

FRENCH REPUBLIC
ON BEHALF OF THE FRENCH PEOPLE

PARIS COURT OF APPEAL

International Commercial Chamber
DIVISION 5 - CHAMBER 16

JUDGMENT OF 23 JANUARY 2024

(n° 10 /2024, 10 pages)

General directory entry number: **No. RG 22/00275 - No. Portalis 35L7-V-B7G-CE5JX**

Decision referred to the Court: arbitral award rendered on 5 October 2021 in [Locality 1], under the aegis of the ICC Rules of Arbitration in case no. ICC 23851/DDA/AZO

APPLICANT:

Company SICON OIL & GAS S.P.A.

an Italian company,
having its registered office at: [Address 3] (ITALY),
in the person of its legal representatives,

Represented, as counsel with right of audience, by: Michel GUIZARD of SELARL GUIZARD ET ASSOCIES, of the PARIS Bar, locker: L0020

Represented, as trial counsel, by: Gabriele RUSCALLA, of the PARIS Bar

RESPONDENT:

MELLITAH OIL & GAS B.V.

a company registered in the NETHERLANDS,
having its registered office at: [Address 2], (NETHERLANDS),
in the person of its legal representatives,

Represented, as counsel with right of audience, by: Matthieu BOCCON GIBOD, of the SELARL LEXAVOUE PARIS-VERSAILLES, of the PARIS Bar, locker: C2477

Represented, as trial counsel, by: Olivier LOIZON, member of the PARIS Bar, locker: R 145

COMPOSITION OF THE COURT:

The case was heard on 07 November 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. Fabienne SCHALLER, under the conditions provided for by article 804 of the French Code of Civil Procedure.

Court Clerk at the hearing: Ms. Najma EL FARISSI

JUDGMENT:

- adversarial

- judgment made available at the Court 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 Mr. Daniel BARLOW, President, and by Ms. Najma EL FARISSI, Court Clerk to whom the judgment's original was delivered by the signatory judge.

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I/ FACTS AND PROCEDURE

1. The Paris Court of Appeal is seized of an action for partial annulment of an arbitral award rendered in Paris on 5 October 2021 under the aegis of the International Court of Arbitration of the International Chamber of Commerce, in a dispute between:

- Sicon Oil & Gas S.P.A, a company incorporated under Italian law (hereinafter "Sicon") specializing in engineering, procurement and construction projects, with expertise in the oil and gas sector, and

- Mellitah Oil & Gas B.V, a company incorporated under Dutch law (hereafter "Mellitah"), which operates onshore fields in Libya, manages a pipeline network and exports natural gas.

2. The dispute at the origin of this award relates to a contract for the engineering, procurement and construction of a gas-oil separation and gas compression plant in Libya entered into on 17 April 2008 (hereinafter the "Contract").

3. Various circumstances, including the Libyan revolution in 2011, disrupted the performance of the Contract. Sicon requested the termination of the Contract on 14 March 2016 due to a fault of Mellitah, and initiated arbitration proceedings on 2 August 2018 on the basis of the arbitration clause inserted in article 30.3 of the general terms and conditions included in the parties' agreement.

4. In an award rendered in Paris on 5 October 2021, the arbitral tribunal ruled as follows:

[In english:]

"676 In light of the above, the Arbitral Tribunal renders the following Final Award. The Arbitral Tribunal decides and orders that:

i. Mellitah Oil & Gas B.V. shall pay EUR 339,117.80 to Sicon Oil and Gas S.p.A. for the amounts owed under Invoice 20/2013(a), Invoice 20/2013(b), Invoice 2/2014, Invoice 3/2014 and Invoice 4/2014;

ii. Mellitah Oil & Gas B.V. shall pay EUR 488,690.74 to Sicon Oil and Gas S.p.A. for legal interest on unpaid and delayed invoices;

iii. Mellitah Oil & Gas B.V. shall pay EUR 2,207,431.30 to Sicon Oil and Gas S.p.A. for the remaining portion of the Retention Money;

iv. Mellitah Oil & Gas B.V. shall pay EUR 8,880,000 to Sicon Oil and Gas S.p.A. for reimbursement of the Performance Guarantee;

v. The amount of the pending advance payment which is due to Mellitah Oil & Gas B.V. (EUR 60,365.97) shall be offset from the payments set forth in items i. to iv. above;

- vi. Sicon Oil and Gas S.p.A.'s request for a declaration that the Contract was validly terminated on 14 March 2016 is granted;
- vii. Sicon Oil and Gas S.p.A.'s claim for hardship is rejected;
- viii. Sicon Oil and Gas S.p.A.'s claim for unjust enrichment is rejected;
- ix. Mellitah Oil & Gas B.V.'s counterclaim for liquidated damages is rejected;
- x. Mellitah Oil & Gas B.V.'s counterclaim for clawback is rejected;
- xi. Sicon Oil and Gas S.p.A. and Mellitah Oil & Gas B.V.'s requests for adverse inferences are rejected;
- xii. Sicon Oil and Gas S.p.A.'s requests for interest (excluding the interest granted under item ii. above), possible enforcement and foreclosure costs and expenses are rejected;
- xiii. Each Party shall bear its own legal costs and expenses;
- xiv. Each Party shall bear one half of the ICC costs of arbitration fixed by the ICC Court at USD 884,000 (i.e., USD 442,000 for each Party). As a consequence, there shall be no payment of the ICC costs of arbitration between the Parties;
- xv. This Final Award shall be immediately and provisionally enforceable;
- xvi. All other claims for relief from the Parties are hereby rejected".

Translation

[Translation into French of the above paragraphs]

5. On 24 December 2021, Sicon lodged an action for partial annulment of the award.

6. The proceedings were closed on 13 June 2023 and the hearing was held on 7 November 2023.

II/ CLAIMS OF THE PARTIES

7. According to its latest submissions, sent electronically on 21 February 2023, Sicon asked the court, under Article 1520 of the French Code of Civil Procedure, to:

Annul the Arbitral Award rendered in ICC Case No. 23851/DDA/AZO on 5 October 2021 between SICON OIL & GAS S.P.A. and MELLITAH OIL & GAS B.V. insofar as it:

- Ordered to offset the amounts owed by Mellitah Oil & Gas B. V. to Sicon Oil and Gas S.p.A. and the amount of the pending advances by Sicon Oil and Gas S.p.A. to Mellitah Oil & Gas B.V. for EUR 60,365.97 (Award, §676 (v));
 - Rejected Sicon Oil and Gas S.p.A's claim for damages for hardship (Award, §676 (vii));
 - Rejected Sicon Oil and Gas S.p.A's claim for damages for unjust enrichment (Award, §676 (viii));
 - Rejected Sicon Oil and Gas S.p.A's claim for damages for adverse inferences (Award, §676, (xi));
 - Rejected Sicon Oil and Gas S.p.A.'s claim for reimbursement of enforcement and foreclosure costs and expenses, with interest (Award, §676, (xii));
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- Ordered Sicon Oil and Gas S.p.A. to bear its costs and expenses incurred for the purposes of the proceedings (Award, §676, (xiii));
- Ordered Sicon Oil and Gas S.p.A. to bear half of the ICC costs of arbitration, fixed by the ICC at USD 884,000, i.e. USD 442,000 dollars for Sicon Oil and Gas S.p.A. and as consequence decided that there would be no payment of the ICC costs of arbitration between the parties (Award, §676 (xiv));
- Rejected all other claims for relief from Sicon Oil and Gas S.p.A. (Award, §676 (xvi)).

8. According to its latest submissions, sent electronically on 19 May 2023, Mellitah asked the court to:

- Dismiss Sicon Oil & Gas S.p.A.'s action for annulment;
- Dismiss the claims, requests and arguments of Sicon Oil & Gas S.p.A.;
- Order Sicon Oil & Gas S.p.A. to pay Mellitah Oil & Gas B.V. the sum of EUR 50,000 pursuant to the provisions of Article 700 of the Code of Civil Procedure, as well as all costs, which will be awarded to Selarl Lexavoue Paris Versailles.

III/ REASONS FOR THE DECISION

9. Sicon puts forward three grounds for partial annulment of the award, based on the arbitral tribunal's failure to comply with its terms of reference (A), its failure to comply with the adversarial principle (B) and the conflict between the enforcement of the award and international public policy (C).

10. Mellitah answers that Sicon is trying to turn the annulment action into an appeal procedure, as the court does not review the content of the grounds. It contests any breach of the adversarial principle or of international public policy.

A. The ground according to which the arbitral tribunal failed to comply with its terms of reference

11. Sicon argues that the tribunal breached its terms of reference by failing to comply with its obligation to state its reasons under article 32(2) of the ICC Rules of Arbitration.

12. It argues, regarding the offset (i) that:

- the tribunal did not rule on Sicon's grounds for rejecting Mellitah's claim for reimbursement of advance payments,
- the tribunal ordered offset between the sums claimed by Mellitah for reimbursement of the advance payment and the payments owed by Mellitah to Sicon, wrongly interpreting Sicon's silence as acceptance, whereas the claim was unfounded,
- the tribunal erroneously stated in the award's statement of reasons that its decision on offset was justified,
- the tribunal did not rule on the merits of Sicon's defense to Mellitah's reimbursement claim.

13. It then argues, on the claim for damages (ii) that:

- by rejecting “*all other claims for relief*”, the arbitral tribunal rejected its claim for compensation for the replacement of equipment,
- it rejected any compensation on the grounds that this diligence was allegedly included in the scope of the contract, as allegedly stemming from the correspondence between the parties and in Mellitah’s denials,
- However, the tribunal did not examine the factual arguments put forward by Sicon in support of its case.

14. On unforeseeability, (iii) it argues that:

- by rejecting its claim based on unforeseeability on the grounds that article 147 of the Libyan Civil Code provides that such a claim made after termination of the Contract must be rejected, the arbitral tribunal breached its terms of reference by failing to rule on the arguments raised by Sicon to the effect that its claims had been made prior to termination of the Contract.

15. On unjust enrichment (iv), Sicon maintains that:

- by rejecting its claim based on unjust enrichment on the grounds that Mellitah could not be considered to have enriched itself, the arbitral tribunal breached its terms of reference by failing to rule on the arguments and documents presented by Sicon to demonstrate Mellitah’s enrichment.

16. On Sicon’s claim for interests and enforcement costs (v), Sicon argues that:

- by rejecting its claim on the grounds that it was imprecise, the arbitral tribunal breached its terms of reference by failing to seek explanations for its claim.

17. On the claim for the costs of the proceedings (vi), it maintains that:

- the annulment of the above-mentioned decisions of the arbitral tribunal shall entail the annulment of the tribunal’s decision on the costs of the proceedings, failing which there would be a contradiction of reasons which would amount to a failure to state reasons.

18. Mellitah replies that neither the failure to state reasons for an award, nor the failure to answers to the heads of claim, nor the contradiction of reasons constitute grounds for annulment of an arbitral award, and that all the arguments and grounds are factually lacking.

19. It argues that:

- (i) as regards the offset, Sicon formally replied in writing that it did not object to the request to reimburse the advance payment of EUR 60,365.97 to offset any amount awarded to it. In this respect, no failure by the arbitral tribunal to comply with its obligation to state reasons can be established;
 - (ii) as regards the complaint of misrepresentation concerning the claim for damages, this complaint does not constitute a case for initiating an action for annulment and cannot be equated with a failure to comply with the tribunal’s terms of reference, especially as the arbitral tribunal devoted three pages to answering the question. The fact that Sicon is not satisfied with the tribunal’s conclusion cannot constitute grounds for annulment.
 - (iii) as regards unforeseeability, Sicon has not demonstrated that it formulated its claim for hardship prior to the termination of the Contract, and in any event this claim is factually unsubstantiated.
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- (iv) as regards unjust enrichment, it was after analyzing the question in law and in fact that the tribunal ruled out the theory of unjust enrichment. It added that the arbitral tribunal's failure to respond to the parties' arguments and documents did not constitute a breach of its terms of reference.
- (v) as regards interests and enforcement costs, Sicon cannot without ground blame the court for not upholding its claims. In any event, this complaint does not give rise to any grounds for annulment.
- (vi) as regards the contradictory grounds concerning the costs of the proceedings, in the event of annulment of the award, the claim is irrelevant and lacking in fact as well as in law.

20. The court refers to the abovementioned submissions for a full presentation of the parties' arguments, in accordance with article 455 of the French Code of Civil Procedure.

ON THIS MATTER,

21. Under article 1520, 3°, of the French Code of Civil Procedure, an action for annulment may be brought if the tribunal has ruled without complying with its terms of reference.

22. The arbitrators' terms of reference, as defined by the arbitration agreement, are delimited primarily by the subject matter of the dispute, as determined by the parties' claims, without there being any need to focus solely on the statement of issues in the terms of reference.

23. With regard to the obligation to state reasons for the award, which is part of the arbitrators' terms of reference under article 32 of the ICC Rules (2017), to which the parties in this case intended to subject the arbitral proceedings, the annulment court's review is however limited to verifying the existence of a statement of reasons, without assessing its relevance, merits, intelligibility or coherence, unless the principle of non-review of the merits of arbitral awards is breached.

24. Finally, arbitrators do not have to follow the parties' arguments in detail.

25. In the present case, it follows from the above that the complaint that the arbitral tribunal failed to take into account the contrary elements put forward by Sicon in its submissions, and in particular the fact that its silence would have been interpreted as an acquiescence to the proposed compensation, is an argument that goes to the heart of the matter and that it is therefore not for the court to reconsider. The arbitrators' reasoning for retaining the offset, the existence of which is not disputed by Sicon, which expressly refers to the disputed reasoning, is not subject to review and does not constitute grounds for annulment.

26. The complaints of misrepresentation of claims, failure to rule, misapplication of the law, rejection of factual arguments put forward by a party, imprecision and contradiction of grounds, as set out by Sicon in its submissions and recalled above in the statement of the claims of the parties, do not constitute grounds for annulment of an award within the meaning of article 1520 of the French Code of Civil Procedure.

27. All the claims raised, which are based solely on one or other of these complaints, and which do not constitute a lack of reasoning, are lacking in fact and in law and shall not lead to the annulment of the award for breach of the terms of reference.

28. The request for annulment on this ground must be rejected.

B. The ground based on the failure to comply with the adversarial principle

29. Sicon maintains that the arbitral tribunal breached the adversarial principle in three respects:

- (i) by rejecting its request for payment of invoice no. 1/2016 in the amount of EUR 514,000 without the parties being able to discuss either the acceptance of this invoice, or the question of the possibility of circumventing the absence of a request for variation, but of the effect of the alleged non-completion of the work on the due date of the invoice and of the formalism of the variation requests, distorting the respective claims and defenses of the parties;
- (ii) by rejecting all its other claims for damages, substituting the issue of causation, not disputed by the parties, for that of the existence of the obligation, and in so doing distorting the parties' claims;
- (iii) by rejecting its claim based on unjust enrichment on the grounds that there was a contractual relationship between Sicon and Mellitah, on the basis of arguments that were not the subject of an adversarial debate between the parties.

30. In response, Mellitah argues that:

- (i) the debate concerning invoice no. 1/2016 did not focus on whether Mellitah had refused to approve this invoice, but on whether it had been justified in doing so, which was set out in the submissions exchanged, the reading of said submissions and of the award establishing that the adversarial process had not been breached;
- (ii) the issue of causation is raised in the submissions and refers to Libyan law, which states that damage is not compensable if it is not caused by the fault of the co-contractor. Sicon provided a copy of article 224(1) of the Libyan Civil Code, which requires a causal link, and the arbitral tribunal did not breach the adversarial principle in this respect;
- (iii) the arguments relating to Libyan law on the theory of unjust enrichment were based on Libyan law, and developed in Mellitah's submissions.

ON THIS MATTER,

31. Article 1520, 4°, of the French Code of Civil Procedure provides for an action for annulment when the adversarial principle has not been complied with.

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

33. It follows from the reasons given above concerning the alleged failure to state reasons for breach of terms of reference that the applicant is in fact seeking to revise the award and to ask the court to review the way in which the arbitral tribunal ruled on the case, which is not its role.

34. With regard more specifically to the three claims mentioned above, it should be noted that:

- The conditions for validating the payment of the invoices and the work invoiced were put up for debate by Mellitah in its submissions to the arbitral tribunal (Sicon exhibit no. 9 §239 and 240), with Mellitah concluding that the payment should be rejected, and the arbitral tribunal upholding in the award

the rejection of said invoice on said grounds (award §399): *“The files of the case therefore establish that the Respondent did not approve invoice 1/2016. As discussed above in paras. 380-382, in order for the Claimant to be paid for this invoice, the Claimant must demonstrate that the Respondent should have approved this invoice. The Claimant has not established that the vacuum truck and Mimic Panel were outside the scope of the Works and that a variation order should have been approved by the Respondent, allowing additional payment through said invoice. Consequently, the Arbitral Tribunal rejects the Claimant’s request for payment of invoice 1/2016”*.

- The causal link between breach and damage for the payment of damages was raised in Mellitah’s submissions (Sicon exhibit no. 9 §117), this link being provided for under Libyan law and repeated in the award. The tribunal concluded (award §371): *“It follows from this provision that the establishment of contractual liability is subject to three conditions under Libyan law: (i) the existence of damage; (ii) non-performance or delay in performance of a contractual obligation; and (iii) a causal link between the two preceding conditions. Consequently, in accordance with the Libyan Civil Code, the Arbitral Tribunal must dismiss a claim for contractual liability where one or more of these conditions are lacking.”*
- the conditions of the theory of unjust enrichment were developed in Mellitah’s submission (Sicon exhibit n°9 §248-252), and repeated in the award (§600-609), thus complying with the adversarial debate. Apart from the fact that the reference to the contract was indeed part of the debate, this ground was not decisive, since the tribunal rejected the claim on the basis of the lack of enrichment and not on the basis of the existence of a contract, and the ground of breach of the adversarial principle must therefore be dismissed.

35. As a result, it has not been demonstrated that the tribunal ruled on matters of fact or law that were not part of the debate. In fact, Sicon complains that the arbitrators rejected its claims on the basis of the substantive information provided by Mellitah in its submissions, which were duly submitted to the adversarial debate.

36. The complaint alleging breach of the adversarial principle must be rejected.

C. The ground that enforcement of the award is contrary to international public policy

37. Sicon argues that by failing to comply with its terms of reference, in particular the obligation to state reasons, and by breaching the adversarial principle, in particular with regard to misrepresentation, the arbitral tribunal breached international public policy.

38. Mellitah replies that:

- the arbitral tribunal’s failure to reply to the parties’ arguments and its distortion of the parties’ claims do not constitute grounds for an action for annulment;
- Sicon has not demonstrated how the award breaches international public policy. Instead, it uses a ground for annulment to seek a review of the merits of the award.

ON THIS MATTER,

39. Under article 1520, 5° of the French Code of Civil Procedure, an action for annulment may be brought against an international award rendered in France if the recognition or enforcement of that award is contrary to international public policy.

40. The requirement to give reasons for judicial decisions is an element of the right to a fair trial. Arbitrators who fail to give reasons for their decisions disregard the scope of their terms of reference, and the recognition of an award lacking reasons is contrary to the French concept of international public policy.

41. However, the annulment court's review only concerns the existence and not the relevance of the reasons of the award, and it has been established in this case that the reasons are not contested in their reality, but in their content and substance, which is beyond the control of the annulment court.

42. Similarly, the misrepresentation of an argument, assuming it is established, does not constitute a failure to state reasons, which could be qualified as a breach of international public policy.

43. The claim alleging breach of international public policy should therefore be dismissed as unfounded.

44. For all the above reasons, the action for annulment must be dismissed.

D. Costs and expenses

45. Sicon, the losing party, will be ordered to pay all costs.

46. It will also be ordered to pay Mellitah the sum of EUR 30,000 under article 700 of the French Code of Civil Procedure.

IV/ DECISION

On these grounds, the court hereby:

1) Dismisses the action for annulment lodged by the company Sicon Oil & Gas SpA against the arbitral award rendered on 5 October 2021 in [Locality 1] under the aegis of the ICC Rules of Arbitration in case no. ICC 23851/DDA/AZO;

2) Orders the company Sicon Oil & Gas SpA to pay the company Mellitah Oil & Gas BV the sum of thirty thousand euros (EUR 30,000) pursuant to article 700 of the French Code of Civil Procedure;

3) Order the company Sicon Oil & Gas SpA to pay all costs.

THE COURT CLERK,

THE PRESIDENT,