4A_342/2015[1]

Judgment of April 26, 2016

First Civil Law Court

Federal Judge Kiss (Mrs.), Presiding
Federal Judge Klett (Mrs.)
Federal Judge Kolly
Federal Judge Hohl (Mrs.)
Federal Judge Niquille (Mrs.)

Clerk of the Court: Mr. Carruzzo

1. X1._____,
2. X2._____,
3. X3._____,
4. X4._____,
All represented by Mr. Bernard Lachenal and Mr. Léonard Stoyanov,
Appellants

v.

Z._____ GmbH,
Represented by Mrs. Nathalie Voser and Mrs. Anya George,
Respondent

Facts:

A.
A.a. X1._____, X2._____, X3._____ and X4._____ (hereafter: the Claimants) belong to a Turkish group of companies (hereafter: Group X._____) founded by a certain W._____ in the 1950s. Their activities involve the production of electrical appliances belonging to the category of white goods, such as washing machines and dishwashers, and of brown goods, such as televisions and radios. The devices of the latter category are manufactured by the Turkish law company A._____ (formally: A.A._____), a subsidiary of Group X._____.

[1] Translator's Note: Quote as X1._____ to X4._____ *v.* Z._____ GmbH, 4A_342/2015.
The decision was issued in French. The original text is available on the website of the Federal Tribunal, www.bger.ch.

Z._____ GmbH (hereafter: Z._____ or the Defendant), a German law company, pursuant to a joint venture between B._____ GmbH and C._____ AG, manufactures a wide range of domestic appliances including white goods for the international market. Within Group X._____, X5._____ Company was responsible for the manufacturing of the white goods. In 1995 the Respondent wished to increase its share of the Turkish market for the goods in question and became a shareholder of the latter company to which it gave the new name of X6._____.

A.b. Pursuant to a Share Sale and Purchase Agreement (hereafter: the SPA) of October 2, 2003, governed by Turkish law, the Claimants sold all their shares in X6._____ to the Defendant. Art. 5.2 of the SPA required the Defendant to provide for the conclusion of a distribution agreement between X6._____ and A._____ in the following terms:

> Z._____ as the majority shareholder of X6._____ shall ensure that X6._____ will conclude, as of the date of signature of this Agreement, a new distributorship agreement ("Distributorship Agreement") with A.A._____ ("A._____") for an indefinite period of time according to the terms and conditions of the draft agreement A._____ - X6._____ as annexed hereto (Annex 5).[2]

The Distributorship Agreement (hereafter: the DA) pursuant to the aforesaid clause was concluded on October 8, 2003. A._____ granted X6._____ the exclusive right to sell the brown goods in Turkey that it would manufacture.

A.c. On May 27, 2008, X6._____ notified A._____ of the termination of the DA (Notice of Termination) for various reasons and sought the payment of USD 10 million. The subsequent dispute between the two companies was submitted to the Turkish state courts. More than three years after the termination was notified, the Claimants advised the Defendant by letter of counsel of June 29, 2011, that the illegal termination of the DA caused the extinction of the SPA. They reiterated their position through their lawyer on August 23, 2013, and complained that they had received no answer whilst informing the Defendant that they were going to initiate arbitration against it.

B.

B.a. On October 1, 2013, the Claimants relied on the arbitration clause included in the SPA and filed a Request for Arbitration with a view to obtaining a finding that the termination of the DA by X6._____ extinguished the SPA and they sought the restitution of the shares of that company against reimbursement of the selling price and the corresponding dividends received by the Respondent since the contract was entered into.

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

On December 23, 2013, the Defendant submitted its answer to the request (Respondent's Answer to the Request for Arbitration) and submitted that the claim should be rejected whilst reserving its right to submit a counterclaim should the restitution of the shares it had acquired be ordered.

A three-member Arbitral Tribunal was constituted on February 19, 2014, under the aegis of the Court of Arbitration of the International Chamber of Commerce (ICC). In accordance with the aforesaid arbitration clause, the seat of the arbitration was set in Zürich and English was the language of the proceedings.

