THE PRESIDENT,
