4A_240/2009[1]

Judgement of December 16, 2009

First Civil Law Court

Federal Judge KLETT (Mrs), Presiding,

Federal Judge KOLLY,

Federal Judge KISS (Mrs),

Clerk of the Court: LEEMANN.

1. X._____,

2. Y._____,

Appellants,

Both represented by Mr André A. GIRGUIS

v.

Z._____,

Respondent,

Represented by Mr Harold FREY and Mr Dominique MÜLLER

Facts:

A.

A.a X._____ Ltd. (Appellant 1) is the only shareholder of Y._____ Ltd. (Appellant 2; both together: the Appellants) since July 1999. The latter quarries fluorid (calciumfluorid) in its mines in South Africa.

[1] Translator's note: Quote as X._____ and Y._____ *v.* Z._____, 4A_240/2009. The original of the decision is in German. The text is available on the website of the Federal Tribunal www.bger.ch.

Z._____ Inc. (Respondent) is an international conglomerate with its seat in the United States. Among other things it is a significant producer of hydrofluoric acid and regularly requires large quantities of fluorid for that purpose.

A.b In an Agreement of February 16, 2001 the Appellants undertook to deliver 85'000 metric tons of fluorid to the Respondent yearly.

For the year 2001 the Parties agreed on a basic price of USD 106.25 per dry metric ton (DMT). For the following years the prices were to be computed according to a contractually determined formula, which referred to the so called FCA (free carrier) prices, which the Respondent paid to other suppliers. Should the price calculated on the basis of the formula fall under an agreed upon minimum price or go above a determined maximum price, the Agreement contained an obligation for the Parties to negotiate in good faith a price that would be fair and appropriate for both. The Agreement was first concluded until December 31, 2005. Eventually the contract was to be extended for a year to the extent that it was not terminated by a party with six months notice. Art. 3 (c) provides the following among other things with regard to the possibility to terminate:

"This Agreement may be terminated by either party in the following instances: (i) if either party is in material breach of the Agreement, which breach remains uncured following thirty (30) days written notice from the non-breaching party, the non-breaching party may terminate the Agreement immediately, by written notice; ..."[2]

The Agreement contains a choice of law in favour of Swiss law in addition to an arbitration clause, with the following wording:

[2] Translator's note: In English in the original German text.

"[t]his Agreement shall be construed and interpreted in accordance with the laws of Switzerland as applied between domestic parties provided, however, that the express agreements, understandings and provisions contained herein shall always prevail."[3]

A.c On January 19, 2006, the Appellants terminated the February 16, 2001 Agreement without notice because the Respondent had committed an important breach of contract ("material breach"[4]), to the extent that it would have refused to pay fully the invoices for two deliveries and to disclose the FCA prices to the Appellants.

The Respondent denied that the Appellants were entitled to terminate and raised a claim for damages on the basis of failure to deliver.

B.

B.a On February 15, 2006 the Respondent filed a request for arbitration against the Appellants, essentially submitting (and this was changed during the proceedings) that the Appellants should be ordered to pay USD 6'847'305.29 with interest at 5 % since January 19, 2006. Additionally, Exhibits C-176 and C-177 were to be treated in strict confidence.

The Appellants raised a counterclaim of in total USD 3'830'273.35 with interest based on deliveries made and inadequate price computations.

B.b In an arbitral award of April 3, 2009 the ICC Arbitral Tribunal with seat in Zurich partially upheld the claim and ordered the Appellants jointly to pay damages in the amount of USD 1'243'824.- with interest at 5 % since January 19, 2006 (Award – paragraph 1). Furthermore it ordered the Appellants to treat Exhibit C-176 and C-177 strictly confidentially (Award – paragraph 2) and it rejected the counterclaim (Award – paragraph 3). Furthermore it decided the costs of the proceedings (Award – paragraphs 4 and 5).

[3] Translator's note: In English in the original German text.
[4] Translator's note: In English in the original German text.

