Sentença Arbitral Baseada em Fatos não Alegados pelas Partes. Tribunal Federal da Suíça. Processo 4A_214/2013. 5 de agosto de 2013. X._SA (Recorrente) *v.* Y._SA (Recorrido)

SUMÁRIO: I – Julgado. II – Comentário.

I – JULGADO*

4A_214/2013[1]

Judgment of August 5, 2013

First Civil Law Court

Federal Judge Klett (Mrs.), Presiding
Federal Judge Corboz
Federal Judge Kolly
Federal Judge Kiss (Mrs.)
Federal Judge Niquille (Mrs.)
Clerk of the Court: Carruzzo

X._____ SA
Represented by Mr. Elliott Geisinger
Appellant

v.

Y._____ SA
Represented by Mr. Thomas Rohner and Mr. Florian Mohs
Respondent
Facts:

A.

Pursuant to a December 27, 2010, contract, the Swiss company X._____ SA (hereafter: X._____) sold to Y._____ SA (hereafter: Y._____), another Swiss company, 65'000 metric tons (MT) – plus or mi-

* Decisão traduzida do francês para o inglês por Charles Poncet, Florent Baroz e Luisa Mockler, disponível em http://www.swissarbitrationdecisions.com/.

1 Translator's Note: Quote as X._____SA v. Y._____ SA, 4A_214/2013. The original decision is in French. The full text is available on the website of the Federal Tribunal, www.bger.ch.

nus 10% at the carrier's choice – PCI Kuzbassky coal originating from Kuzbass (Russia) at a unit price of USD 150. According to the explanations given by X._____, PCI is the acronym for pulverized coal injection, a steel industry technique consisting of spraying pulverized coal into a blast furnace. The sales contract provided for substantive Swiss law to be applicable, to the exclusion of the United Nations Convention on Contracts for the International Sale of Goods of April 11, 1980.

For reasons that no longer have an impact on the issue of the dispute at this stage, X._____ was in default for the delivery of the goods. Therefore, Y._____ renounced performance of the sales contract by letter of March 23, 2011, and claimed damages for breach.

B.

On April 5, 2011, Y._____ relied on the arbitration clause inserted in the aforesaid contract and started arbitral proceedings in the Swiss Chambers' Arbitration Institution (SCAI). On the basis of Art. 191(3) CO,[2] it sought an amount of USD 5'362'500, with interest, from X._____ which corresponded, in its view, to the difference between the market price on the aforesaid date of March 23, 2011, i.e., USD 16'087'500 (USD 225 X 71'500 MT [i.e. 65'000 MT x 10%]), and the price stipulated in the December 27, 2010, contract, namely, USD 10'725'000 (USD 150 x 71'500 MT). X._____ submitted that the claim should be entirely rejected and argued in substance that the circumstances of the case at hand did not lend themselves to an abstract computation of damages within the meaning of the aforesaid provision.

A three-member Arbitral Tribunal was constituted under the aegis of the SCAI, the seat of the arbitration being in Zürich and the proceedings to be conducted in English, according to the arbitration clause. The letter also provided for the Swiss international arbitration rules in force at the date of the filing of the request to be applicable.

In a final award of February 27, 2013, the Arbitral Tribunal ordered X._____ to pay to Y._____ an amount of USD 1'780'350 with interest at 5% per year from April 5, 2011. To justify the award of this amount to the claimant, the Arbitral Tribunal used the following reasoning.

X._____'s obligation to compensate Y._____ for failing to deliver the goods sold is not disputed in principle. It remains to compute the amount of damages due by the former to the latter. The pertinent quantity of coal is 71'500

2 Translator's Note: CO is the French abbreviation for the Swiss Code of Obligations, which contains the Swiss law on contracts.

metric tons. The pertinent date for the abstract computation of the damages is 22-23 March, 2011. According to Art. 191(3) CO, such calculation is possible only if there was a Market price for the goods sold at that date. The price generally charged for the same type of goods in comparable circumstances in a specific place must be established for this purpose; in other words, a price resulting from the application of some objective criteria.

In this respect, most of the examples given to the Arbitral Tribunal must be set aside for various reasons. The Russian PCI Bachatsky coal, sold on March 21, 2011, by Y._____ to company A._____ at the unit price of USD 235.25, is indeed of the same type as the PCI Kuzbassky coal in the unperformed sale. However, it cannot be used as a decisive element of comparison because it is a brand name product coming from one mine only and a leader in the market while the PCI Kuzbassky coal is a blend of coals extracted from several mines which X._____ introduced into the market shortly before the pertinent date. Similarly, it is not possible to take into consideration the price of USD 135 per metric ton as in the March 7, 2011, contract between X._____ and company B._____, as this is a preferential price with a view to establish a long-term contractual relationship with a client. As to the contracts concluded by X._____ with A._____ on March 27, 2010, and with C._____ on December 27, 2010, they cannot be taken into consideration either due, in particular, to their being long before the pertinent date. Ultimately, only the contract entered into by X._____ with D._____ LTD (hereafter: the D._____ contract) on February 10, 2011, as to the sale of 30'000 metric tons of PCI coal from the same geographical origin as the PCI Kuzbassky coal at the unit price of USD165 may be considered as a reference to define the market price of the latter coal. One does not know whether the coal in contract D._____ came from a single mine as opposed to the coal in dispute. Therefore, the unit price mentioned above is not necessary in this respect. However, the price must be reduced by USD 6 to USD 159 in view of the explanations given by E._____, the partyappointed expert of Y._____, because the coal sold according to the D._____ contract was of better quality due to its lower content of volatile matter (9-11%) than the coal sold in the contract at hand (19-21%). However, if one takes into consideration the constant increase in the price of PCI coal during the first quarter of 2011, it may be assumed in view of all the pertinent circumstances of the case at hand that X._____ could have claimed a 10% increase for a spot sale of 65'000 metric tons of PCI coal on the pertinent date (22-23 March, 2011). Hence, the market unit price for PCI Kuzbassky coal must be set at USD 174.90 (i.e. USD 159 plus 10%). Accordingly, the amount of damages due by X._____ to Y._____ will be assessed at USD 1'780'350. It is equal to the difference between USD 12'505'350 (i.e. USD 174.90 x 71'500 MT) and USD 10'725'000 (i.e. USD 150 x 71'500 MT).

C.

On April 18, 2013, X._____ (hereafter: the Appellant) filed a civil law appeal with the Federal Tribunal with a view to obtaining the annulment of the aforesaid award.

In its answer of May 17, 2013, Y._____ (hereafter: the Respondent) submitted that the appeal should be rejected to the extent that the matter is capable of appeal.

The Arbitral Tribunal submitted its file and stated in a letter of its Chairman of May 17, 2013, that it would not express a view as to the appeal.

In a reply of June 6, 2013, and a rejoinder of June 24, 2013, the Appellant and the Respondent maintained their respective submissions.

Reasons:

1.

According to Art. 54(1) LTF,[3] the Federal Tribunal issues its judgment in an official language;[4] as a rule, in the language of the decision under appeal. When the decision is in another language (here, in English) the Federal Tribunal resorts to the official language chosen by the parties. Before the Arbitral Tribunal they used English. In its brief to the Federal Tribunal, the Appellant used French. The Respondent's answer was submitted in German. According to its practice, the Federal Tribunal shall resort to the language of the appeal and consequently issue its judgment in French.

2.

The seat of the Arbitral Tribunal is in Switzerland and both parties had their seat there. Thus, Chapter 12 PILA[5] is not applicable in this case because this is a domestic arbitration within the meaning of Art. 353 ff CPC[6] (see Art. 176(1) PILA a contrario) and the parties did not avail themselves of the possibility given by Art. 353(2) CPC to opt out of these provisions in favor of Chapter 12 PILA. Moreover, the waiver of appeal contained in the arbitration clause is ineffective (judgment 4A_254/2011 of July 5, 2011, at 3.1 and references[7]).