B.b. In a letter of April 3, 2014, the Defendant, claiming the absence of any cause and effect relationship between the termination of the DA and the fate of the SPA, asked the Arbitral Tribunal to decide this as a preliminary issue after a first exchange of briefs, namely once the Statement of Defense was submitted. In a letter of April 10, 2014, the Claimants accepted the Respondent's proposal to bifurcate the proceedings (Respondent's Request for Bifurcation).

In an email of April 30, 2014, the chairman of the Arbitral Tribunal advised the parties that a case management conference would be held on May 6, 2014, with a view to adopting the Terms of Reference and the Specific Procedural Rules as well as a full Procedural Timetable including, in particular, two exchanges of briefs. Moreover, he accepted both the bifurcation of the proceedings and that the impact of the termination of the DA on the existence of the SPA would be addressed as a preliminary issue. The email contains the following clarifications:

> 1. At the meeting of 6 May 2014, in consultation with the parties, the Arbitral Tribunal will establish a full procedural timetable, including two rounds of submissions, document production, if appropriate, and an evidentiary hearing.
>
> 2. In the first round of submissions, i.e. the Statement of Claim and the Statement of Defence, the parties shall set out in full their respective cases on liability and the legal basis for any relief claimed. In particular, the Claimants shall set out the basis of their case that the termination of the Distributorship Agreement between X6._____, the Respondent's Turkish subsidiary, and A._____, the Claimants' affiliate, brings about the termination of the SPA 2003 and triggers the rescission of the SPA 2003, or otherwise entitles the Claimants to a remedy against the Respondent under the SPA 2003 (...). The Respondent shall then submit a full defence.
>
> 3....
>
> 4. After the submission of the Statement of Defence, the Arbitral Tribunal will decide whether it is appropriate to render a partial award or to invite further submissions. If it decides that the Claimants have succeeded in showing the legal basis for their claims, then the proceedings will continue according to the established timetable. If the Arbitral Tribunal finds that the Claimants have failed in showing a legal basis for their claims, it will render an award to that effect. This will conclude the proceedings subject to any order for costs.
>
> 5....[3]

[3] Translator's Note: In English in the original text.

On May 6, 2014, the Arbitral Tribunal held a telephone conference with the parties; the Specific Procedural Rules (SPR) and the Procedural Timetable were adopted and attached to Procedural Order No. 1 of the same date. The Procedural Timetable was worded as follows:

PROCEDURAL TIMETABLE IN ICC CASE NO. 19755/GFG[4]

Date	Procedural Activity	Party Concerned
29 August 2014	Statement of Claim together with witness statements and expert reports, if any.	Claimants
19 December 2014	Statement of Defence together with witness statements and expert reports, if any.	Respondent
	Next Steps to be determined by the Arbitral Tribunal in consultation with the parties.	Parties and Arbitral Tribunal

The same day, the chairman of the Arbitral Tribunal notified Procedural Order No. 1 to the parties and its two enclosures. In the cover letter, he provided in particular the following clarifications:

> The parties agreed during the conference call that the Arbitral Tribunal should limit the initial stage of the proceedings to the question of the rescission of the SPA 2003 and the compound contract issue. They further agreed that the Arbitral Tribunal should, if appropriate, render a binding award thereon after the submission of the Statement of Defence. Accordingly, the Procedural Timetable provides only for the submission of a Statement of Claim and Statement of Defence. Any further procedural steps will be determined by the Arbitral Tribunal in consultation with the parties as and when appropriate.
>
> The Arbitral Tribunal directs that the parties should set out their positions regarding the rescission of the SPA 2003 and the compound contract issue in detail. Their submission may, if the parties see fit, include legal contractual analysis and evidence regarding the negotiation history and commercial purpose of the SPA 2003. If they consider it helpful to the Arbitral Tribunal, the parties may submit factual as well as legal exhibits, witness evidence and expert reports.[5]

On May 15, 2014, the parties and the three Arbitrators signed the Terms of Reference. Paragraph 88 states the following:

> Pursuant to Respondent's letter of 3 April 2014 and Claimants' response of 10 April 2014, the provisional timetable will provide for the Arbitral Tribunal to decide, after the submission of the Statement of Defence, in an arbitral award whether Claimants have succeeded in establishing a legal basis for their claims. The relevant timetable and directions relating to this stage will be contained in the procedural timetable itself and relevant procedural order.[6]

[4] Translator's Note: Timetable in English in the original text.
[5] Translator's Note: In English in the original text.
[6] Translator's Note: In English in the original text.

On August 29, 2014, the Claimants filed their Statement of Claim. They attached various exhibits to their brief including a legal opinion and two witness statements. Pursuant to an invitation by the Arbitral Tribunal, they filed a supplementary statement of claim and new exhibits on October 10, 2014.

On December 19, 2014, the Defendant submitted its Statement of Defense to which it attached various exhibits, including three legal opinions and seven witness statements.

In an email of its chairman of February 4, 2015, the Arbitral Tribunal referred to paragraph 88 of the Terms of Reference and to its Procedural Order No. 1 to close the first phase of the proceedings.

B.c. The next day, February 5, 2015, the Claimants wrote to the Arbitral Tribunal to state that they wished to produce some rebuttal witness statements and a legal opinion (rebuttal expert opinion) with a view to rebut the witness statements and legal opinions attached to the Statement of Defense. Moreover, they stated that some new factual and legal elements appearing from the documents they intended to file would justify a second round of briefs. In particular, the letter in question referred to the last sentence of the aforesaid Procedural Timetable, to Art. 8.1 and 11.3 SPR and to Art. 4(6) of the IBA Rules on the Taking of Evidence in International Arbitration (2010), applicable by way of reference in Art. 19 SPR.

In a letter of February 6, 2015, the Defendant categorically opposed the Claimants' request and stated its reasons.

In an email of February 10, 2015, the Arbitral Tribunal rejected the request. Referring to paragraph 88 of the Terms of Reference, to the Procedural Timetable, and to its letter of May 6, 2014, it advised the parties that they had clearly agreed that it would issue a preliminary decision as to the Claimants' right to terminate the SPA after one exchange of detailed briefs. As to the sentence at the end of the Procedural Timetable – "*Next Steps to be determined by the Arbitral Tribunal in consultation with the parties*" – it its view, the sentence obviously referred to the procedural steps to be undertaken after an award binding the parties was issued, pursuant to the statements of Claim and Defense. The Arbitral Tribunal also qualified the importance of references to Procedural Order No. 1 to the SPR and, in the latter, to the IBA Rules whilst pointing out that the specific agreement of the parties as to the exchange of briefs must take precedence over the latter rules. Finally, it pointed out that the Claimants did not provide reasons for their request to change the procedure mutually agreed upon with the Defendant.

The Claimants reiterated their position in a long letter of February 16, 2015. Denying that the procedural rules were clear, they invoked their objective interpretation of such rules, which would not prevent them an opportunity to give their views on the factual statements and evidence provided by the Respondent. The contrary interpretation proposed by the Arbitral Tribunal would deprive them of the minimal guarantee of the right to be heard at Art. 182(3) PILA.[7] Thus, they requested the right to file a *rebuttal witness statement* by

[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.

V._____, the Turkish lawyer who had conducted the contractual negotiations on their behalf, with a view to rebutting five statements contained in the Statement of Defense as well as some other rebuttal witness statements meant to challenge the written statements of three other individuals that the Respondent had produced. Moreover, they wanted permission to include a rebuttal legal opinion in the file to challenge the theories developed by a university professor from Geneva as to combined contracts in Swiss law.

Upon invitation by the Arbitral Tribunal, the Respondent stated its view as to this letter, item by item, in a submission of February 20, 2015. In its view, the parties were given the opportunity to submit all of the detailed arguments they wished to raise on the issue in dispute. What the Claimants were really seeking was a third exchange of briefs after the first exchange (the filing of the request for arbitration and the answer) and the second exchange (the Statement of Claim and the Statement of Defense). Yet, this could not be permitted as the parties had agreed to waive this opportunity and the right to be heard does not encompass the right to rehash *ad libitum* arguments already submitted. In the Respondent's view, the facts that the Claimants intended to prove were irrelevant anyway, which it sought to demonstrate in the rest of its submission. As to the legal issue in dispute, the Claimants had ample opportunity to address it with the assistance of a Turkish law professor, who referred to Swiss case law and legal writing in this respect.

In a reasoned decision of March 4, 2015, the Arbitral Tribunal rejected the Claimants' request and confirmed that the first phase of the proceedings was closed. In its view, the procedural directives were clear and accepted by all parties at the May 6, 2014, conference, in accordance with Art. 24 of the ICC Rules of Arbitration. Moreover, they were summarized in its letter to the parties of the same day, and reference to them was made in the Terms of Reference signed by the parties on May 15, 2014. In light of paragraph 88 of the Terms of Reference, moreover, which clearly excluded any uncertainty as to the unfolding of the proceedings, the Claimants could not reasonably claim that the subsequent proceedings would remain entirely open after the filing of the Statement of Defense or that it should be the object of new discussions between the parties and the Arbitral Tribunal at that time. To the contrary, the parties agreed that the issue of the combined contract would be dealt with in one exchange of briefs only. Be this as it may, even if the Claimants had had the right to request to state their views after the filing of the Statement of Defense, as they claimed, the Arbitral Tribunal thought that they did indeed do so by way of the Claimants' letters of February 5 and 16, 2015, and in the Respondent's letters of February 6 and 20, 2015. Furthermore, the Arbitral Tribunal stated that pursuant to its assessment in advance of the evidence submitted by the Claimants, it reached the conclusion that they were not pertinent to resolve the dispute. Finally, it pointed out that no party could infer an unlimited right to rebut its opponent's arguments from the principle of contradiction stated at Art. 182(3) PILA invoked by the Claimants.

B.d. On May 27, 2015, the Arbitral Tribunal issued a Partial Award in the operative part of which it found, in particular, that the termination of the DA did not cause the extinction of the SPA and consequently rejected the points of claim based on the opposite thesis.

In support of their submissions, the Claimants mainly argued that the SPA and the DA were compound contracts or even a single contract or that extinction of the DA was a condition subsequent contained in the SPA.

Applying the old Turkish code of obligations (OTCO), the Arbitral Tribunal states that, pursuant to Art. 18 of that Code, the real and common intent of the parties must be sought first and to do so, priority should be given to the text of the contract, to the history of the negotiations, to the commercial goal pursued and the usages of trade could be auxiliary means in the framework of this inquiry. In its view, objective interpretation of the contract should be resorted to only if the latter failed.

In the light of the four legal opinions in the file of the arbitration in particular, the Arbitral Tribunal recalled the characteristics of interdependent contracts (also called related agreements or combined contracts) and examined the nature of the SPA and of the DA. Five reasons that need not be stated here led it to the conclusion that the parties did not agree to create interdependence or linkage between these two contracts. This conclusion enables it to reject the thesis of a single contract *a fortiori*, submitted by the Claimants in the alternative. As to the condition subsequent, it found nothing to substantiate it in the text of the two contracts at issue. Hence, it formally rejected the claim insofar as it was based on the three legal forms supposed to be its foundation.

Having done so, the Arbitral Tribunal made the following remark by way of an intermediary conclusion (Award, n. 156):

> It is common ground that the primary means of contractual interpretation is the contract itself and that a court or arbitral tribunal will only have recourse to extrinsic aids to interpretation, such as the negotiation history, where the contract is unclear. As set out, the Arbitral Tribunal finds that Claimants' three lines of argument all fail to show that the termination of the DA brings about the rescission of the SPA 2003. This conclusion follows from the clear and unambiguous wording of the agreements. The parties have, however, set out the surrounding circumstances and the negotiating history, in particular, at length. The Arbitral Tribunal has therefore considered them but only insofar as they bear on the interpretation of the SPA 2003. This step was not strictly necessary and does not alter the Arbitral Tribunal's findings in any way.[8]

Based on this remark, the Arbitral Tribunal then proceeded to a detailed historical analysis of the contractual negotiations, which led it to confirm the conclusion drawn from its textual interpretation of the SPA on the basis of four reasons that need not be repeated here either.

C.

On June 29, 2015, the Claimants (hereafter: the Appellants) filed a civil law appeal with a view to obtaining annulment of the aforesaid award. They argue a violation of their right to be heard in contradictory proceedings and of the principle of equal treatment, or even of procedural public policy, as well as a violation of substantive public policy.

[8] Translator's Note: In English in the original text.

In a letter of its Chairman of September 23, 2015, the Arbitral Tribunal produced its file and submitted various remarks, denying that it disregarded the Appellants' right to be heard.

In its answer of September 29, 2015, the Defendant (hereafter: the Respondent) submitted that the matter was not capable of appeal and, in the alternative, that it should be rejected insofar as it was admissible.

In their reply of October 16, 2015, the Appellants maintained their submissions as did the Respondent, in its rejoinder of November 3, 2015.

Reasons:

1.
According to Art. 54(1) LTF,[9] the Federal Tribunal issues its judgements in an official language,[10] as a rule in the language of the decision under appeal. When the decision is in another language (here, English) the Federal Tribunal uses the official language chosen by the parties. Before this Court, they used French. Hence, this judgment shall be issued in French.

2.
2.1.
In the field of international arbitration, a civil law appeal is admissible against the decisions of arbitral tribunals pursuant to the requirements of Art. 190-192 PILA (Art. 77(1)(a) LTF). Whether as to the subject matter of the appeal, the standing to appeal, the time limit to appeal, the submissions made by the Appellants, or the grounds for appeal invoked, none of these admissibility requirements raises any problem in the case at hand. The same does not apply to the reasons in support of the appeal (Art. 42(1) and (2) LTF).

2.2.
2.2.1. When the decision under appeal contains several independent reasons, whether in the alternative or a subsidiary, which are all sufficient to decide the case at hand, the Appellant must demonstrate that each of them is contrary to the law, under penalty of inadmissibility (ATF 138 I 97 at 4.1.4 and the cases quoted). The rule concerning alternate reasons applies to international arbitration as well (judgment 4A_90/2014 of July 9, 2014, at 3.2.3.3).

Relying on this precedent, the Respondent refers to the aforesaid n. 156 of the award to infer that the latter relies on two sets of reasons: on the one hand, the main reasons based on the very texts of the SPA and of the DA, which revealed the real and common will of the parties to not create any interdependence between these two contracts; on the other hand, alternate reasons or subsidiary reasons based on the historical

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

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

analysis of the contract negotiations, which was not strictly speaking necessary but confirmed the soundness of the textual analysis. Noting that the Appellants challenge the alternate reasons of the award almost exclusively whilst leaving the principle reasons untouched, the Respondent submits that the matter is not capable of appeal for lack of appropriate reasons in support.

The Appellants dispute that the reasons upon which the award under appeal relied are in the alternative. In their view, since purely literal interpretation is not allowed, according to the case law of the Federal Tribunal concerning Art. 18 CO[11] to which Art. 18 OTCO corresponded, it cannot constitute independent reasons. In fact, it should be seen as merely one of two parts of a single reasoning purporting to illuminate the common internal will of the parties, the second one being the lessons drawn from examining the negotiations that led to the conclusion of the SPA.

2.2.2. Whether purely literal interpretation would be outlawed by applicable Turkish law in the case at hand is of little importance. Even if this were the case and if that had been the principal *ratio decidendi* upheld by the Arbitral Tribunal to support its award, the Appellants would nonetheless challenge in vain the alternate reasons based on a review of the contractual negotiations simply because the manner in which the Arbitrators interpreted applicable law is not among the grounds for appeal referred to at Art. 190(2) PILA, so that the principal reasons of the award would remain intact for lack of an opportunity to challenge them. The same would apply *a fortiori* in the opposite case, namely should a strictly literal interpretation of the SPA and the DA be admissible according to the old Turkish law of obligations, since the result of such interpretation would be outside the scope of review of the Federal Tribunal.

The only decisive issue is therefore the relationship between the two sets of reasons upon which the Award under appeal rests. In this respect, the Respondent's submission hardly appears convincing. Admittedly, the Arbitral Tribunal points out, in the last sentence of the aforesaid n. 156 of the Award, that historical analysis of the negotiations was not strictly necessary and did not in any event change the result of its textual interpretation. Yet, it did it and devoted no less than nine pages to it. In so doing, it implicitly acknowledged that the analysis of the contractual negotiations was not superfluous and was one of the means to determine the real and common will of the parties. The utility of such review was therefore not excluded *a priori*, except if one were to engage in art for art's sake. As to its remark that such review was not strictly necessary and changed nothing to its assessment of the legal position, it was obviously made after concluding the review of the contractual negotiations – as is clear from the use of the past tense in the last two sentences of the aforesaid n. 156 of the award ("*has…considered*"; "*was*") – which significantly qualifies its scope. Moreover, nothing justified claiming that if the Arbitrators had reached the conclusion that the result of their text interpretation was incompatible with that of the review of the contractual negotiations, they would necessarily have given priority to the literal interpretation. They may have done the opposite, or reached the conclusion that it was necessary to resort to objective interpretation of the statements of will of the parties in accordance with the principle of trust. It must therefore be found with the Appellants that the reasons based on historical interpretation belonged to the research of the real and

[11] Translator's Note: CO is the French abbreviation for Swiss Code of Obligations.

common will of the contracting parties just as the textual interpretation and constituted with it one of the two pillars of the reasons on which the award under appeal rested. Therefore, the Appellants cannot be denied the right to challenge the latter reasons based on the violation of various procedural guarantees when the former, purely legal, is by nature outside the scope of review of the Federal Tribunal.

2.3. Irrespective of what the Respondent says, the Appellant's criticism is not appellate in nature. To the contrary, the Appellants rely on case law as to each of their arguments and set forth the contents in their view of the procedural or substantive guarantee invoked and then state on the basis of the pertinent facts why, in their view, the Arbitral Tribunal disregarded that guarantee in the case at hand.

The Respondent raises another issue, namely whether the Arbitral Tribunal is or is not bound by the following remark at page 8 of its decision of March 4, 2015: "[the Arbitral Tribunal] *finds that the parties agreed to limit the submissions on the compound contract issue to a single round*."[12] An answer to this specific question must be reserved here but it has no influence on whether the recourse here is of an inappropriately appellate nature (see 4.2.2.1 hereunder).

Therefore, the merits of the appeal may be addressed.

3.
The Federal Tribunal issues its decisions on the basis of the facts held in the award under appeal (see Art. 105(1) LTF). This Court may not rectify or supplement *ex officio* the factual findings of the arbitrators, even if the facts were established in a blatantly inaccurate manner or in violation of the law (see Art. 77(2) LTF, ruling out the applicability of Art. 105(2) LTF). However, as was already the case under the aegis of the federal judicial law organizing the courts (see ATF 129 III 727 at 5.2.2; 128 III 50 at 2a and the cases quoted), the Federal Tribunal retains the right to review the factual findings on which the award under appeal is based if one of the grievances raised at Art. 190(2) PILA is raised against the aforesaid factual findings or when some new facts or evidence are exceptionally taken into consideration in the framework of the civil law appeal (judgment 4A_124/2014 of July 7, 2014, at 2.3).

It must be pointed out that the factual findings of the Arbitral Tribunal as to the unfolding of the proceedings also bind the Federal Tribunal, subject to the same reservations, whether as to the submissions of the parties, the facts claimed or their legal arguments submitted, the statements made during the proceedings, the submission of evidence or even the contents of a witness statement or an expert report or even information gathered during an on-site inspection (judgment 4A_54/2015[13] of August 17, 2015, at 2.3, quoting 140 III 16 at 1.3.1).

[12] Translator's Note: In English in the original text.
[13] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/no-duty-arbitral-tribunal-expressly-address-any-and-all-points-raised

4.
In a first line of arguments, the Appellants argue that the Arbitral Tribunal did not treat the parties equally and violated their right to be heard in contradictory proceedings in several respects.

4.1.
4.1.1. The right to be heard as guaranteed by Art. 182(3) and 190(2)(d) PILA does not differ in principle from that which is established by constitutional law (ATF 127 III 576 at 2c; 119 II 386 at 1b; 117 II 346 at 1a, p. 347). Thus, it was held that in the field of arbitration each party has the right to state its views on the essential facts for judgment, to submit its legal arguments, to introduce evidence on pertinent facts, and to participate in the hearings of the arbitral tribunal (ATF 127 III 576 at 2a; 116 II 639 at 4c, p. 643). However, the right to be heard does not encompass a right to oral arguments (ATF 117 II 346 at 1b; 115 II 129 at 6a, p. 133 and the cases quoted). Similarly, it does not require an international arbitral award to be reasoned. However, case law has also inferred from it a minimal duty for the arbitral tribunal to examine and handle the pertinent issues. This duty is breached when due to oversight or misunderstanding, the arbitral tribunal does not take into consideration some statements, arguments, evidence, and offers of evidence submitted by one of the parties and important to the decision to be issued (ATF 133 III 235 at 5.2, p. 248).