As to the termination made by the Appellants, the Arbitral Tribunal held that the Respondent had violated the Agreement of February 16, 2001, to the extent that it had not disclosed the FCA prices to the Appellants, but that the breach could not be considered as "material breach"[5] within the meaning of paragraph 3 (c) of the Agreement, thus making the termination of January 19, 2006 unjustified.

As to the Appellants' counterclaim, which was based on allegedly inaccurate price computations for the deliveries made, the Arbitral Tribunal held that according to commercial good faith it was to be assumed that the second Appellant had agreed without reservation to the prices set by the Respondent, to the extent that it had based its signed invoices on such prices, thus validly renouncing any retroactive review of the prices. There was no intentional deceit according to Art. 28 OR[6].

C.

In a Civil law appeal the Appellants submit that the Federal Tribunal should annul paragraph 1 and 3-5 of the April 3, 2009 award of the ICC Arbitral Tribunal "and that the matter should be sent back to the Arbitral Tribunal for a new decision, the Arbitral Tribunal being instructed to reject the Respondent's claim entirely and to grant the Appellants' counterclaim entirely within the meaning of the opinion of the Federal Tribunal". Subsidiarily, the aforesaid paragraphs of the award are to be annulled and the dispute sent back to the Arbitral Tribunal for a new decision.

The Respondent submits that the appeal should be rejected, to the extent that the matter is capable of appeal. The Arbitral Tribunal did not submit a brief.

D.

On June 22, 2009, the Federal Tribunal granted the Respondent's motion for security for costs. The Appellants subsequently deposited the amount of CHF 35'000.- with the Federal Tribunal as security for a possible award of costs to the other Party.

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[5] Translator's note: In English in the original German text.
[6] Translator's note: OR is a German abbreviation for the Swiss Code of Obligations.

On July 28, 2009 the Appellants' request for a stay was rejected by the Federal Tribunal. A renewed application for a stay and a request to reconsider the previous decision was rejected in a decision of October 27, 2009.

The Appellants' request to be given time for a rebuttal was rejected on October 21, 2009. On October 29, 2009 the Appellants filed a brief in rebuttal with the Federal Tribunal.

Reasons:

1.
A Civil law appeal is allowed against awards of arbitral tribunals under the requirements of Art. 190-192 PILA[7] (Art. 77 (1) BGG[8]).

1.1 The seat of the Arbitral Tribunal is presently in Zurich. The Parties do not have their seat in Switzerland. As they did not rule out in writing the provisions of chapter 12 PILA, they are to be applied (Art. 176 (1) and (2) PILA).

1.2 The Civil law appeal within the meaning of Art. 77 (1) BGG is principally only for annulment of the award under appeal (see Art. 77 (2) BGG ruling out the application of Art. 177 (2) BGG to the extent that the latter allows the Federal Tribunal to decide the matter itself). To the extent that the dispute involves the jurisdiction of the arbitral tribunal, however, there is an exception, already available within the framework of the old Public law appeal, whereby the Federal Tribunal itself may determine the jurisdiction or lack of jurisdiction of the arbitral tribunal (BGE 127 III 279 E. 1b p. 282; 117 II 94 E. 4 p. 95 f.; Decision 4A_224/2008 of October 10, 2008 E. 2.4; 4A_128/2008 of August 19, 2008 E. 2.3).

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[7] 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.

[8] Translator's note: BBG is the German abbreviation for the Federal Statute of June 17, 2005 organising the Federal Tribunal, RS 173.110.

The Appellants may not submit that paragraphs 1 and 3 – 5 of the award should not only be annulled but that the matter should be sent back to the Arbitral Tribunal with instructions to reject the Respondent's claim and to grant the Appellants' counterclaim for the reasons contained in the opinion. To the extent that the Appellants seek a material judgment from the Federal Tribunal or a specific instruction to the Arbitral Tribunal as to the decision to be taken, the matter in not capable of appeal.

1.3 Only the grievances limitatively mentioned at Art. 190 (2) PILA are admissible (BGE 134 III 186 E. 5 p. 187; 128 III 50 E. 1a p. 53; 127 III 279 E. 1a p. 282). According to Art. 77 (3) BGG the Federal Tribunal reviews only the grievances which are brought forward and reasoned in the appeal; this corresponds to the requirement to submit grievances contained in Art. 106 (2) BGG as to the violation of constitutional rights and of cantonal and inter-cantonal law (BGE 134 III 186 E. 5 S. 187 with references). Criticism of an appellate nature is not allowed (BGE 119 II 380 E. 3b p. 382).

1.4 The Federal Tribunal bases its decision on the facts which the Arbitral Tribunal found (Art. 105 (1) BGG). It may not rectify or supplement the factual findings of the Arbitral Tribunal, even when these are manifestly inaccurate or rely on a violation of the law within the meaning of Art. 95 BGG (see Art. 77 (2) BGG ruling out the application of Art. 97 BGG and Art. 105 (2) BGG). However the Federal Tribunal may review the factual findings of the award under appeal, to the extent that some grievances within the meaning of Art. 190 (2) PILA are brought against such factual findings or exceptionally when new evidence is to be taken into account (BGE 133 III 139 E. 5 p. 141; 129 III 727 E. 5.2.2 p. 733; with references). Whoever relies on an exception to the rule that the Federal Tribunal is bound by the factual findings of the lower court and wishes to correct or supplement the facts on that basis, must show on the basis of the record that the corresponding factual allegations were made in the proceedings in a formally valid way (see BGE 115 II 484 E. 2a p. 486; 111 II 471 E. 1c p. 473; with references).

2.

In connection with the issue of the legality of their termination, the Appellants claim that Art. 190 (2) (b) or (c) PILA was violated.

2.1 In view of the fact that the Parties had expressly provided that Swiss law would be applicable as though domestic parties[9] would be involved, the Arbitral Tribunal rightly found that the Parties had validly excluded the application of the United Nations Convention on Contracts for the International Sale of Goods of April 11, 1980 (CISG SR 0.221.211.1). Yet the Arbitral Tribunal would have decided based on Art. 25 CISG as to whether the Respondent's contractual breach was a material breach[10] or not. To the extent that the Arbitral Tribunal thus disregarded the clear choice of law of the Parties, it exceeded its jurisdiction according to Art. 190 (2) (b) PILA. Furthermore it decided an issue which the Parties had not submitted to arbitration, which is why a violation of Art. 190 (2) (c) PILA took place.

2.2 The grievance is unfounded. Aside from the fact that it is doubtful whether the Appellants' grievance could be treated *per se* as a lack of jurisdiction within the meaning of Art. 190 (2) (b) PILA, since it rather concerns the way the law was applied, to which merely the grievance of Art. 190 (2) (e) PILA applies (see decision 4P.146/2004 of September 28, 2004 E.5.2.2; Pierre A. KARRER, in: Basler Kommentar, 2nd edition 2007, n° 312 ad Art. 187 PILA; Anton HEINI, in: Zürcher Kommentar, 2nd edition 2004, n°13 ad Art. 187; BERGER/KELLERHALS, Internationale und interne Schiedsgerichtsbarkeit in der Schweiz, 2006, Rz. 1556; a.M. BERTI/SCHNYDER, in: Basler Kommentar, 2nd edition 2007, n° 39 ad Art. 190 PILA), the allegation on which the grievance is based, namely that the Arbitral Tribunal would have applied foreign law instead of the chosen Swiss law, is unfounded.

The Arbitral Tribunal did not misjudge that the Parties wanted to have Swiss law applied to their contractual relationship and that they ruled out the application of the Vienna Convention. To assess the legality of the Appellants' termination it had to

[9] Translator's note: In English in the original German text.
[10] Translator's note: In English in the original German text.

interpret paragraph 3 (c) of the February 16, 2001 Agreement, which provided for a possibility to terminate in case of material breach[11].

According to Swiss law, a contract must be interpreted first on the basis of the actual concluding intent of the parties; in its absence, the contractual clause must be interpreted according to the principle of trust, namely as it could and should have been understood according to its wording and context and in good faith in view of all the circumstances (BGE 133 III 61 E. 2.2.1 p. 67; 132 III 268 E. 2.3.2 p. 274 f.; 130 III 417 E. 3.2 S. 424, 686 E. 4.3.1 p. 689; with references). Considering that the concept of "material breach"[12] used by the Parties could not be used in traditional Swiss contract law, the Arbitral Tribunal held that in order to interpret it, it could resort to a paraphrase of the "fundamental breach"[13] in Art. 25 CISG, although the Vienna Convention was fundamentally not applicable to the agreement and (the Arbitral Tribunal) simultaneously referred to Art. 7.3.1 of the Unidroit Principles of International Commercial Contracts. In this way it decided how the Parties understood or could understand, as companies active in international trade, the concept they used. The Arbitral Tribunal thus undertook the interpretation of a contract according to Swiss law and did not apply foreign law contrary to the Parties' choice of law. The grievance that the Arbitral Tribunal would have disregarded the clear choice of law of the Parties and thus exceeded its jurisdiction according to Art. 190 (2) (b) PILA or decided an issue which was not in front of him in violation of Art. 190 (2) (c) PILA, is therefore unfounded.

For these reasons, the grievance of a violation of public policy (Art. 190 (2) (e) PILA) also comes to nothing, to the extent that the Appellants base it on the alleged disregard of the choice of law clause.

[11] Translator's note: In English in the original German text.
[12] Translator's note: In English in the original German text.
[13] Translator's note: In English in the original German text.

3.
With regard to the assessment of their termination, the Appellants then claim a violation of the right to be heard (Art. 190 (2) (d) PILA).

3.1 They claim that they could not have taken into account that the Arbitral Tribunal would interpret the concept of "material breach"[14] according to the Vienna Convention, as the latter is not to be correlated with Swiss law. Thus, they did not take any position as to the applicability of Art. 25 CISG, particularly as to the relevant issues of the subjective and objective foreseeability of the harm resulting from the violation of the contract according to that provision. That the Appellants would not have taken into account an interpretation according to the Vienna Convention and could not have done so would also result from the fact that the Arbitral Tribunal, in its Procedural Order 19 of October 29, 2008 did not address that issue and had not requested the Parties to argue it. Submissions by the Parties as to Art. 25 CISG, particularly as to foreseeability, according to the Appellants, would have required new statements of facts, which the Arbitral Tribunal would have explicitly ruled out further to the October 27, 2008 hearing as well as in paragraph 1.2 (2) of the Procedural Order of October 29, 2008. In view of these statements and orders the Appellants could have trusted that they would not have to argue any further in this respect. The approach of the Arbitral Tribunal would have prevented them from expressing their view on the aforesaid issues and bringing them into the proceedings.

3.2 According to federal case law there is no constitutionally protected right of the parties to be specifically heard as to the legal assessment of the facts they bring into the proceedings. The right to be heard does not require either that the parties should be advised in advance of the facts important for the decision. There is an exception when a court intends to base its decision on a legal reason which the parties did not invoke and which they could not reasonably have deemed as pertinent (BGE 130 III 35 E. 5 p. 39; 126 I 19 E. 2c/aa p. 22; 124 I 49 E. 3c p. 52). It is a matter of appreciation to determine the issue as to whether or not the application of law by the arbitral tribunal is to be

[14] Translator's note: In English in the original German text.

qualified as unexpected within the meaning of federal case law and in order to assess that issue in the field of international arbitration, the Federal Tribunal proceeds with restraint. The peculiarities of the proceedings – namely the concurring intent of the parties not to bring their dispute in front of State Courts and the fact that the arbitrators may come from different legal traditions – must be taken into account and it must be avoided that the argument of the unexpected application of the law is abused to achieve material review of the award by the Federal Tribunal (BGE 130 III 35 E. 5 p. 39 f.; 4A_42/2007 of July 13, 2007 E. 7.1; 4P.260/2000 of March 2, 2001 E. 6b).

3.3 The Arbitral Tribunal interpreted the contractual clause contained in the Agreement of February 16, 2001, which describes the requirements for extraordinary termination and held that failing "material breach"[15] by the Respondent, the extraordinary termination was not justified. The issue as to whether or not the Respondent's attitude was to be qualified as "material breach"[16] within the meaning of the clause and whether the February 16, 2001 Agreement could be terminated prematurely by the Appellants, was one of the Appellants' principal arguments against the Respondent's damage claim and thus one of the central issues in the arbitral proceedings. Thus they had to assume that the Arbitral Tribunal would review the contractual requirements for extraordinary termination according to paragraph 3 (c) of the February 16, 2001 Agreement and interpret the concept of "material breach"[17] in this respect. Therefore they had an inducement to express their views on that issue. As the Parties, active in international trade, did not circumscribe the concept contractually and since it is not usual in Swiss contract law, it was obvious that in order to interpret the concept of "material breach"[18] the understanding in international trade was to be taken into account and that Art. 25 CISG and Art. 7.3.1 of the Unidroit Principles of International Commercial Contracts were to be brought in.

The interpretation and the application of paragraph 3 (c) of the February 16, 2001 Agreement therefore did not come as a surprise and the grievance of the violation of

[15] Translator's note: In English in the original German text.
[16] Translator's note: In English in the original German text.
[17] Translator's note: In English in the original German text.
[18] Translator's note: In English in the original German text.

the right to be heard is unfounded. It cannot be claimed that the Appellants were prevented to express their view on the issues just mentioned by the orders of the Arbitral Tribunal, since, to the contrary, the lower court, in the aforesaid Procedural Order of October 29, 2008 instructed the Parties to express their views as to the dispute comprehensively again, also in a legal prospective.

4.
In connection with their termination, the Appellants further claim a violation of public policy (Art. 190 (2) (e) PILA).

4.1 The material review of an international arbitral award by the Federal Tribunal is limited to the issue as to whether the award is consistent with public policy or not (BGE 121 III 331 E. 3a p. 333). The material adjudication of a claim violates public policy only when it disregards some fundamental legal principles and thereby becomes incompatible with the essential and broadly recognised values which, according to prevailing opinion in Switzerland, should be the basis of any legal order. Belong to such principles the observance of contracts (*pacta sunt servanda*), the prohibition of abuse of rights, the principle of good faith, the prohibition of expropriation without compensation, the prohibition of discrimination and the protection of incapables. An award can be annulled only if its result contradicts public policy and not merely its reasons (BGE 132 III 389 E. 2.2 p. 392 ff.; 128 III 191 E. 6b p. 198; 120 II 155 E. 6a p. 166 f.).

4.2 The Appellants unjustly claim a violation of the principle that continuing obligations may be terminated for cause (see decision 4P.172/1999 of February 17, 2000 E. 5d). They concede that the Arbitral Tribunal did not fundamentally deny them the right of extraordinary termination of the Agreement with the Respondent. (The Arbitral Tribunal) rather assumed that an early termination of the contractual relationship was permissible but held that the prerequisites were not given failing the absence of an important breach of contract ("material breach"[19]).

[19] Translator's note: In English in the original German text.

In their arguments as to the duty to disclose prices the Appellants disregard that it does not behoove the Federal Tribunal to review the results of the interpretation to which the arbitral tribunal arrived as to its consistency with the law or the constitution (prohibition of arbitrariness). They engage in appellatory criticism of the reasons of the lower court, according to which the Respondent, whilst failing to disclose the FCA prices, did not breach any important contractual obligation and that the termination by the Appellants was therefore unjustified. Apart from that they now claim in front of the Federal Tribunal an unreasonable limitation of their personality rights, without showing to what extent they would already have made corresponding allegations in the arbitral proceedings besides the termination ground for "material breach"[20]. Contrary to the opinion expressed in the appeal, the Arbitral Tribunal did not violate public policy when it did not qualify the Respondent's breach of the duty to disclose prices as "material breach"[21] and on that basis denied to the Appellants the right to terminate without notice.

4.3 They also engage into merely appellatory criticism against the award under review with the argument that the Arbitral Tribunal would have violated public policy because at the time of termination the Appellants no longer had any obligation to deliver due to the lack of determinability of the purchase price. In doing so, they question the reasons of the Arbitral Tribunal improperly, according to which the price was determinable enough on the basis of the contractual guidelines even if the maximum price of USD 116.- was exceeded. Contrary to the Appellants' opinion, the lower court did not disregard the principle of private autonomy when it determined the damages for wrongful termination by applying Art. 42 (2) OR. A violation of public policy (Art. 190 (2) (e) PILA) is not substantiated.

[20] Translator's note: In English in the original German text.
[21] Translator's note: In English in the original German text.

5.

Finally, the Appellants argue a violation of the right to be heard (Art. 190 (2) (d) PILA), respectively of public policy (Art. 190 (2) (e) PILA) in connection with the rejected force majeure defence, the Respondent's damage claim and their counterclaim.

5.1 According to case law of the Federal Tribunal, a factual finding that is blatantly inaccurate or contrary to the file is not *per se* sufficient to annul an arbitral award. The right to be heard contains no entitlement to a materially accurate decision. Therefore it is not for the Federal Tribunal to review whether the Arbitral Tribunal took into account the entire record and understood it correctly. A formal violation of due process is required, meaning that the parties' right to be heard was factually made meaningless by blatant oversight and that in the end the party is not in a better position than if the right to be heard had not been granted at all with regard to an issue essential for the decision. He who wishes to deduct a violation of the right to be heard from a blatant oversight must show that the judicial oversight made it impossible for him to bring forward and prove his point of view with regard to an issue pertinent in the case (BGE 133 III 235 E. 5.2 p. 248 f.; 127 III 576 E. 2b-f).

5.2

5.2.1 With regard to the Appellants' force majeure defence as to their obligation to deliver from October 2005, the Arbitral Tribunal held that they had not sufficiently substantiated that the drought they claimed would constitute a situation of force majeure; thus they had neglected to provide statistical information showing that the meteorological situation in the Zeerust region at the time was significantly and unpredictably different from the normal fluctuations.

What the Appellants argue in this respect is not appropriate to show a violation of the right to be heard. The list of their submissions in the arbitral proceedings contained in the appeal brief do not show specifically to what extent the amount of precipitation at the relevant time differed from the meteorological values, but they merely describe generally the alleged production problems as a consequence of the drought. Their

arguments do not establish a relationship with the usual seasonal fluctuations. It is not substantiated to what extent the Arbitral Tribunal would have disregarded the Appellants' submission in a way that would have made it impossible for them to present their point of view with regard to the force majeure situation in the proceedings. The Appellants' arguments actually do not aim at the factual findings of the Arbitral Tribunal but rather question its legal assessment as to the substantiation of the alleged legal defence. The grievance fails.

5.2.2 The Appellants do not show any violation of the right to be heard either when they argue that, so far as is apparent, the Respondent would never have denied that the second Appellant's mine would have suffered such pronounced drought in the winter of 2005 and specifically in October/November 2005, that its production would have been significantly limited. They do not demonstrate which of their arguments in the arbitral proceedings would thus have been overlooked and to what extent they could not have presented their own point of view in the proceedings.

5.2.3 When the Appellants further claim that the Arbitral Tribunal would have wrongly denied a force majeure situation by virtue of their deliveries to other customers and would have inaccurately found that the Appellants' export volume sunk in November/December 2005, they do not show a violation of the right to be heard either. They rather criticise the conclusions of the lower court claiming various alleged "blatant oversights" and "factual findings blatantly false and contrary to the record", but they do not substantiate to what extent it would have been made impossible for them to present their point of view as to the issue of force majeure into the proceedings.

5.3 The Arbitral Tribunal held that in view of the prices published in the magazine "Industrial Minerals" there was a salability price within the meaning of Art. 191 (3) OR. Accordingly, it allowed the Respondent to calculate its claim for damages according to the difference between the price due under the contract and the salability price, without evidence of specific covering purchases. The Appellants disregard the

requirements for reasons of a grievance (Art. 77 (3) compared to Art. 106 (2) BGG) and the scope of judicial review by the Federal Tribunal when they repeat *verbatim* an argument by the Respondent and their own detailed arguments as to the issue of market prices in the arbitral proceedings in front of the Federal Tribunal and claim on that basis that the Arbitral Tribunal would have disregarded the submissions or not dealt with them appropriately and then draw different conclusions from those in the award under review as to the evidence and the application of Art. 191 (3) OR. By doing so they criticise – again by claiming various alleged "blatant oversights" and "factual findings blatantly inaccurate and contrary to the record" – in a merely appellate way the assessment of the evidence and the legal evaluation of the Arbitral Tribunal. Even with their claim that the Respondent's arguments as to the issue of the market prices would not have been properly substantiated, they do not assert a violation of the right to be heard. The Appellants merely explain their own point of view once again and claim that it would be established by the record. This is not admissible in an appeal against an arbitral award. The Appellants' arguments also disregard that it is not a matter for the Federal Tribunal to examine whether the Arbitral Tribunal took into account the entire record and understood it properly (BGE 133 III 235 E. 5.2 p. 249; 127 III 576 E. 2 p. 578). It is not a violation of the right to be heard that the Arbitral Tribunal did not expressly take a stand as to the Appellants' various arguments that in their view there was no salability price within the meaning of Art. 191 (3) OR. In the award under review, the Arbitral Tribunal summarized the Appellants' main arguments by reference to their first Post Hearing Brief and extensively substantiated why there was a salability price according to Art. 191 (3) OR. This did not require a specific rejection of all the Appellants' arguments (see BGE 134 III 186 E. 6.2 p. 188). Neither was the Arbitral Tribunal under a duty to instruct the Parties in its Procedural Order of October 29, 2008 to present additional statements as to the existence of a market price or as to whether or not such a price could be deducted from the magazine "Industrial Minerals". The grievance of a violation of the right to be heard with regard to the Respondent's claim for damages comes to nothing.

5.4 With regard to the counterclaim, the Appellants claim a violation of their right to be heard and of public policy.

5.4.1 The Arbitral Tribunal held that the Respondent transmitted the price it had calculated to the second Appellant without the basis of computation, yet that the latter established its invoices on that basis until October 2005 without any reservations as to a subsequent computation of the price. In good faith, such behaviour was to be assessed as an agreement without reservation by the second Appellant to the prices set by the Respondent. Through its submission of invoices without reservations, the second Appellant renounced a subsequent review of the prices on the basis of the price formula agreed upon.

The Appellants' arguments show no blatant oversight or a factual finding contrary to the record, which would lead to another result. They challenge the finding of the lower court in another context, that it is undisputed that the second Appellant made its first formal request for disclosure of the FCA prices for the years 2002-2004 on October 12, 2005 and argue by reference to their briefs and various Exhibits that they claimed in the arbitral proceedings to have demanded from the Respondent that it disclose the FCA prices already before the beginning of the contractual year 2002, so that the price for the contractual year 2002 could be calculated, or that on June 19, 2003 they would have demanded the disclosure of the FCA prices again in order to calculate the price for the contractual year 2003. Yet neither these arguments nor the additional attempts to hold the Respondent to a disclosure of the FCA prices, as mentioned in the First Memorial and in the First Post Hearing Brief were decisive for the consideration of the Arbitral Tribunal that a renunciation to subsequent verification by the Respondents was to be assumed. As the Respondent rightly objects, the requests mentioned merely relate to the disclosure of the prices for the current year or for the next one, but not to any retroactive disclosure of the underlying FCA prices for a subsequent computation on the basis of the price formula. There is accordingly no blatant contradiction in the finding of the Arbitral Tribunal that the second Appellant issued invoices until October 2005 in each case by reference to the prices calculated by the Respondent and

without reservation with regard to a subsequent calculation according to the contractual formula.

Failing a factual finding blatantly inaccurate or contrary to the record in connection with the acceptance without reservation of the Respondent's prices by the second Appellant as found by the Arbitral Tribunal, the grievance of a violation of the right to be heard proves to be unfounded in this respect as well.

5.4.2 The Appellants further claim that the Arbitral Tribunal would have wrongly concluded that on the basis of the numerical data openly available, they could have assessed the prices which the Respondent paid to other suppliers. Yet they do not show to what extent the alleged blatant oversight made it impossible for them to present and to prove their point of view in the proceedings (BGE 133 III 235 E. 5.2 p. 248 f.; 127 III 576 E. 2b-f).

5.4.3 In this context as well, the Appellants wrongly claim a violation of public policy (Art. 190 (2) (e) PILA) in connection with the principle of good faith.

By reference to various considerations in the award under review and to their own arguments in the arbitral proceedings, they criticise the conclusion of the lower court, according to which the behaviour of the second Appellant was to be assessed as a renunciation to a subsequent calculation or that the Respondent never deceived the Appellants according to Art. 28 (1) OR and they submit they own view on the issue to the Federal Tribunal.

The Arbitral Tribunal assessed the behaviour of the second Appellant according to the principle of trust, by reference to the fact that the Respondent, contrary to the Agreement of February 16, 2001, did not disclose the FCA prices and transmitted the prices to the second Appellant without the basis for calculation and found that a subsequent computation had been renounced. In doing so it took into consideration the principle of good faith, yet drew other conclusions than the Appellants. Their

arguments aim at criticising the essential factual findings and the legal assessment of the attitude of the second Appellant in the submission of the invoices as described in the award under review, which is not admissible in the appeal proceedings as the Federal Tribunal, even when a violation of public policy is claimed (Art. 190 (2) (e) PILA), cannot review the issues of fact and law as an appeal court would (see 4.1 in this respect).

6.
The appeal must be rejected to the extent that the matter is capable of appeal. In such a procedural outcome the Appellants must pay the costs jointly (Art. 66 (1) and (5) as well as Art. 68 (2) and (4) BGG). Compensation for the Respondent must be set at CHF 35'000.- and is to be paid from the amount deposited with the court as security for costs. Contrary to the Respondent's opinion, that amount appears appropriate even considering the various briefs of the Appellants as to the issue of a stay and the extent of the appeal (see Art. 3 (1) of the Regulations on compensation for the parties and for public representation in proceedings in front of the Federal Tribunal [SR 173.110.210.3]).

The Federal Tribunal pronounces:

1. The appeal is rejected, to the extent that the matter is capable of appeal.

2. The Appellants shall pay the court costs CHF 30'000.- jointly and internally by half.

3. The Appellants shall pay CHF 35'000.- to the Respondent for the federal proceedings, jointly and internally by half. That amount shall be paid from the security for costs deposited with the court.

4. This judgment shall be notified in writing to the Parties and to the ICC Arbitration with seat in Zurich.

Lausanne, December 16, 2009

In the name of the First Civil Law Court of the Swiss Federal Tribunal

The Presiding Judge (Mrs): The Clerk:

KLETT LEEMANN