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3 Translator's Note: LTF is the French abbreviation of the Federal Statute of June 17, 2005, organizing the Federal Tribunal, RS 173. 110.

4 Translator's Note: The official languages of Switzerland are German, French, and Italian.

5 Translator's Note: PILA is the most commonly used English abbreviation for the Federal Statute on International Private Law of December 18, 1987, RS 291.

6 Translator's Note: CPC is the French abbreviation for the Swiss Code of Civil Procedure.

7 Translator's Note: The original French decision is available here:

http://www.swissarbitrationdecisions.com/decision-did-not-concern-international-arbitration-domestic-arbitration-and-was-consequently-not-13

3.

In a domestic arbitration, a civil law appeal is allowed against the decisions of arbitral tribunals pursuant to the requirements of Art. 389 to 395 CPC (Art. 77(1)(b) LTF; judgment 4A_67/2013 of July 1, 2013, at 1.2 and 1.3). Whether as to the object of the appeal, the standing to appeal, the time limit to do so, and the submissions made by the Appellant, none of these admissibility requirements raises any problem in this case. As to the grounds in support of the appeal, the Respondent is wrong to deny that they are sufficient.

Moreover, it is not necessary to decide here the disputed issue as to whether or not a Civil law appeal against an award in a domestic arbitration must meet the requirement of a minimal amount in dispute. Indeed, the CHF 30'000 threshold at Art. 74(1)(b) LTF is clearly met in the case at hand.

There is therefore no reason not to address the appeal.

4.

Invoking Art. 393(d) CAP, the Appellant first argues that the Arbitral Tribunal violated its right to be heard by essentially basing its reasons on an exhibit – the D._____ contract – to which both parties denied any pertinence and claims that they were not asked for their views in advance.

4.1. An arbitral award may be challenged on the basis of the aforesaid provision when the equality of the parties or their right to be heard in contradictory proceedings was not complied with. This ground for appeal was taken from the rules applicable to international arbitration. Hence, the case law concerning Art. 190(2)(d) PILA is, in principle, also applicable to domestic arbitration (judgment 4A_439/2012 of May 8, 2013, at 5.1[8]).

As a general rule, according to the adage *jura novit curia,* arbitral tribunals freely assess the legal significance of the facts and they may also base their decisions on rules of law other than those invoked by the parties. Consequently, as long as the arbitration agreement does not limit the task of the arbitral tribunal to the legal arguments raised by the parties, they do not have to be heard specifically as to the scope to be given to the rules of law. As an exception, they need to be asked for their views when the court or the arbitral tribunal considers basing its decision on a norm or a legal consideration which was not discussed in the proceedings and the pertinence of which the parties could not anticipate (ATF 130 III 35 at 5 and the references). This precedent, which the Federal Tribunal applies restrictively, does not extend to factual findings. In this respect, the right to be heard admittedly entitles each party to state its views on the

8 Translator's Note: The original French decision is available here: http://www.swissarbitrationdecisions.com/domestic-case-or-appeal-withdrawn-or-manifestly-inadmissible-11

essential facts for the award to be issued, to propose evidence on pertinent facts and to participate in the hearings of the arbitral tribunal. However, it does not oblige the arbitrators to ask the parties to state their position as to the significance of each exhibit produced and neither does it entitle one of the parties to limit the autonomy of the arbitral tribunal in the assessment of a specific exhibit only to the purpose it wants to give for this piece of evidence. Indeed, if each party could decide in advance what evidentiary weight the arbitral tribunal would be authorized to give to each exhibit, the principle of the free assessment of the evidence, which is the pillar of arbitration, would be undermined (judgment 4A_538/2012 of January 17, 2013, at 5.1 and the references[9]).

4.2. While claiming that it does not question this precedent in principle, the Appellant nonetheless seeks to build on it so that a duty of the arbitrators to ask for the views of the parties would be imposed when the following four cumulative conditions are met (Appeal nº 50): First, both parties have consistently advised the Arbitral Tribunal that a specific exhibit in the file, clearly identified, is devoid of any pertinence; Second, this common statement is based on precise factual grounds and not on some general or subjective consideration as to the pertinence of the exhibit; Third, the exhibit is the necessary basis of an essential part of the reasons by which the Arbitral Tribunal reaches its decision; and Fourth, no such reasoning was put forward by any of the parties during the arbitral proceedings, thus making it impossible for them to anticipate that it would be the basis of the award. According to the Appellant, it would indeed be shocking for a party to refute all its opponent's arguments only to ultimately lose as a consequence of reasons drawn from a piece of evidence considered without pertinence by both parties without having been granted a possibility to state its views in this respect. This would also result in a formal denial of justice, as sanctioned in the case published at ATF 121 III 331, as the Arbitral Tribunal would be issuing its decision on the basis of factual findings differing from that which the parties jointly agreed to submit.

The aforesaid four requirements would be met in this case according to the Appellant. Indeed, during the arbitral proceedings, both parties consistently claimed that the D._____ contract could not be a reference to determine the market price of the coal sold. They did so based on precise, objective reasons concerning, in particular, the different chemical characteristics of the products to be compared. The arbitrators based an essential part of their reasons on the D._____ contract, which they considered after setting aside all other contracts in the file. Finally, the parties could not anticipate that the arbitrators would use this exhibit to calculate damages. Thus the Arbitral Tribunal violated their right to be heard by failing to ask for their views before issuing its award. Moreover,

9 Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/alleged-lack-authority-representatives-creates-jurisdictional-issue

still according to the Appellant, the Arbitral Tribunal relied on factual findings differing from that which the parties jointly agreed to submit when it admitted that the D._____ contract was pertinent evidence to assess the market price of the coal sold to the Respondent, first committing a formal denial of justice.

4.3.

4.3.1. Case law is not unchangeable in principle, as it may be based on circumstances or legal concepts that can evolve in time. However, certainty as to the law requires that it be countered only with circumspection whether to extend its scope or to change it radically. This requires that some objective reasons would render necessary a modification of the status quo by judicial order (ATF 136 III 6 at 3).

The reasoning the Appellant advances in support of the evolution of case law that it wishes to see, namely the desire to remove any element of surprise, is not such as to impose an extension of the principles stated in the aforesaid judgment 4A_538/2012 to the factual findings. Moreover, upon closer inspection, it appears that the conditions which the Appellant would impose upon such an extension are contingent in nature, so that they appear inseparable from the factual circumstances germane to the case at hand. One can hardly avoid the feeling that the evolution of case law suggested principally seeks to circumvent the prohibition made to the parties as to any criticism of the assessment of the evidence in the framework of a civil law appeal against an award issued in a domestic arbitration, or even to free this Court from the restriction imposed by Art. 393(e) CPC as to its judicial review with regard to the legal scope of a factual finding resulting from a specific exhibit in the arbitration file.

The duty to comply with the rules of good faith applies to any participant in the proceedings. The principle is general in scope and it has been codified for ordinary civil proceedings (see Art. 52 CPC) and also applies to arbitral proceedings. In connection with the right to be heard, case law deduced from it an obligation of the arbitrators, as an exception, to ask the views of the parties when they consider basing the award on a norm or a legal consideration that was not invoked during the proceedings and the importance of which the parties could not anticipate (see above at 4.1). As to the factual findings, however, there is another principle, which is the cornerstone of the entire system: it is the free assessment of the evidence. Art. 157 CPC states it in the following terms for ordinary civil proceedings: "The court reaches its conviction by way of a free assessment of the evidence adduced." Unless the parties otherwise agree, the same prerogative belongs to the arbitrators and case law does not hesitate to see this as a cornerstone of arbitration (BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 2nd Ed. 2010, n.1238 with other references). The principle is moreover embodied in several arbitration rules (for examples, see BERGER/KELLERHALS, (Op. Cit.) p. 354, footnote 74) and Art. 25(7) of the

2004 version of the Swiss Rules of International Arbitration, applicable in this case, stated the following: "The arbitral tribunal shall determine the admissibility, relevance, materiality, and weight of the evidence offered." The free assessment of the evidence implies that the arbitral tribunal may decide the evidentiary weight of each piece of evidence in the arbitration file, whichever party may have offered the evidence in question and regardless of the purpose for which it did so. The necessary consequence is that each party in an arbitral procedure is deemed to know from the beginning that the arbitrators will exercise their power to freely assess all the evidence adduced and consequently that, as the case may be, they may draw from an exhibit produced by a party some consequences diametrically opposed to the purpose given to this evidence or even to the scope both parties would agree to give it. In other words, as a matter of principle, a party may not successfully argue an element of surprise as to any factual findings by the arbitral tribunal. Consequently, it falls to the party to act sua sponte and in a timely manner by weighing all aspects of the probative value of a piece of evidence it considers tendering and to consider the evidence it or its opponent have already tendered, taking them into account in its argument, while knowing that the arbitrators may draw some other conclusions than those which the party may have suggested, even it with its opponent's approval. The corollary of this duty is that the arbitrators are not obliged to seek the views of the parties in the process of their factual findings, barring some quite exceptional circumstances.

Moreover, the very list of the conditions which, according to the Appellant, would justify extending the duty of the arbitral tribunal to seek the views of the parties before issuing an award, demonstrates in itself how difficult it would be for the arbitrators to determine in a specific case whether these cumulative requirements are met and for this Court to verify a posteriori whether the decision taken in this respect during the proceedings is well founded. Indeed, it is not obvious how to safely determine whether both parties agreed to explain to the arbitrators that a specific exhibit is without pertinence, whether their common opinion as to the evidentiary value of the aforesaid evidence rests on some precise "factual reasons" or even if this evidence constitutes "the necessary basis of an essential part of the reasons" that the arbitral tribunal is about to adopt. This will often require an in-depth analysis of the views the parties adopted in their respective briefs and, as the case may be, at the hearing, as well as an assessment in advance of the role that the exhibit in question could have in the reasons on which the future award would rely. It goes without saying that the results of such a process could give rise to a discussion between the parties, so it is to be feared that the certainty of the law may suffer as a consequence. It must be recalled in this context, that an argument that the right to be heard was violated should not serve as a pretext for criticism of an appellate nature of the factual findings and the legal reasons put forward by the arbitrators to support the award.

This being so, there is no reason to extend the scope of the case law on the duty to ask the views of the parties. Consequently, it is unnecessary to examine whether the other four aforesaid cumulative conditions were met in this case.

4.3.2. In the same argument, the Appellant claims that the Arbitral Tribunal relied on a factual finding differing from that which the parties had agreed to submit. Indeed, according to the Appellant, the parties agreed that the coal considered by the D._____ contract could not be used to determine the market price of the coal in the contract in dispute.

To support this argument, the Appellant refers to the case published at ATF 121 III 331, in which the Federal Tribunal annulled an award because the arbitrator held that a party had stopped delivering services to the other at a date before that which both parties had jointly stated.

However, this precedent is not at all equal to the case at hand. Indeed, in the latter, contrary to the former, the decisive fact – namely the market price of PCI Kuzbassky coal sold by the Appellant to the Respondent on December 27, 2010, – has always remained in dispute between the parties. That they agreed to deny any evidentiary value to the D._____ contract does not change anything: to agree on a pertinent fact is one thing; to agree on the absence of evidentiary value of an exhibit purporting to establish a fact in dispute is another.

This being so, the argument cannot but be rejected on similar grounds as above (see 4.3.1).

5.

Secondly, the Appellant argues that the Arbitral Tribunal lapsed into arbitrariness as to both the application of the law and the establishment of the facts.

5.1. A domestic arbitral award may be challenged, in particular, when due to a manifest violation of the law, it is arbitrary in its result (Art. 393(e) CPC). This refers to substantive law only, to the exclusion of procedural law. It must be recalled that, according to the general definition of arbitrariness, a decision is arbitrary as to the way the law was applied only if it grievously disregards a norm or a clear and undisputed legal principle. Hence it does not suffice for another solution to appear possible, or even preferable (ATF 138 III 378 at 6.1 and the cases quoted).

By the reasoning above, the blatant violation of the law must also have caused the award to be arbitrary in its result, as expressly stated by the provision quoted.

5.2.

5.2.1. According to the Appellant, the award under appeal contains some "irreconcilable contradictions" which lead to arbitrariness in the application of the law, of the same type as those which lead to annulment in the judgment published at ATF 130 I 337. After settling on a definition or a paradigm to determine the market price by way of several objective criteria and applying them coherently to all contracts included in the file as examples, the Arbitral Tribunal apparently set aside its own paradigm in reviewing the D._____ contract from a triple perspective: First, it satisfied itself of one objective criterion of comparison – the geographic origin of the coal – when the aforesaid contract had a number of points in common with those it had set aside by way of other objective criteria; Second, it adjusted the D._____ contract to attempt to erase the objective differences between it and the contract in dispute; and Third, by increasing the price in the D._____ contract by 10%, it substituted its subjective assessment of the market price to the objective criteria stated in its own definition of this concept. The result would therefore be an arbitrary award because if the arbitrators had correctly applied the aforesaid criteria, they could not have but rejected the claim for lack of any elements enabling them to set the market price of the coal sold to the Respondent.

For its part, the latter disputes the pertinence of the case invoked by the Appellant. It argues, moreover, that under the guise of an arbitrary application of the law, the Appellant seeks to challenge the assessment of the evidence by the Arbitral Tribunal or the allegedly insufficient reasons in the award under appeal. In its view, the arbitrators did not at all abuse the broad discretion they enjoyed in assessing the evidence in this case.

5.2.2. Whether or not the grievance is admissible depends on deciding if the grievance concerns the application of the law, as the Appellant argues, or the assessment of the evidence, as the Respondent claims. Indeed, in the latter case, the argument would not be capable of appeal (see case 4A_537/2012 of January 8, 2013, at 2. 2[10]).

The application of the law to the case at hand is done by way of a judicial syllogism. The major premise of the syllogism states the rule of law. Once it has been stated, the judge or the arbitrator must resort to subsumption to verify whether the hypothesis it encompasses – the Tatbestand – is met in the case at hand. That is the minor premise of the syllogism. In order to state it, the judge or the arbitrator must first find the pertinent facts in view of the rule of law being considered; he or she will do so by assessing the evidence at hand. Finally, by bringing together the major and the minor premises, he will be able to draw a conclusions, namely to attribute the legal consequence foreseen by the rule of law to the facts found. This is the case for the subsumption, which is the

10 Translator's Note: The original French decision is available here: http://www.swissarbitrationdecisions.com/domestic-case-or-appeal-withdrawn-or-manifestly-inadmissible-1

most delicate item: this process consists of placing one or several material facts under the light of the legal concept, and applying this notion to concrete reality (HENRI DESCHENAUX, La distinction du fait et du droit dans les procédures de recours au Tribunal fédérale, 1948, p. 12 ff).

The Arbitrators first stated their opinion as to the definition of the market price within the meaning of Art. 191(3) CO (Marktpreis or prezzo di mercato, according to the German and Italian versions of the provisions; the French version uses the wording "prix courant") and to what extent the definition was applicable in abstracto to the PCI coal (award nº 226 ff). By stating the major premise of the judicial syllogism in this manner, they undoubtedly dealt with a legal issue. The Arbitrators then stated the minor premise of the syllogism in a two-fold process: First, they pointed out the circumstances which impacted the selling price of the coal, contemplated in each contract included in the file, as an element of comparison; this process was meant to establish the facts and clearly remained outside the scope of legal reasons. Second, they wondered whether the price agreed in such a contract, on the basis of the circumstances in which it was set, could fall within the notion of a market price as previously defined; by doing so, they engaged in a subsumption which brought them back on legal ground (award nº 228 to 247). Finally, the Arbitrators remained on this ground by drawing the legal conclusion anticipated by the aforesaid legal provision – namely the Respondent's right to damages consisting of the difference between the market price at the date of reference and the sale price agreed upon in the contract in dispute – after persuading themselves that the price stated in one of the contracts they reviewed (the D._____ contract) corresponded to the notion of market price for PCI coal contained in the December 27, 2010, sales contract (award n. 248 ff). As to distinguishing the facts from the law, the case at hand may be compared mutatis mutandis with cases concerning rental leases, in which the common rents in the neighborhood are invoked (Art. 269(a)(a) CO and Art. 11(1) OBLF; ATF 136 III 74 at 3.1; 123 III 317 at 4a p. 319): similar to the concept of usual rents in the neighborhood, that of market price is a matter of law; however, the process of pointing out the specificities of the sale of a specific coal at a specific time is a matter of fact, just like a finding of what defines an apartment proposed by way of comparison (location, dimensions, equipment, condition, etc.); defining whether the price in a contract for the sale of coal submitted by a party meets the requirements to be considered for the purposes of defining the market price of the coal in the contract in dispute is again a legal issue, just like determining whether or not an apartment allegedly appropriated to set the usual rents of the neighborhood meets the necessary requirements for this purpose.

Consequently, the Federal Tribunal may review whether or not the Arbitrators manifestly violated the law as considered by Art. 393(e) CPC, for finding that the D._____ contract enabled them to determine the market

price of the coal in the sales contract which caused the dispute between the parties.

5.2.3. To demonstrate that the award under appeal would be arbitrary as a consequence of a manifest violation of the law, the Appellant invokes the case published at ATF 130 I 337. The case concerned medical liability and the Federal Tribunal, in a public law appeal, considered that a cantonal administrative court had lapsed into arbitrariness when it based its decision on an irreconcilable contradiction. The cantonal judges had found that the behavior of a post-operative patient after cardiac surgery was inherently unpredictable; however, they then denied any breach of duty of diligence by the medical staff because, in the case at hand, they could not anticipate that the patient would meet his death by jumping from the balcony of a nearby room (5.3 p. 345). According to the Appellant, the arbitrariness found by the Federal Court consisted in the fact that the Cantonal Court, after stating a clear principle, added an additional requirement when applying it to the circumstances of the case at hand, which was incompatible with its very definition by subjecting the liability of the medical staff to the predictability of the specific behavior of the deceased patient. According to the Appellant, the situation is the same in the case at hand for the reasons summarized above (see 5.2.1, first §). The Respondent counters that the precedent invoked by the Appellant is not at all on topic because the decision appealed was not an arbitral award, but emanated from a state administrative court and, moreover, the Federal Tribunal did not indicate whether or not the arbitrariness of the decision the Court annulled resulted from the application of the law (answer n. 128 ff).

The objection is not convincing. Indeed, as to the application of substantive law, the power of review of the Federal Tribunal in a civil law appeal against a domestic arbitral award is not different from that which this Court exercised at the time when seized of a public law appeal against a decision issued by a cantonal court and claiming an arbitrary violation of substantive cantonal or federal law in a case in which the amount in dispute was below CHF 8'000. Moreover, and even if this is not fully clear in the text of the judgment, the Federal Tribunal appears to have conducted its reasoning in law in the precedent quoted as it found that the Cantonal Court arbitrarily denied a violation of the duty of diligence which the heirs of the deceased patient attributed to the medical staff (see. 5.5).

Be this as it may, it is not necessary to discuss more at length the extent to which the aforementioned federal case has precedential value in this case. Moreover, the Appellant refers to it only to substantiate its assertion that an arbitral tribunal would lapse into arbitrariness if, after indicating the manner in which it understands the pertinent rule of law, it more or less deviated from its own definition of this rule of law when applying it to the factual circumstances of the case so that the manner in which it applies it in the case at hand would

no longer be compatible with that definition. One may indeed hold that an irreconcilable contradiction between the manner in which the rule is stated and its practical application is arbitrary. However, the precedent quoted does not need to be invoked to substantiate such a conclusion. It is easier to hold that it sanctions a type of arbitrary application of the law consisting of modifying the major premise of the judicial syllogism during the subsumption, in other words, in failing to examine the legal bearing of all the pertinent facts under the same standard.

5.2.4. In the case at hand, the Arbitral Tribunal started by defining the market price within the meaning of Art. 191(3) CO, by which it meant the price generally asked for the same type of goods as those the subject of the unfulfilled sale under comparable circumstances, namely, a price that can be set according to some objective criteria (award n. 226). Then, applying its definition to the product involved, it stated that the PCI coal, as a fungible item, may have a current price. However, "PCI coal" is a generic denomination referring to a relatively broad range of items and the Arbitral Tribunal stated that it was impossible to find one single market price applicable to any type of PCI coal. Indeed, such a price may vary according to a number of objective parameters, such as the quantity sold, the geographic origin of the ore, the market of destination, its chemical specificities, its nature, its notoriety, etc. (award n. 227; appeal n. 69). The Appellant points out that it does not criticize the paradigm laid down in the award under appeal as to the market price (reply p. 11, footnote 9).

Moving on to the subsumption, the Arbitral Tribunal applied its definition of a market price to all elements it had received for comparison. This was done pursuant to the aforesaid objective criteria and lead it to the conclusion that none of the contracts in the file – except the D._____ contract – could be considered to determine the market price of the coal in the sales contract in dispute due to the numerous differences they showed compared to the former (see above at B., § 5, the summary of its argument). Moreover, the Arbitrators did not consider the opportunity to make some adjustments or corrections in order to compensate for the differences between the contract to be compared and the contracts supplied for this purpose.

It must be found with the Appellant that the Arbitral Tribunal did not display the same coherence in examining the D._____ contract. However, it was aware that some potential and specific and important differences as to the nature of the coal, its chemical specificities and its date of reference existed between the aforesaid contract and the contract in dispute. Indeed, it pointed them out itself (award n. 42 ff; see above at B. § 6 of its reasons). Moreover, it could not ignore that according to the concurring views stated by both parties throughout the proceedings, the D._____ contract could not constitute a valid element of comparison to set the market price of the PCI coal in the contract under dispute. Notwithstanding the foregoing, the Arbitral Tribunal relied on

the D._____ contract and considered that only one point of comparison was conclusive, namely the geographic origin of the coal, without considering the difference between the two contracts to be compared; although such differences had led it to simply set aside all other elements of comparison, even though they were similar to the contract in dispute in several ways. Moreover, to erase the differences that would prevent it from considering the price in the D._____ contract as the market price, it chose to adjust it to the actual situation by distancing itself from the definition of a market price based exclusively on objective criteria that it had set previously, a step it did not take with regard to the other elements of comparison.

The first correction was dictated to the Arbitrators by finding the very important difference between two coals to be compared as to the admissible contents in volatile matter (9-11% of the D._____ contract: 9-21% for the contract in dispute). This was done in a way that can be criticized indeed, both as to the principle and the modalities and the Appellant argues that it was an arbitrary finding of facts (appeal n. 89 ff). Put briefly, they first overlooked that according to a specific provision of the D._____ contract, the purchaser would have been entitled to refuse the delivery of PCI coal containing more than 11% of volatile matter, namely a percentage substantially lower than the one in the contract in dispute. Hence, it appears problematic, to the very least, to intend to lower the price in the D._____ contract in order to adapt it to the specificities of the contract in dispute while disregarding that the purchaser could refuse the coal. Secondly, the arbitrators did not see that the D._____ contract itself contained an adjustment mechanism which would have justified reducing the price of the coal in that contract by USD 10 to 12 per metric ton and not by USD 6, as they held (for the calculations, see appeal n. 94). Thirdly and finally, they appear to have relied on testimony concerning coal containing between 12 and 21% of volatile matter when the D._____ contract involved coal with between 9 and 11% of volatile matter (for more details, see appeal n. 95 ff).

The Arbitral Tribunal made a second adjustment due to the constant increase in the price of PCI coal during the first quarter of 2011, and because the D._____ contract applied to a spot sale concluded around February 10, 2011, when the date of reference to determine the market price of the coal in dispute (22-23 March, 2011) was more than a month later. It did concede that while an increase had been found on the Australian market of PCI coal, where it had reached 15.95% between February 2011 and March 2011, it did not, however, have any information enabling it to verify if PCI of Russian origin had followed the same curve. Yet, this did not prevent it from considering that, on the basis of all the circumstances of the case, it was appropriate to assume that the Appellant could have claimed a 10% increase at the date of reference as compared to the price contained in the D._____ contract (award n. 245).

The correction thus made by the arbitrators is indeed based on a subjective and unreliable assessment of the situation because the arbitrators acknowledged that they have no information as to the evolution of the price of Russian coal. Thus, they resorted to invoking the pertinent circumstances of the case – a notoriously vague notion that makes it impossible to verify the soundness of the increase in price they upheld. This means that the Appellant rightly sees an unexplained deviation from the paradigm which is the cornerstone of the Arbitral Tribunal's reasoning based on Art. 191(3) CO.

5.2.5. Based on the foregoing, it appears that the Arbitral Tribunal went into a subsumption containing some irreconcilable contradictions because it did not uniformly apply its own definition of the market price of PCI Kuzbassky coal – and the objective criteria supposedly reflecting it – to all the elements of comparison at hand. Indeed, disregarding the concurring opinion of both parties on this issue, it asserted that the D._____ contract, despite many differences with the contract in dispute, could be taken into account to determine the market price of the coal in the December 27, 2010, contract with some adjustments. Such opinion does not appear sustainable, even if the arbitrators have broad power to appreciate how they will apply the relatively undetermined concept of market price to their own factual findings. By deducing the existence of such a price from one element of comparison that had only a vague similarity with the contract to be compared and to which the parties agreed to deny any pertinence, the Arbitral Tribunal departed without valid reason from the line of conduct it had followed in the analysis of the other elements of comparison. In doing so, it committed a manifest violation of the law in its application of Art. 191(3) CO.

This violation causes the arbitral award to be arbitrary in its result. Indeed, in its absence, the Arbitral Tribunal would have reached the conclusion that it was not possible to determine the market price of the goods in the contract in dispute or to assess the quantify of the damages sought by the Respondent. Therefore, it could not have but rejected the request.

Under such conditions, the award issued by the Arbitral Tribunal on February 27, 2013, must be annulled.

5.2.6. This being so, it is not necessary to examine the second part of the argument in which the Appellant argues that the Arbitral Tribunal established the facts arbitrarily in connection with the adjustment of USD 6 per metric ton that it made on the price set in the D._____ contract.

6.

The appeal being admitted, the Respondent shall pay the costs of the federal proceedings (Art. 66(1) LTF) and compensate the Appellant (Art. 68(1) and (2) LTF).

The Federal Tribunal therefore pronounces:

1. The appeal is admitted and the award under appeal is annulled.

2. The judicial costs, set at CHF 15'000 shall be borne by the Respondent.

3. The Respondent shall pay to the Appellant an amount of CHF 17'000 for the federal judicial proceedings.

4. This judgment shall be notified to the representatives of the parties and to the chairman of the Arbitral Tribunal.

Lausanne, August 5, 2013.

In the name of the First Civil Law Court

Presiding Judge: Klett (Mrs.)

Clerk: Carruzo

II – COMENTÁRIO

Trata-se de disputa comercial entre X._ e Y._ em decorrência da inexecução de um contrato de venda de carvão. Devido à quebra contratual por parte de X._, vendedor, Y._ rescindiu o contrato e pleiteou indenização na arbitragem, conforme previsto contratualmente. A arbitragem foi administrada pelo Instituto de Arbitragem da Câmara Suíça, o local da arbitragem era Zurique e a lei aplicável ao mérito era a lei suíça. Y._ pleiteou o pagamento da diferença do preço do carvão entre a data da assinatura do contrato e a data da rescisão contratual. O Tribunal Arbitral deu provimento ao pleito de Y._. Para o cômputo do valor da indenização, de acordo com o art. 191(3) do Código de Obrigações da Suíça, deveria ser possível identificar o valor de mercado do carvão na data da rescisão contratual. Esse valor foi identificado pelo Tribunal Arbitral com base em contratos fornecidos pelas próprias partes, durante a instrução processual, nos quais havia o preço do carvão por elas negociado com outras empresas.

Durante a instrução processual, as partes juntaram diversos contratos de compra e venda de carvão. O Tribunal Arbitral analisou os requisitos contratuais do carvão negociado nesses contratos, o local da venda, o valor do carvão, a época da celebração dos contratos e as condições de negociação contratual. Após essa análise, o Tribunal Arbitral entendeu que apenas o contrato celebrado entre X._ e D._LTD., datado de 10.02.2011, acerca da compra de 30.000 toneladas métricas de carvão PCI da mesma região geográfica que o carvão PCI Kuzbassky ("contrato de D._") poderia indicar qual seria o preço do carvão contratado por X._ e por Y._. Segundo o Tribunal Arbitral, o contrato de D._ trataria de um carvão semelhante ao do contrato em disputa, seria proveniente de uma região próxima à do carvão do contrato em disputa.

Ocorreu que ao basear o preço de mercado do carvão em um dos contratos juntados pelas partes, X._ entendeu que o Tribunal Arbitral violou o contraditório e a ampla defesa, pois o propósito de se juntar tais contratos no processo de arbitragem nunca foi de utilizá-los para verificação do preço de mercado do carvão.

Após, X._ pleiteou anulação da sentença arbitral perante o Tribunal Federal da Suíça. Segundo as alegações de X._ neste processo, uma vez estabelecido que o preço do carvão do contrato de D._ seria utilizado para determinar o preço de mercado do carvão do contrato em disputa, o Tribunal Arbitral deveria ter convidado as partes para exporem sua opinião a esse respeito.

X._ ainda pleiteou a anulação da sentença arbitral por alegada arbitrariedade da sentença quando da determinação do preço de mercado do carvão PCI. A anulação da sentença por arbitrariedade é permitida segundo o art. 393(e) do Código de Processo Civil da Suíça.

O Tribunal Federal da Suíça entendeu que a conduta do Tribunal Arbitral não violou o contraditório e a ampla defesa porque aos árbitros é concedida a livre apreciação das provas produzidas no processo de arbitragem. Todavia, o Tribunal Federal anulou a sentença por arbitrariedade dos árbitros quando da determinação do valor de mercado do carvão PCI Kuzbassky, conforme autoriza o art. 393(e) do Código de Processo Civil da Suíça nos casos de sentença arbitral doméstica.

Para fins deste comentário, explorar-se-á a autorização concedida pelo Tribunal Federal para que os árbitros embasem sua decisão em fatos não alegados pelas partes, já que esta afeta as arbitragens internacionais.

Feito esse introito, passa-se a análise pormenorizada da decisão.

É importante esclarecer que se o Tribunal Arbitral não encontrasse o valor de mercado para o carvão PCI na data da rescisão contratual, 23 de março de 2011, o pleito de indenização de Y._ seria julgado improcedente por não preencher os requisitos do art. 191(3) do Código de Obrigações da Suíça. De acordo com os termos da decisão do Tribunal Federal, o cálculo da indenização seria possível segundo o referido artigo, apenas se fosse possível determinar o valor de mercado do carvão na data da rescisão contratual. Portanto, o preço geralmente cobrado pela mesma mercadoria em circunstâncias comparáveis, e um local específico, deveria ser estabelecido para esse propósito. Ao utilizar o preço de mercado disposto no contrato de D._ para avaliar o carvão PCI Kuzbassky, o Tribunal Arbitral viabilizou o pleito de indenização de Y._.

Se considerarmos o argumento de X._, de que nenhuma das partes alegou que o preço do contrato de D._ deveria ser utilizado para a determinação do preço de mercado; e que o Tribunal Arbitral não convidou as partes a se manifestarem sobre a pertinência do contrato de D._ para determinação do

preço de mercado do carvão, poderia se argumentar que o Tribunal Arbitral estava tendente a privilegiar a posição de Y._. Todavia esse argumento não se sustenta, justamente por conta da aplicação do princípio da livre apreciação da prova em arbitragem.

Como já dito, o Tribunal Federal entendeu que cabe aos árbitros avaliar as provas. Nesse sentido, muito embora seja essencial o respeito ao contraditório e à ampla defesa, postos em prática por meio do direito de produzir provas sobre os fatos pertinentes e participar nas audiências do Tribunal Arbitral, os árbitros não são obrigados a convidar as partes a se manifestarem acerca de cada fato apresentado, nem a garantir às partes o direito de limitar a autonomia do Tribunal Arbitral para esse propósito. De fato, como bem colocado pelo Tribunal Federal, se isso fosse possível, haveria o desrespeito ao princípio da livre apreciação das provas. Com isso, o Tribunal Federal concluiu que cabe às partes avaliar a pertinência de apresentar determinada prova no processo, a materialidade e a relevância das provas apresentadas pela parte contrária, bem como a pertinência de se expressar sua análise sobre tal prova.

O Tribunal Federal ressaltou ainda que os efeitos da jurisprudência suíça no que diz respeito à aplicação do *Jura Novit Curia* pelos árbitros não se estendem à instrução fática. Isso porque, quando se trata da instrução fática, há um outro princípio que é considerado a pedra de toque do sistema: a livre apreciação das provas.

Definindo que o princípio da livre apreciação das provas é aplicável em arbitragens internacionais situadas na Suíça, trataremos agora da discricionariedade dos Tribunais Arbitrais para embasar suas decisões em fatos não alegados pelas partes. Em seguida, concluiremos o presente comentário resumindo o escopo de atuação dos árbitros no que diz respeito à análise fática dos casos.

O escopo da liberdade dos árbitros para embasar suas decisões em fatos não alegados pelas partes é confirmado, ou, para se melhor referenciar, definido, pelas Cortes do local da arbitragem ou do local de execução da sentença arbitral. Isso porque, na prática, se houve apreciação, pelos árbitros, de fatos não arguidos pelas partes, seja no processo, seja de conhecimento público, são as Cortes que validarão ou anularão a sentença em decorrência do comportamento dos árbitros. Se a Corte entender que o árbitro não poderia ter levado em consideração fatos dispostos à sua frente, mas não arguidos pelas partes, ela anulará a sentença e, portanto, naquela jurisdição, o escopo de liberdade dos árbitros para apreciação de provas será mais restrito do que na Suíça, por exemplo.

Como é de conhecimento geral, os fundamentos de uma sentença de um procedimento arbitral que envolve questões de construção, produção, engenharia, quebra de representação contratual e defesas que invocam força maior, depende dos fatos. A análise fática é relevante, igualmente, em pleitos de apu-

ração de haveres, seja baseado em fluxo de caixa descontado, seja em critério contábil. Isso porque necessita-se verificar a situação do mercado, e/ou da empresa, quando da saída do sócio. A relevância dos fatos também é reconhecida para solução de questões processuais, como a definição da extensão da cláusula compromissória com base na teoria do grupo de companhias, da agência e no caso da cessão contratual, por exemplo[11]. Em todas essas situações a decisão final da arbitragem dependerá dos fatos relevantes para o caso.

A produção probatória, portanto, é de extrema relevância no contexto do processo de conhecimento, incluindo-se aí as arbitragens. Embora seja difícil se atingir uma estatística, vale-se aqui de um entendimento esposado por Redfern e Hunter de que entre 60 e 70% dos resultados de arbitragens internacionais dependem mais dos fatos do que da aplicação de princípios jurídicos. Ainda, uma boa proporção dos casos remanescentes diz respeito a uma combinação de fatos e da lei, e apenas uma minoria dos resultados das arbitragens depende somente de questões jurídicas, em que os fatos que embasam a decisão são incontroversos ou irrelevantes[12].

Tendo isso em consideração, compreende-se a relevância dos fatos no deslinde dos processos.

Porém, o problema é definir quais são os fatos que podem ser utilizados para embasar a decisão dos árbitros. A princípio, a resposta poderia ser fácil: *quod non est in actis non est in mundo*. Nesse sentido, apenas os fatos presentes no processo poderiam ser utilizados pelos árbitros para fundamentarem sua decisão. E às partes caberia o ônus de se manifestarem sobre eles. Isso significa que, uma vez trazido o fato aos autos, cabe às partes expor seu entendimento sobre ele, e o Tribunal Arbitral tem a discrição para aproveitá-lo como melhor entender.

O Tribunal Federal da Suíça, na decisão em comento, assim entendeu ao permitir que o Tribunal Arbitral se baseasse em fatos presentes na arbitragem, mas que não foram abordados pelas partes em suas alegações, fazendo valer a aplicação do princípio da livre apreciação da prova em arbitragem.

Vale considerar, ainda, que nem sempre os árbitros se convencem das alegações das partes. Muitas vezes adotam uma posição intermediária, embasando sua decisão em alguns fatos alegados pelo demandante e outros alegados pelo demandado. Como bem observado por Lars Heuman, se os árbitros não se

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11 Waincymer, Jeff. Procedure and Evidence in International Arbitration. Editora: Kluwer Law International. 2012, p. 743.

12 "It is impossible to collect reliable statistics in relation to private international commercial arbitrations, but the eventual outcomes in the majority of international arbitrations (perhaps 60 to 70 per cent) probably turn on the facts rather than the application of the relevant principles of law. A good proportion of the remainder turn on a combination of facts and law, and only in a minority of cases is the outcome dependent solely on issues of law, with the underlying facts being undisputed or irrelevant." (REDFERN, Alan; HUNTER, J. Martin; et al. *Redfern and Hunter on International Arbitration*. Oxford University Press, 2009. p. 384)

convencem de nenhuma das alegações de fato das partes, eles podem acabar decidindo a disputa baseados em comparações e combinações de diferentes partes das alegações e em conclusões extraídas dos fatos não contestados ou provados[13]. Em contraposição a esse entendimento, veja-se que Waincymer ressalta que o Tribunal Arbitral não deve exercitar seu poder para produzir provas com vistas a identificar fatos que levem a uma conclusão diversa daquela alegada pelas partes[14].

Em um entendimento mais restrito a respeito dessa discussão, Lew, Mistelis e Kröll, quando discorrem acerca das formas de produção de prova, afirmam que, mesmo em um sistema inquisitorial de produção de provas em arbitragem, é importante que as questões que formam a base para a decisão do tribunal sejam apresentadas às partes para exame e análise crítica. Nesse sentido, defendem que seria desejável que o Tribunal Arbitral utilize sua experiência e expertise para tomar suas decisões, mas que, ao se basearem em pontos específicos, deveriam convidar às partes a comentá-los[15]. Ou seja, aparentemente, de acordo com os referidos doutrinadores, o escopo de liberdade dos árbitros com relação aos fatos que embasam suas decisões é mais restrito do que aquele trazido pela decisão do Tribunal Federal da Suíça.

Todavia, o princípio estampado em latim não responde a pergunta por completo. Isso porque, em muitos casos, é permitido ao Tribunal Arbitral a utilização de fatos não presentes no processo para basear sua decisão. Esse foi exatamente o entendimento exposto no clássico caso Radauti, decidido pelas Cortes da Inglaterra na década de 1980, conforme será exposto a seguir.

Em 1977, Navrom fretou uma embarcação da Radauti para Callitsis Ship Management S.A. transportar um carregamento de farinha de trigo ensacado em Roterdã e com destino a Trípoli ou Bengasi. O navio chegou em Trípoli em 21.10.1977 e informou sua prontidão para descarregar no dia seguinte. O navio não pôde atracar até 15.12.1977 devido ao congestionamento no porto, tendo completado o descarregamento apenas em 18.01.1978[16].

O proprietário pleiteou indenização por *demurrage* com data base de 22.10.1977, de acordo com a Cláusula 6 do contrato, que previa que o tempo perdido em espera para atracar seria contado como tempo de descarregamento (*laytime*). O transportador admitia a responsabilidade desde a data em que a embarcação havia atracado no porto, 15.12.1977. Isso porque, de acordo com a Cláusula 33 do contrato, eles não seriam responsáveis pelos dias perdidos no congestionamento. A Cláusula 33 do contrato previa que obstáculos intranspo-

13 HEUMAN, Lars. *Arbitration Law of Sweden*: Practice and Procedure. Juris Publishing, 2003. p. 473.
14 WAINCYMER, Jeff. Procedure and Evidence in International Arbitration. Kluwer Law International, 2012. p. 779.
15 LEW, Julian D. M.; MISTELIS, Loukas A. et al. Comparative International Commercial Arbitration. Kluwer Law International, 2003. p. 532.
16 [1988] 2 Lloyd's Rep. 416, p. 1.

níveis que atrasassem o descarregamento excetuariam qualquer dever de indenizar, razão pela qual não resultaria no tempo de descarregamento (*laytime*) ou dias de *demurrage*. O árbitro desempatador (*umpire*) decidiu a disputa em favor do transportador, fundamentando sua decisão no fato de que (i) o congestionamento era endêmico à época da chegada da embarcação no porto e a Cláusula 33 do contrato excetuaria a responsabilidade das partes para casos de congestionamento; e (ii) que a alocação dos navios no porto caberia à autoridade portuária[17].

O proprietário impugnou a sentença arbitral alegando a existência de erro processual. De acordo com suas alegações, havia dois fatos controvertidos na disputa: primeiro, se a causa do atraso era o congestionamento ou outra causa; segundo, se a causa fosse o congestionamento, se ele ocorreu sem a culpa dos transportadores. No curso da arbitragem, o proprietário da embarcação alegou que não havia prova da causa do atraso. Isso levou o árbitro indicado pelo transportador a observar que todos engajados em fretes internacionais sabiam que havia congestionamento no porto de Trípoli no final da década de 1970. O árbitro desempatador então esclareceu, na sentença, que a alocação de espaço para atracar os navios cabe às autoridades portuárias, e que nem os transportadores nem os proprietários poderiam ser responsabilizados por tal fato[18].

O proprietário não se opôs ao fato do árbitro desempatador utilizar seu conhecimento para entender o que se passava no porto de Trípoli na época. Mas questionou o fato de que o árbitro desempatador não poderia utilizar seu conhecimento para entender as causas de congestionamento sem que notificasse os proprietários sobre sua intenção previamente[19].

O proprietário alegou que se o árbitro desempatador houvesse informado previamente sua intenção, haveria pedido de prova técnica ou até mesmo pedido de documentos das autoridades portuárias. Exemplo da importância dessa prova seria o de que se Radauti possuísse dois navios na fila do porto, eles passariam o navio que teria a maior multa de *demurrage* na frente. E a falha do árbitro desempatador de notificar o proprietário acerca do que ele tinha em mente constituiria um erro processual. A Corte de Apelação entendeu que o argumento era improcedente, pois o árbitro desempatador teria o direito de inferir de seu conhecimento geral que o congestionamento no presente caso ocorreu sem culpa de qualquer transportador. Assim, não haveria necessidade para o árbitro desempatador informar parte de seu conhecimento geral e, portanto, não haveria erro processual[20].

17 Ibid., p. 1 e 2.
18 Ibid., p. 6 e 7.
19 Ibid., p. 7.
20 Ibid., p. 7/9.

Vale ressaltar ainda a conclusão exposta pela decisão de primeira instância do caso Radauti, em que o Justice Staughton citou o Lord Justice O'Connor na seguinte situação: um árbitro deve avaliar um touro morto a partir da negligência de uma das partes. Se o árbitro *expert* se baseia em seu conhecimento geral sobre avaliação de touros, incluindo flutuações de mercado sabidas por qualquer pessoa que estude o mercado, não há necessidade de notificar as partes acerca desse fato. Mas se recentemente o árbitro vendeu um touro idêntico por determinada quantia, é necessário notificar as partes acerca dessa informação. Ou, se o árbitro identifica que o touro morto sofreu alguma doença ou infecção que reduziria seu valor, é necessário notificar as partes acerca desse fato. Em resumo, o árbitro *expert* pode se basear em seu conhecimento geral para comparar locações em uma região, mas se ele sabe de um caso particular semelhante, ele deve notificar as partes acerca desses detalhes antes de se basear neles na sentença arbitral[21].

A decisão esposada pela Corte inglesa é razoável, e no mesmo sentido entende Waincymer, que defende que o Tribunal Arbitral pode utilizar seu conhecimento técnico para arrazoar a sentença, desde que seja um conhecimento geral[22]. Portanto, aos árbitros cabe a utilização de seu conhecimento técnico, afinal de contas, uma das análises que se faz quando se indica um árbitro é sua experiência no ramo de negócio em disputa. Nesse sentido, não há como se negar que a experiência do árbitro e, por conseguinte, seu conhecimento técnico são levados em consideração quando de sua indicação.

Outra decisão da Corte da Inglaterra que merece citação, e em um entendimento um pouco mais restrito sobre a liberdade dos árbitros para interpretação fática, é o caso London Underground Limited *v.* Citylink Telecommunications Limited[23], em que Justice Ramsey, ao negar provimento ao pedido de anulação da sentença, esclareceu que, com relação à instrução fática: (i) o Tribunal Arbitral geralmente deve dar às partes a oportunidade de expor seu entendimento sobre os fatos de uma premissa maior que não tenha sido tratada anteriormente no processo; (ii) o Tribunal Arbitral possui um poder autônomo para buscar fatos que podem diferir dos fatos alegados pelas partes. Esse será o caso, geralmente, de inferir fatos dos fatos primeiramente trazidos ao tribunal sobre a premissa maior. Nesse caso, o Tribunal Arbitral não necessita dar às partes a oportunidade de expor seu entendimento sobre esses fatos; (iii) quando um Tribunal Arbitral for constituído por conta de sua experiência jurídica, comercial ou técnica, as partes assumem o risco de que, a despeito de sua expertise, os árbitros cometam erros fáticos ou inferências inválidas sem que lhes seja concedida a chance de comentar sobre esses fatos[24].

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21 [1987] 2 Lloyd's Rep. 276, p. 11.
22 Waincymer, Jeff. Procedure and Evidence in International Arbitration. Kluwer Law International, 2012. p. 780.
23 2007 WL 2041811, p. 9.
24 Ibid., p. 9.

Com relação ao primeiro e ao segundo pontos da decisão do Justice Ramsey, acredita-se que ele siga a ideia do silogismo trazida por Aristóteles, acerca da premissa maior, premissa menor e conclusão. Nesse sentido, de acordo com Justice Ramsey, às partes caberia tratar os fatos da premissa maior, e aos árbitros seria permitido analisar fatos da premissa menor, mesmo que não alegados pelas partes, para que se chegasse a uma conclusão[25].

Diante do exposto, verifica-se que aos árbitros é permitido embasar suas decisões em fatos não arguidos pelas partes. A liberdade dos árbitros engloba tanto a possibilidade de proferir uma decisão baseada em fatos presentes no processo, mas não alegados pelas partes, quanto em fatos não presentes nos autos, mas de conhecimento dos árbitros, desde que esses não sejam de conhecimento pessoal do árbitro, mas sim de conhecimento disponível ao público.

Isso significa que no contexto fático é atribuído às partes o ônus de lidar com os fatos que tocam à disputa, e a ausência de posicionamento sobre esses fatos perante o Tribunal Arbitral não exclui a possibilidade de utilizá-los para fundamentar uma decisão. Nesse sentido, cabe às partes e seus advogados verificarem cuidadosamente o tratamento que deve ser dado a cada prova juntada no processo, bem como o contexto do mercado, quando se trata de uma avaliação a preço de mercado, por exemplo, e o contexto de uma indústria, quando se trata de uma discussão de produção ou construção, por exemplo.

Com efeito, o entendimento do Tribunal Federal da Suíça, bem como das decisões do judiciário da Inglaterra, acerca da possibilidade dos árbitros embasarem suas decisões em fatos não alegados pelas partes, concede à arbitragem um caráter final.

O caráter final da arbitragem é relevante, pois dele depende a eficácia de se escolher arbitrar ao invés de recorrer ao judiciário. Nesse sentido, é importante que as Cortes, quando da análise de pedidos de anulação de sentença arbitral, prestem deferência à decisão dos árbitros, exceto quando verificadas as hipóteses de anulação, ou recusa da execução, da sentença arbitral, conforme a lei do local da arbitragem e a Convenção de Nova Iorque, quando aplicável, respectivamente.

De fato, quando as partes optam pela arbitragem ao invés do judiciário, elas estão, ao mesmo tempo, aceitando que (i) o Tribunal Arbitral possa cometer um erro na decisão do mérito da disputa, e (ii) que esse erro não poderá ser revisto pelo judiciário em grau recursal. De pouco serviria a opção pela arbitragem, se as partes não estivessem obrigadas a cumprir a decisão dos árbitros e pudessem recorrer ao judiciário para uma análise em sede de recurso, e daí se compreende a importância do caráter final da arbitragem. Esse foi exatamente o entendimento trazido por Willian Park no comentário à decisão do Judiciário da

25 Ibid., p. 9.

Inglaterra no caso Lesotho Highlands[26], que tratava de um erro cometido pelo Tribunal Arbitral, porém na aplicação da lei e não na interpretação fática, mas que o pedido de anulação da sentença arbitral foi negado, haja vista que aos árbitros seria permitido incorrer em erros na aplicação da lei[27].

As decisões aqui debatidas confirmam o argumento de Willian Park no sentido de que, ao recorrer à arbitragem, as partes se sujeitam ao erro dos árbitros, e que não lhes cabe o recurso ao judiciário para anular uma sentença por eventuais erros como esses[28].

Prova disso, e, por conseguinte, de que a arbitragem possui caráter final, é a própria limitação das hipóteses de pedido de anulação de sentença arbitral disposta na maioria das legislações de arbitragem influenciadas pela Lei Modelo da Comissão das Nações Unidas. Veja-se que tanto nos pedidos de anulação de sentença por erro de interpretação fática, quanto nos casos de erro na aplicação de lei, não há um fundamento específico para o pleito, mas sim uma construção realizada em duas das hipóteses mais amplas de pedido de anulação de sentença, após a ordem pública logicamente, que são o excesso de mandato dos árbitros e a violação ao contraditório. A necessidade de elastecimento do conceito desses dois fundamentos para anulação de sentença em que os árbitros embasaram sua decisão em fatos não alegados pelas partes, apenas confirma a tese de que o propósito de uma sentença arbitral é seu caráter final e vinculante.

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26 O caso Lesotho Highlands Development Authority (LHDA) *v.* Impregilo SpA e outros (consórcio) dizia respeito à construção de uma barragem em Lesoto por um consórcio de empresas estrangeiras. Da discussão oriunda do contrato, o consórcio recorreu à arbitragem. O local da arbitragem era a Inglaterra. O consórcio pleiteou indenização que, se fosse paga de acordo com o contrato, teria sido feita na moeda de Lesoto. À época da sentença, o valor da moeda de Lesoto havia desvalorizado, o que levou o consórcio a pleitear o pagamento da indenização em quatro moedas europeias, estabelecidas contratualmente como moedas não locais para pagamento. O Tribunal Arbitral proferiu a sentença condenando LHDA ao pagamento da indenização nas moedas europeias, com base no art. 48 da Lei de Arbitragem da Inglaterra, o qual permite que o Tribunal Arbitral determine o pagamento da sentença em qualquer moeda, desde que não haja acordo diverso das partes. LHDA buscou a anulação da sentença arbitral por excesso de poder do Tribunal Arbitral. Segundo as alegações de LHDA, a previsão contratual para pagamento em quatro moedas europeias, excluía expressamente a discrição do Tribunal Arbitral para escolher a moeda da indenização de acordo com o art. 48 da Lei de Arbitragem. O pedido de anulação foi rejeitado pela Corte com base no fato de que o contrato não previa a moeda de pagamento de eventual sentença arbitral. Todavia, a Corte também decidiu que a escolha do Tribunal Arbitral poderia ser um erro na aplicação da lei, mas não um excesso de poder. Ou seja, o erro dos árbitros quanto à aplicação da lei não constituiria base para anular uma sentença por excesso de poder. [2005] UKHL 43.

27 "Sound distinctions between simple mistake and excess of authority rest on two fundamental principles. First, an agreement to arbitrate normally means accepting that the arbitrator might make a mistake in evaluating the merits of the parties' claims and defences. It would make little sense to say that an award will page be binding if litigants automatically get a second bite at the apple, turning arbitration into foreplay to court proceedings.

Equally important, however, is the principle that litigants in arbitral proceedings do not expect to be bound by overreaching intermeddlers. Decisions on matters never submitted to arbitration deserve no more deference than the opinions of a random commuter passing through the Paris Métro or New York's Grand Central Station." (PARK, William W. The Nature of Arbitral Authority: A Comment on Lesotho Highlands, Arbitration International, 2005 Volume 21 Issue 4. Kluwer Law International, p. 483-491, p. 485)

28 PARK, William W. The Nature of Arbitral Authority: a Comment on Lesotho Highlands, Arbitration International, 2005. Volume 21 Issue 4. Kluwer Law International, p. 483-491, p. 485.

Conclui-se, assim, que a liberdade do Tribunal Arbitral, para embasar sua decisão em fatos não alegados pelas partes, ou até mesmo em previsões contratuais, como foi o caso Lesotho Highlands, seja ela um erro ou um acerto, é mais um meio de se confirmar o caráter final da arbitragem.

LEONARDO FURTADO
Advogado em São Paulo.