As to the right to adduce evidence, it must have been exercised in a timely manner and in accordance with the applicable rules (ATF 119 II 386 at 1b, p. 389). The arbitral tribunal may refuse to hear evidence without violating the right to be heard if the evidence is unfit to support a conviction, if the fact to be proved is already established, if it is objectively without pertinence, or also if the tribunal reaches the conclusion by way of an anticipated assessment of the evidence that its decision is already made, and that the result of the evidence submitted can no longer alter it. The Federal Tribunal may not review an advanced assessment of the evidence except from the extremely limited point of view of public policy (judgment 4A_246/2014[14] of July 15, 2015, at 6.1).

Equal treatment of the parties is also guaranteed by Art. 182(3) and Art. 190(2)(d) PILA and requires that the proceedings be organized and conducted such that each party has the same opportunity to present its arguments. Finally, the principle of contradiction guaranteed by the same provisions requires each party to have the right to state its views on its opponent's arguments, to review and discuss the evidence it introduced, and to rebut it by its own evidence (ATF 117 II 346 at 1a).

4.1.2. In Switzerland, however, the right to be heard in contradictory proceedings is far from unlimited and sees some significant restrictions in the field of international arbitration. Thus – as was seen – it does not require an international arbitral award be reasoned (ATF 134 III 186[15] at 6.1 and references). Furthermore, a party does not have the right to state its views on the legal assessment of the facts or on the legal

[14] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/partial-violation-right-be-heard-leads-partial-annulment-award

[15] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/right-to-be-heard-equality-between-the-parties

reasoning to be upheld generally, unless the arbitral tribunal considers basing its decision on a provision or a legal ground not discussed in the previous proceedings and which none of the parties raised and could anticipate the pertinence in the case in dispute. The arbitral tribunal is not bound either to advise a party specifically of the decisive nature of a factual element on which it is preparing to base its decision, provided it was raised and proved in accordance with the rules (judgment 4P.196.2003 of January 7, 2004, at 4.1). Moreover, the argument of a breach of the right to be heard is not meant to enable the party raising deficiencies as to the reasoning of the award to secure a review of the manner in which substantial law was applied (ATF 116 II 373 at 7b).

It must be recalled, furthermore, that a party to the arbitration agreement cannot argue in a civil law appeal to the Federal Tribunal against an arbitral award that the arbitrators breached the ECHR, even if its principles may, as the case may be, put into effect the guarantees invoked on the basis of Art. 190(2) PILA. Moreover, the parties may organize the arbitral proceedings as they wish, particularly by way of reference to a set of arbitration rules (Art. 182(1) PILA), as long as the arbitral tribunal guarantees equal treatment and their right to be heard in contradictory proceedings (aforesaid judgment 4A_246/2014[16] at 7.2.2). Similarly, the relatively strict requirements as to the right to reply formulated by the Federal Tribunal in the light of the case law of the ECtHR (ATF 139 I 189 at 3.2 and the cases quoted; as to this issue, see also Schaller and Mahon, Le droit de réplique: un aller-retour sans fin entre Strasbourg et Lausanne? *Le droit de république*, François Bohnet [ed.], 2013, p. 19 *ff.*) may not be taken over as such in domestic or international arbitration. Indeed, it is generally admitted in this field that the guarantee of the right to be heard does not encompass an absolute right to a double exchange of briefs, as long as the claimant has the opportunity to state its position in one way or the other as to the respondent's arguments and in particular as to any counterclaim (see with various nuances: Berger and Kellerhals, *International and Domestic Arbitration in Switzerland*, 3rd ed. 2015, n. 1137; Tarkan Göksu, *Schiedsgerichtsbarkeit*, 2014 n. 1534 and 2084; Gabriel and Bhur, Commentaire bernois, *Schweizerische Zivilprozessordnung*, vol. III 2014, n. 87 ad Art. 373 CPC; Schneider and Scherer, Commentaire bâlois, *Internationales Privatrecht*, 3rd ed. 2013, n. 88 ad Art. 182 PILA; Nater-Bass and Rouvinez, *Swiss Rules of International Arbitration, Commentary*, