

FRENCH REPUBLIC
ON BEHALF OF THE FRENCH PEOPLE

PARIS COURT OF APPEAL

International Commercial Chamber
DIVISION 5 – CHAMBER 16

JUDGEMENT OF 05 DECEMBER 2023

(no. 85 /2023, 18 pages)

General directory entry number: **No. RG 22/11002 – No. Portalis 35L7-V-B7G-CF6NZ**

Decision referred to the Court: arbitral award entitled “final award” dated 28 January 2022, rendered in Paris under the aegis of the International Court of Arbitration of the International Chamber of Commerce under reference no. ICC 24692/AYZ.

APPLICANTS:

Company RAIYA GROUP

a company incorporated under Iraqi law,
having its registered office at: [Address 5] (IRAQ),
in the person of its legal representatives,

Mr. [G][J][L][R]

born on 21 September 1983 in [Locality 6] (IRAQ)
Residing: [Address 9] (IRAQ)

Represented, as counsel with right of audience, by: Mr. Luca DE MARIA of SELARL PELLERIN - DE MARIA - GUERRE, of the Paris bar, locker: L0018

Represented, as trial counsel, by: Mr. Jacques PELLERIN, of the Paris Bar, locker: L0018 and Mr. Georges AFFAKI, of law firm AFFAKI, member of the Paris Bar

RESPONDENT:

Company CREST FOODS INTERNATIONAL LTD

a company incorporated in the British Virgin Islands under number 1510116
having its registered office at: [Address 2] TEXAS [Address 2] (UNITED STATES)
in the person of its legal representative,

Represented, as counsel with right of audience, by: Mr. Emmanuel JARRY of SELARL RAVET & ASSOCIÉS, of the Paris Bar, locker: P0209

Represented, as trial counsel, by: Mr. Jalal EL AHDAB of AARPI BIRD & BIRD, of the PARIS Bar, locker: R 255

COMPOSITION OF THE COURT:

The case was heard on 10 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 Mr. Daniel BARLOW 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 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 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 an arbitral award rendered in Paris on 28 January 2022, under the aegis of the International Court of Arbitration of the International Chamber of Commerce, in a dispute between the Iraqi company Raiya Group, principal party, and Mr. [G][J][L][R], Mr. [B][F] and Mr. [T][Z][M], intervening parties, and the British Virgin Islands company Crest Foods International Ltd (hereinafter "Crest Foods").

2. The dispute originates in the execution of a regional development agreement (hereinafter the "Agreement") entered into between Crest Foods and Raiya Group on 19 June 2014, for the opening of cafés operating the Neslé and Toll House brands in Iraq.

3. The Agreement was signed by Mr. [L] on behalf of the Raiya Group.

4. Article 1.4 thereof provides that it is entered into in accordance with a "Product Reference Framework Agreement" concluded between Crest Foods and company Nestlé Middle East FZE (hereinafter "Nestlé") under which Nestlé grants Crest Foods the exclusive right to display the "Nestlé" and "Toll House" brands prominently on the shop fronts of cafés operating in Iraq.

5. Pursuant to the Agreement, Raiya Group and Crest Foods entered into six franchise agreements between 17 November 2014 and 7 March 2017 providing for the opening of cafés in consideration for an initial franchise fee and a minimum annual fee.

6. Citing various conflicts and problems, Raiya Group initiated arbitration proceedings on the basis of article 11.8 of the Agreement and article 18.9 of the franchise agreements.

7. During the arbitration proceedings, a motion arose between the parties concerning the admissibility of certain exhibits produced by Raiya Group from another arbitration proceeding between Nestlé and Crest Foods.

8. This motion was the subject of three procedural orders, no. 2, 6 and 7, issued on 15 October 2020, 2 February 2021 and 16 March 2021 respectively.

9. In an award dated 28 January 2022, the arbitral tribunal ruled as follows:

"With reference to the foregoing, the Arbitral Tribunal, in this Final Award, and having reviewed the arbitration records and all the arguments raised by the Parties, hereby rules and:

1) Declares the Claimant in breach of its contractual obligations under the Agreements, namely:

- a. The Regional Development Agreement signed by and between the Claimant and the Respondent on 19 June 2014; and
 - b. The “second amendment to the Regional Development Agreement” signed by and between the Claimant and the Respondent on 1 December 2016; and
 - c. Franchise Agreements signed between the Claimant and the Respondent:
 - i. The Franchise Agreement dated 17 November 2014 relating to [Address 11] and its amendment dated 1 January 2016 relating to the site located at [Address 1], and its second amendment dated 2 January 2019 relating to the [Address 10] site;
 - ii. The Franchise Agreement dated 11 February 2015 relating to the [Address 4] site and its amendment dated 1 September 2016 relating to the University of Technology;
 - iii. The Franchise Agreement dated 1 December 2016 relating to the [Address 7] site;
 - iv. The Franchise Agreement dated 9 February 2016 relating to the site of [8], [Address 3];
 - v. The Franchise Agreement dated 28 March 2016 relating to the University of [Locality 6]; and
 - vi. The Franchise Agreement dated 7 March 2017 relating to Cihan University.
- 2) Declares the Respondent in compliance with its contractual obligations under the above-mentioned Agreements;
- 3) Dismisses the Claimant’s allegations of mistake, impossibility and onerous obligations;
- 4) Dismisses the Claimant’s allegations of Respondent’s bad faith and misrepresentations;
- 5) Declares the termination of the RDA and the Franchise Agreements as of the date of the termination letter sent by the Respondent to the Claimant, i.e. 27 August 2019 ;
- 6) Declares the Intervening Parties jointly and severally liable with the Claimant to the Respondent prior to 1 March 2016;
- 7) Declares Intervening Party 2 jointly and severally liable with Claimant to Respondent from 1 March 2016 and ;
- 8) Declares Intervening Party 1 and Intervening Party 3 released from any liability incurred under this Final Award for events occurring after 1 March 2016;
- 9) Orders the Claimant to pay, jointly and severally with Intervening Party 2, the total amount indicated in the invoice issued by the Respondent on 6 August 2019 amounting to USD 2,098,268.68 (two million ninety-eight thousand two hundred sixty-eight U.S. dollars and sixty-eight cents) ;
- 10) Dismisses all the Parties’ claims for compensation and other damages;
- 11) Declares the Claimant in breach of its post-termination obligations under the RDA and the Franchise Agreements, and orders the Claimant, jointly and severally with Intervening Party 2, to comply with these obligations, including returning the operating manuals to the Respondent and complying with the post-termination non-compete clauses;
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12) Sets that late fees shall not apply to amounts due to the Respondent;

13) Orders the Claimant to pay the Respondent, jointly and severally with Intervening Party 2, annual interest at the rate of 7% (seven percent) on the total amount due on the invoice issued on 6 August 2019 amounting to USD 369,960.90 (three hundred and sixty-nine thousand and nine hundred and sixty US dollars and ninety cents) from the date on which the Claimant first filed the Request for Arbitration on 2 July 2019 and until the date of issuance of the Final Award. Such interest shall be considered an integral part of the principal amount owed jointly and severally by the Claimant and Intervening Party 2 to the Respondent, and shall apply each year thereafter and until paid in full; and

14) Orders the Claimant, jointly and severally with Intervening Party 2, to pay the Respondent USD 182,780 (one hundred and eighty-two thousand seven hundred and eighty US dollars) to cover 100% (one hundred per cent) of the arbitration costs set by the Court at USD 365,560 (three hundred and sixty-five thousand and five hundred and sixty US dollars), which include ICC administrative costs, fees and expenses of the Arbitral Tribunal;

15) Orders the Claimant, jointly and severally with Intervening Party 2, to pay the Respondent 75% (seventy-five percent) of the Respondent's legal costs and expert fees, amounting to USD 368,437.50 (three hundred and sixty-eight thousand four hundred and thirty-seven US dollars and fifty cents);

16) Declares that the Claimant and the Intervening Parties shall bear their own legal costs; and

17) Orders the Claimant, jointly and severally with Intervening Party 2, to pay annual interest of 7% (seven percent) on the amounts awarded in (14) and (15) above from the date of this Final Award until final payment thereof. Interest shall be considered an integral part of the principal amount owed jointly and severally by the Claimant and Intervening Party 2 to the Respondent and shall be calculated for each subsequent year until payment in full.

18) All other requests and claims of the Parties are dismissed”.

10. Raiya Group and Mr. [L] lodged an action for annulment of this award before the Court of Appeal on 3 June 2022.

11. The parties have agreed to the protocol on procedural rules of the International Commercial Chamber.

12. The proceedings were closed on 10 October 2023 and the parties' counsel were heard on the same day.

II/ CLAIMS OF THE PARTIES

13. According to their latest submissions, sent electronically on 29 September 2023, Raiya Group and Mr. [L] asked the court, under Articles 1464, 1509, 1510 and 1520 of the French Code of Civil Procedure, to:

- Grant annulment of the arbitral award entitled “final award” dated 28 January 2022, rendered in Paris under the aegis of the International Court of Arbitration of the International Chamber of Commerce (No. ICC 24692/AYZ), by the arbitral tribunal composed of Dr. Mahmoud Hussein Ali Ahmad, Chairman, and Dr. Buraq Swaady Alhamdy, and Talal H. Jaber, co-arbitrators;

- Order Crest to pay Raiya and Mr. [G] [J] [L] [R] the sum of 120,000 euros for fees not included in the costs incurred in their defence;
- Order Crest to pay all the costs.

14. According to its submissions, sent electronically on 26 September 2023, Crest Foods asked the court, under Articles 1464, 1509, 1510, 1520 and 1527 of the French Code of Civil Procedure, to:

- Dismiss the annulment action;
- Dismiss the Applicants' claims in their entirety;
- Grant exequatur to the award dated 28 January 2022;
- Order the Applicants to pay €100,000 under article 700 of the French Code of Civil Procedure.

Alternatively:

- Dismiss the action for setting aside in its entirety, with the exception of paragraph 17 of the operative part of the Award;
- Dismiss the Applicants' order, referred to in paragraph 17 of the Award, to:
 - o pay 7% interest on the order to pay 182,780 USD for the Respondent's arbitration costs;
 - o and to pay 7% interest on the order to pay 75% of the USD 368,437.50 for the Respondent's legal and expert fees;
- Grant exequatur to the Award of 28 January 2022 for the other heads of claim granted by the Arbitral Tribunal in paragraphs 1 to 16 of the Award;
- Order the Applicants to pay €100,000 under article 700 of the French Code of Civil Procedure.

III/ REASONS FOR THE DECISION

15. The applicants rely on four grounds of annulment:

- the exclusion from the proceedings of certain exhibits submitted by Raiya Group (A);
- the allocation to Crest Foods of the amount of its invoice dated 6 August 2019 (B);
- the breach of the parties' procedural position (C);
- the application by the arbitral tribunal of an interest rate to the proceedings and arbitration costs that was not requested (D).

A. The exclusion of certain exhibits submitted by Raiya Group

16. Raiya Group and Mr. [L] argue that the arbitral tribunal excluded from the proceedings some of the exhibits that Raiya Group intended to produce in support of its positions. In their view, this exclusion constitutes a violation of the rights of defense and a failure by the tribunal to comply with its own procedural orders.

1. Breach of the rights of the defense

17. Raiya Group and Mr. [L] argue that:

- the award was rendered in disregard of procedural public policy, in that it imposes penalties on Raiya Group that infringe the principle of equality of the parties, to its detriment;
- this company was deprived of the opportunity to defend itself under conditions that did not disadvantage it, following the arbitral tribunal's decision to exclude from the proceedings the exhibits it was invoking in support of its argument, on the grounds of their confidentiality deriving from their production during another arbitration proceeding;
- this removal placed Raiya Group at a disadvantage, thus breaching the principle of equality of arms within the meaning of the case law of the European Court of Human Rights;
- the disputed documents were excluded before the hearings on the merits took place, and were thus subject to a prior control to which they were not supposed to be subjected;
- their exclusion led to the rejection of Raiya Group's plea based on Crest Foods' bad faith, for lack of evidence, and prevented Raiya Group from justifying its claims while relieving Crest Foods from contesting its allegations;
- Crest Foods' knowledge of the exhibits against it gave it a pre-eminent position with regard to its opposing party in the determination of the exhibits to be used as evidence;
- the most important exhibits admitted to the debate were those accepted by Crest Foods.

18. They add that the confidentiality and lack of relevance on the basis of which the tribunal excluded the exhibits from the proceedings do not justify the imbalance created between Crest Foods and Raiya Group, in view of the impact that these exhibits would have had on the arbitral tribunal's reasoning if they had been admitted, arguing that :

- the arbitral tribunal did not have to consider the relevance of the exhibits to the dispute, as the grounds for exclusion invoked by Crest Foods had limited the debate to whether or not the exhibits were present in the previous arbitration proceedings, thus avoiding any discussion of their content;
- as Crest Foods and Raiya Group were aware of the disputed exhibits, their exclusion from the proceedings did not protect the disclosure of these exhibits to anyone other than those bound by confidentiality, nor did it protect a party from the disclosure of documents that would undermine its rights of defence;
- Nestlé's counsel waived the confidentiality of the documents by agreeing to forward them to Raiya Group;
- the rejected documents were decisive for the outcome of the dispute in that they established the bad faith of Crest Foods;
- Article 3, paragraph 13, of the IBA Rules on the Taking of Evidence in International Arbitration provides for a limitation on the confidentiality of documents produced in the course of arbitration proceedings for the purpose of protecting or pursuing a right;
- the annulment court may disregard the confidentiality decision taken by the arbitral tribunal in order to assess the equal rights of the parties to defend themselves, where a serious breach of international public policy is alleged.

19. Crest Foods replies that the arbitral tribunal may reject exhibits in the exercise of its sovereign power without infringing the equality of arms principle. It maintains that:

- the applicants seek a review of the merits of the dispute, as the annulment court is not required to rule on the admissibility of the exhibits in the arbitration;
- the rejection of the exhibits from the proceedings is based on legitimate grounds, namely their irrelevance to the issues in dispute and their confidentiality, in accordance with article 22 paragraph 3 of the ICC Rules of Arbitration and articles 9 and 3 paragraph 13 of the IBA Rules of on the Taking of Evidence in International Arbitration;
- the parallel arbitration proceedings in which the disputed documents were produced were subject to an express confidentiality agreement;
- Raiya Group's possession of these documents at the time the arbitral tribunal ruled on their admissibility was not necessarily legitimate, and could not be used to lift their confidentiality.

20. It adds that the inadmissibility of the disputed exhibits did not place Raiya Group at a disadvantage since:

- the inadmissibility of documents relating to the relationship between Crest Foods and a third party, Nestlé, which were the subject of another arbitration to which Raiya Group was not a party, cannot be such as to create an imbalance between the parties;
- the concerned Nestlé products were not essential to the operation of the cafés, and alternative solutions had been considered, as stated in the disputed award;
- the arbitral tribunal, which was aware of the content of the exhibits at the time it ruled on their admissibility, was free to form its own opinion as to whether or not they were decisive and relevant to the case;
- the arbitral tribunal is the sole legitimate judge of requests for the disclosure of documents and of the admissibility of exhibits produced following this disclosure phase, the fact that Crest Foods had knowledge of the disputed exhibits having no bearing on the admissibility or non-admissibility of the exhibits;
- the arbitral tribunal was aware of their content and their potential relevance to the proceedings, and Raiya Group was ultimately in a position to win the case, notwithstanding the exclusion of the exhibits.

ON THIS MATTER:

21. Under article 1520, 5°, of the French Code of Civil Procedure, granting annulment of an award may be sought where its recognition or enforcement is contrary to international public policy.

22. The international public policy against which the judge's review is carried out is the French legal system's conception of public policy, i.e. the values and principles whose disregard cannot be tolerated, even in an international context.

23. This control is limited to examining whether the implementation of the provisions made by the arbitral tribunal violates the principles and values included in this international public policy.

24. Whatever proceedings are chosen, under article 1510 of the French Code of Civil Procedure, the arbitral tribunal must guarantee the equality of the parties and respect the adversarial principle.

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

26. It does not, however, require the admission of all evidence, as the arbitrator may be called upon to rule on the admissibility of documents produced before them by the parties, but their assessment on this point is not subject to the control of the annulment court.

27. It appears from the proceedings and the documents in the records that, during the arbitration proceedings, Raiya Group produced a series of documents from a parallel arbitration between Crest Foods and Nestlé, which was not itself a party to the arbitration concerned by this annulment action.

28. Crest Foods challenged the admissibility of these exhibits in the arbitration proceedings and asked the arbitral tribunal to prohibit Raiya Group from producing them, to which Raiya Group objected, the parties sending various e-mails on the subject to the chairman of the arbitral tribunal.

29. By Procedural Order No. 2 of 15 October 2020, the arbitral tribunal prohibited Raiya Group from disclosing information and documents obtained by its witnesses during separate arbitral proceedings and subject to an express confidentiality agreement, considering in particular that:

“the nature of evidence purported to be led by the Claimant obtained from submissions made in an entirely different proceeding between the Respondent and a third party [...] is irrelevant and immaterial to the present dispute and therefore cannot be allowed as evidence in the current proceedings. Also, because the documents exchanged in ICC Case [XXX] are subject to confidentiality undertaking as entailed in the Procedural Order dated 11 July 2017”

Free translation:

“[translation into French of the above text]”

30. By e-mail dated 29 January 2021, Raiya Group requested admission of the disputed exhibits on another ground, asking that any decision on the relevance of said exhibits be reserved until the witnesses had been heard at the final hearing. Crest Foods opposed this request, arguing that no new circumstances were put forward to justify a reversal of order no. 2, and that the exhibits were still irrelevant to the proceedings between it and Raiya Group.

31. In its Procedural Order No. 6 dated 2 February 2021, the arbitral tribunal ruled that:

“9.5 Whereas, in line with the agreement of the Parties and Arbitral Tribunal during the Pre-Hearing Conference, no evidence or documents can be presented before the hearing;

9.6 As such, the Arbitral Tribunal decides to (i) dismiss the Application Requesting Documents’ Submission at this stage of the Arbitration proceedings; and accordingly (ii) currently consider the documents submitted by the Claimant and Additional Parties as part of their email dated January 29th, 2021 inadmissible, noting that the Arbitral Tribunal shall subsequently decide with regards to the possibility of presenting said documents following examination of witnesses and after the final hearing.”

Free translation:

“[translation into French of the above text]”

32. The admissibility of the exhibits was again debated at the hearings held before the arbitral tribunal.

33. On 4 March 2021, the parties submitted post-hearing briefs setting out their respective positions.

34. By Procedural Order No. 7 dated 16 March 2021, the arbitral tribunal ruled as follows:

“a. Declare the admissibility of the redacted versions of exhibits C-008 and C-023 as per the mutual agreement of the Parties;

b. Order the inadmissibility of exhibits C-4, 9, 12-13, 16, 18, 21, 25, 27, 31, and 33 following the Claimant and Additional Parties consent to the Respondent’s objection to that effect and as such, exclude the aforesaid exhibits from the records of the present Arbitration;

c. Decide the admissibility of the exhibits presented and discussed by the Parties at the hearing and that the Arbitral Tribunal has previously refused their admission during these Arbitration proceedings, being exhibits C-049, C-50 and C-051; and

d. Exclude all other documents listed in the Respondent’s request dated February 26th, 2021 for irrelevance and immateriality with regards to the merits of the disputed case subject of this Arbitration.”

Free translation:

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

35. These elements show that:

- the admission of the disputed exhibits was the subject of a thorough adversarial debate between the parties, who were able to put forward their arguments on their production and their admissibility at various stages of the proceedings;

- the arbitral tribunal’s decisions were based on considerations of confidentiality and relevance to the dispute of the exhibits submitted to its review.

36. Such assessments of the admissibility of evidence are a matter for the arbitrators’ sovereign discretion. They do not fall within the scope of review by the annulment court.

37. Moreover, the applicants have not demonstrated any imbalance between the parties in the process of examining the admissibility of the disputed exhibits.

38. It appears from the proceedings that each of the parties was given the opportunity to put forward their positions, and the breach of equality alleged by the applicants cannot be inferred from the arbitral tribunal’s rejection of documents submitted by one of them as material to the outcome of the dispute.

39. In these circumstances, Raiya Group and Mr. [L] cannot claim that their equality of arms or their rights of defence have been violated, as their argument in this case invites the court to review the decision taken by the arbitral tribunal on the admissibility of the documents submitted to it, which does not fall within the powers of the annulment court, the considerations based on the allegedly decisive nature of the documents excluded from the proceedings and the advantage thus given to Crest Foods being in this respect inoperative.

40. The legal argument must therefore be rejected as unfounded.

2. The arbitral tribunal's failure to comply with its own procedural orders

41. Raiya Group and Mr. [L] claim that the arbitral tribunal disregarded its terms of reference and breached the adversarial principle by failing to refer, in its final award, to its Procedural Order no. 7, which admitted exhibits previously excluded by orders no. 2 and 6. They argue that:

- paragraph 10.2.1 of the award, which provide that issues relating to the confidentiality or admissibility of certain documents were decided by the arbitral tribunal in procedural orders, refers only to orders no. 2 and 6, without reference to order no. 7, which is especially important as it admits certain documents that were previously excluded;
- in so doing, the tribunal rejected the exhibits it had previously admitted and altered the substance of the debate without notifying the parties;
- there is no evidence to suggest that this is a material error;
- the award contains no reference to the relevant exhibits, which are completely omitted;
- this absence cannot be considered fortuitous;
- by setting out carefully in the aforementioned paragraph the orders establishing its position on the exhibits, the arbitral tribunal chose a precise summary, and the absence of any reference to the exhibits finally admitted by order no. 7 in the award confirms its intention to exclude them from the proceedings.

42. Crest Foods replies that:

- the assertion that the arbitral tribunal wished to reject the disputed documents is purely speculative and is not based on any concrete fact or procedural element indicating that the respondent in the arbitration were favored, since the outcome of the dispute was the only thing that dissatisfied the respondents in the annulment action;
- to the contrary, the history of the arbitration proceedings demonstrates the arbitral tribunal's concern to listen to claimants' requests to reconsider the admissibility of disputed exhibits, which was the subject of an adversarial debate;
- there is no evidence that the court questioned its procedural order no. 7, which is referred to in the statement of proceedings;
- compliance with the adversarial principle does not require the tribunal to rely on all the exhibits or to mention them in its award;
- there is no evidence that the arbitral tribunal has called into question procedural order no. 7;
- paragraph 10.2.1 of the award was not intended to list all the orders issued or to provide an overview of the proceedings as a whole, which was the purpose of the statement of proceedings at the beginning of the award.

ON THIS MATTER:

43. Article 1520 of the French Code of Civil Procedure provides for annulment action when (3°) the arbitral tribunal has ruled without complying with its terms of reference, or when (4°) the adversarial principle has not been complied with.

44. This principle requires only that the parties have been given the opportunity to debate in an adversarial manner the arguments put forward and the documents produced, and that they have been able to state their factual and legal claims and discuss those of the opposing party, so that nothing on which the arbitrators' decision is based has escaped

their adversarial debate.

45. The arbitral tribunal does not have to submit to the parties the legal arguments on which its award is based before it is made. However, it may not base its decision on legal or factual arguments that have not been put forward.

46. Defined by the arbitration agreement, the terms of reference of the arbitral tribunal is delimited primarily by the subject matter of the dispute, which is determined by the respective claims of the parties, without there being any need to focus solely on the statement of issues contained in the terms of reference.

47. While the arbitral tribunal may be deemed to have departed from its terms of reference if it fails to comply with the procedural rules laid down by the parties, either directly or by reference, such a departure can only result in the award being annulled if it is shown to have caused a grievance to the party invoking it, or to have had an impact on the outcome of the dispute.

48. In the present case, paragraph 10.2.1 of the award states that:

“All of the Parties’ requests relating to issues of confidentiality and/or admissibility of certain documents have been decided by the Arbitral Tribunal during these arbitration proceedings during the document disclosure phase as well as pursuant to the various procedural orders issued by the Arbitral Tribunal, i.e. Procedural Order No. 2 issued on 15 October 2020 and Procedural Order No. 6 issued on 2 February 2021.”

49. Although, as the claimants point out, this paragraph does not refer to Procedural Order no. 7, which admits some of the exhibits produced by Raiya Group, this decision is nonetheless recalled by the arbitral tribunal, which devotes lengthy developments to the debate between the parties on these exhibits, outlining the history of their exchanges, specifying their content, detailing their respective arguments and setting out the solution ultimately adopted with regard to the admissibility of some of the disputed exhibits and the rejection of others, as can be seen from paragraphs 8.31.1 to 8.31.9 of the award.

50. In these circumstances, it cannot be considered that the lack of reference to Procedural Order no. 7 in paragraph 10.2.1 constitutes a reconsideration by the arbitral tribunal of its decision on the admissibility of the disputed documents, since this paragraph, which is included in the section devoted to the “issues to be determined” for the handling of the dispute, has no other purpose than to reiterate that the issue of the confidentiality and admissibility of the documents is no longer disputed and does not call for a further decision on its part.

51. In this respect, the omission from this paragraph of the reference to order no. 7, which is also referred to in the award, does not constitute a breach by the tribunal of its terms of reference, as alleged by the respondents.

52. The fact that the arbitral tribunal did not refer to the documents admitted by this order in the rest of its reasoning can also not be considered as constituting such a breach, as the arbitrators were free to assess the relevance and materiality of the documents in issue, without this being a matter for review by the annulment judge.

53. The award’s reminder of the many exchanges that took place on the admissibility and relevance of these submissions demonstrates the arbitral tribunal’s respect for the adversarial principle. This principle does not require the arbitrators to base their decision on all the exhibits, nor does it require them to assess the relevance of each document, as the award does not incur any grievance in this respect.

54. In these circumstances, this legal argument should be dismissed.

B. The arbitral tribunal's allocation of the amount of the invoice dated 6 August 2019 to Crest Foods

55. Raiya Group and Mr. [L] argue that by ordering Raiya Group to pay the amount of its invoice issued on 6 August 2019, the arbitral tribunal breached the adversarial principle. They argue that:

- the arbitral tribunal based its decision on an invoice that was never submitted to the proceedings, as this exhibit had not been produced by Crest Foods in support of its claims for minimum annual fees;
- Crest Foods did not bring forward this invoice in its submissions, either in respect of its claims for payment of lost fees for cafés not opened on the ground of the Agreement or in respect of its claims for payment of lost fees for cafés opened on the basis of the franchise agreements, which do not refer to the aforementioned invoice ;
- Rayia Group did not discuss the invoice and the amounts involved;
- in his report on the assessment of Crest Foods' losses, the expert did not base his calculations on this invoice, Crest Foods' assertion on this issue being erroneous;
- the tribunal distorted the scope of the debate held before it;
- it thus relied on a document that had not been discussed by the parties;
- to reach this outcome, it also relied on two legal arguments that were not discussed by the parties:
 - first, by applying article 98.2 of Iraqi Law No. 107, which sets out a legal presumption of the accuracy of a party's assertions whose evidence is not contested by its opposing party, an article that Crest Foods never invoked and whose relevance Raiya Group was therefore unable to discuss;
 - second, by introducing a decisive reason for the early payment of the invoice, which was not discussed by the parties.

56. Crest Foods replies that the claim relating to the invoice and the invoice itself were indeed submitted to the adversarial debate. It states that:

- the claim underlying the invoice was at the heart of the debates, as the applicant had claimed in its submissions payment in full of the minimum annual fees still due;
 - the invoice was in fact present as a per se exhibit in the proceedings, to form part of the exhibits listed by the expert, who referred to a spreadsheet showing the amount;
 - the amount of the invoice was actually debated, the claimants having relied on this amount, which the respondent reproduced in the calculation of its claims;
 - the quantum of the claim underlying the invoice was debated;
 - the arbitral tribunal could validly decide, in the exercise of its jurisdictional power, that the amount of the claim was equal to that stated in the invoice, since the invoice had not been contested in this way;
 - the court simply drew the consequences of the general rules governing the burden of proof, without implementing a true legal presumption, and the reference to article 98.2 of Iraq's Trade Law No. 107 was superfluous and does not constitute a breach of the adversarial principle;
 - the annulment court does not review the arbitrator's distortion of the debate, as the
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arbitration claimants are asking the court to rule on the debates that took place during the arbitration and to review the merits of the dispute;

- the alleged distortion of the claimants' position does not therefore constitute a breach of the adversarial principle.

ON THIS MATTER:

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

58. As mentioned above, this principle requires only that the parties have been given the opportunity to discuss the arguments put forward and the exhibits produced, and that they have been able to state their factual and legal claims and discuss those of the opposing party, so that nothing on which the arbitrators' decision is based has escaped their adversarial debate, and the arbitral tribunal, which does not have to submit to the parties the legal arguments on which its award is based before it is made, cannot base its decision on legal or factual arguments that have not been put forward.

59. In the present case, the contested award ordered Raiya Group, jointly and severally with Mr. [L], to pay Crest Foods "the total amount indicated in the invoice issued by the Respondent on 6 August 2019 amounting to USD 2,098,268.68 (two million ninety-eight thousand two hundred sixty-eight U.S. dollars and sixty-eight cents) [...]".

60. It is not disputed that:

- payment of this invoice was not requested as such by Crest Foods in its counterclaims, and that

- the invoice itself is not mentioned in the list of exhibits attached to the submissions setting out these claims.

61. Nevertheless, the Court noted that the counterclaims in question related to compensation for non-payment of minimum annual fees, to which the disputed invoice and the claim it established related. In fact, while Crest Foods' counterclaim was for "payment of fees lost under the franchise agreements", proposing an overall assessment, the disputed invoice related to minimum annual fees required for "cafés set up (open or closed) and cafés not operated", the document specifying that it covered "the minimum annual fee for the duration of the agreement" for seven identified establishments, so that it fell within the scope of this claim.

62. This invoice was attached to the expert report produced by Crest Foods during the arbitration proceedings, along with the other invoices relating to the fees claimed, with the claimants acknowledging in their submissions that they had received these exhibits on 27 October 2020, i.e. a few days after the respondent's rejoinder.

63. It also appears from the award (paras. 10.3.6.1.4, 10.3.6.3.21 and 10.3.6.3.38) and the transcript of the hearings held on 22 and 25 February 2021 (p. 23 and pp. 71 to 73 and 121 respectively) that the payment of this invoice was raised and discussed by the parties before the arbitral tribunal, with Raiya Group and Mr. [L] acknowledging that they had paid all the invoices issued by Crest Foods with the exception of the invoice dated 6 August 2019, arguing in substance that the corresponding amount was not due because the agreements signed with Crest Foods did not provide for their obligation to pay the minimum annual fee after termination - a position reiterated in their post-hearing brief of 29 March 2021.

64. It follows that the disputed claim, and the invoice to which it relates, were part of the debate before the arbitrators, and thus the claimants cannot claim that the adversarial principle has been breached in this respect.

65. While it is common ground that the arbitral tribunal relies on article 98.2 of Iraqi Law No. 107 on evidence in its reasoning (award, par. 10.3.6.3.37), without it being shown that the application of this provision would have been discussed by the parties, it follows from a reading of the award that this reference does not constitute a decisive reason.

66. In fact, it is cited after two paragraphs (10.3.6.3.35 and 10.3.6.3.36) which recall, in general terms, the principles governing the burden of proof in all arbitration proceedings, to which the arbitral tribunal has complied, and the fact that these principles have been adopted by Iraqi law not being decisive here.

67. Lastly, the statement that the amount of the invoice was due irrespective of the due date appearing thereon (contested award, par. 10.3.6.3.23) does not constitute an infringement of the adversarial principle either, as the tribunal linked this payment to the performance of the agreements (par. 10.3.6.3.22), to the breaches found (par. 10.3.6.3.24) and to the fact that the sums were due in respect of minimum annual fees (10.3.6.3.23), all of which were at the heart of the debates and on which it is not for the annulment court to make any assessment.

68. It follows that the legal argument alleging failure to comply with the adversarial principle in the arbitral tribunal's allocation of the amount of the disputed invoice is unfounded.

C. Breach of the parties' procedural position

69. Raiya Group and Mr. [L] claim that the arbitral tribunal failed to comply with its terms of reference and breached the adversarial principle by disregarding the order of claims with regard to the status of the parties. They argue that:

- Crest Foods was a respondent in the proceedings and made counterclaims which the tribunal considered before the main claims referred to it;
- in so doing, it distorted the structure of the dispute and the qualities that each party had in the arbitration proceedings, in breach of the ICC Rules of Arbitration and the will of the parties, expressed in particular in the terms of reference;
- this attitude led the arbitral tribunal to favor Crest Foods' point of view to the detriment of that of Raiya Group, which it treated as a derivative of it and subordinate to it;
- this reversal was never addressed by the arbitral tribunal, and the award contains no explanation on the subject.

70. Crest Foods replies that:

- French arbitration law does not lay down any requirements, *a fortiori* with regard to contradiction, concerning the formal order in which the parties' positions are examined in an international arbitration award;
- the arbitral tribunal complied with the terms of reference, which made no reference to any text laying down specific requirements as to the form of the arbitral award or the order in which the arguments were to be analyzed;
- The ICC Rules of Arbitration do not lay down any specific requirements as to the reasons for the award, apart from its mandatory nature.

ON THIS MATTER:

71. While it follows from the combined provisions of articles 1482 and 1506 of the French Code of Civil Procedure that an international arbitral award must state the reasons on which it is based, unless the parties have agreed otherwise, no principle of French arbitration law imposes any requirement as to the form in which such reasons must be

given, or as to the order in which the arbitral tribunal should examine the claims submitted to it, since arbitrators do not have to submit to the parties for discussion the order in which they intend to rule on said claims.

72. The arbitration claimants have not demonstrated that the arbitration agreement, the arbitration rules to which it refers, or the will of the parties would otherwise give rise to any such requirement.

73. The grievance based on the arbitral tribunal's failure to comply with its terms of reference and the breach of the adversarial principle in this respect is therefore lacking in law. It will be rejected.

D. The application by the arbitral tribunal of an interest rate to the costs of the proceedings and arbitration fees

74. Raiya Group and Mr. [L] argue that the arbitral tribunal ruled *ultra petita* and exceeded its terms of reference by awarding Crest Foods interest on the costs of the proceedings and the arbitration costs. They argue that:

- Crest Foods has not requested the application of such interest, as the formulas it invokes to justify it do not constitute claims before the arbitral tribunal;
- the arbitral tribunal does not have the power to award interest *ex officio*, as the ancillary nature of interest means that a claim for compensation does not necessarily cover a claim for interest on the award, as interest is not provided for by operation of law;
- Crest Foods cannot claim interest by operation of law pursuant to article 171 of the Iraqi Civil Code, as the court did not apply a rate of 4% as provided for in this article, but instead applied contractual interest limited to 7% to the costs and expenses of the arbitration, in accordance with article 172 of the aforementioned code;
- Article 38 of the ICC Rules of Arbitration does not empower arbitrators to award interest on arbitration costs without a request from the parties.

75. Crest Foods replies that the tribunal did not rule *ultra petita* on the arbitration costs, since:

- the parties have asked the arbitral tribunal to grant any appropriate relief and have not objected to the award of interest on the arbitration costs;
- the arbitral tribunal may, at its discretion, award interest on arrears, which is merely ancillary to the pecuniary relief sought from the arbitrators, so that it was necessarily included in the claims for compensation submitted to the arbitrators;
- This power is enshrined in Iraqi law applicable on the merits, in French law applicable alternatively as the law of the seat, and in article 38 of the ICC Rules of Arbitration.

76. In the alternative, should the Court decide to grant annulment of the decision in this respect, it requests that the annulment be confined to this single, isolated element of the decision.

ON THIS MATTER:

77. The Court notes, first of all, that although the title of the fourth part of their submissions refers to article 1520, 4°, of the French Code of Civil Procedure, the legal argument put forward by the claimants is based exclusively on failure to comply with the terms of reference.

78. Pursuant to the terms of its award, the arbitral tribunal ordered Raiya Group and Mr. [L] to pay Crest Foods interest at the rate of 7% per annum on the total amount of the arbitration costs and on the total amount of the tribunal costs and expert fees, from the date of the award until final payment of said costs in accordance with the terms of article 171 of Iraqi civil law, specifying that “interest shall be considered an integral part of the principal amount owed jointly and severally by the Claimant and Intervening Party 2 to the Respondent, and shall apply each year thereafter and until paid in full” (contested award, paras. 11.2.2.3 and point 14 of the operative part).

79. In its submissions dated 14 July and 23 October 2020 and in its post-hearing brief dated 29 March 2021, Crest Foods asked the arbitral tribunal, *inter alia*, that it:

“[...] awards the Respondent the costs of these arbitral proceedings, including but not limited, to all legal costs, the ICC’s administrative fees, the Arbitrators’ costs, fees and expenses, and the costs, fees and expenses of the Respondent’s legal counsel (including any expert and/or witnesses); and

[...] awards such further relief as the Arbitral Tribunal may deem to be appropriate.”

Free translation:

“[translation into French of the above text]”

80. The post-hearing brief dated 29 March 2021, also included a request for interest as follows:

“[...] orders the Claimant and the Additional Parties to pay interest where interest is not expressly claimed as part of any outstanding sum above (i.e., on late fees and on "Other Damage") a rate of seven percent (or at the maximum rate permissible under Iraqi law), starting from the date on which such sums were due”

Free translation:

“[translation into French of the above text]”

81. Contrary to Crest Foods’ arguments, the latter claim cannot be considered as justifying the award of late payment interest on arbitration costs. As it refers explicitly to the claims for damages for the breaches of contract on the merits, it does not relate to the costs of the proceedings, which are the subject of a separate head of claim in the company’s submissions. It cannot therefore form the basis of the award contested by the arbitration claimants.

82. On the other hand, the scope and generality of the request for “such other relief as the tribunal may deem appropriate” would appear to justify the arbitral tribunal’s decision to award late payment interest, which is ancillary to the award of arbitration costs and as such fell within the arbitrators’ powers.

83. In these circumstances, the claim that the arbitral tribunal did not comply with its terms of reference is unfounded.

84. It follows from all these considerations that the annulment action lodged by Raiya Group and Mr. [L] shall be dismissed.

IV/DECISION

On these grounds, the Court hereby:

- 1) Dismisses the annulment action lodged by Raiya Group and Mr. [G] [J] [L] [R] against the arbitral award entitled “final award” dated 28 January 2022 and rendered in Paris under the aegis of the International Court of Arbitration of the International Chamber of Commerce under reference no. ICC 24692/AYZ ;**
- 2) Recalls that pursuant to article 1527, paragraph 2, of the French Code of Civil Procedure, the dismissal of an annulment action grants exequatur on the arbitral award;**
- 3) Dismisses the claim made by Raiya Group and Mr. [G] [J] [L] [R] under article 700 of the French Code of Civil Procedure;**
- 4) Orders Raiya Group and Mr. [G] [J] [L] [R] jointly and severally to pay Crest Foods International Ltd the sum of one hundred thousand euros (€100,000) for fees not included in the costs incurred in their defence;**
- 5) Orders Raiya Group and [G] [J] [L] [R] jointly and severally to pay the costs.**

THE COURT CLERK,

THE PRESIDENT,
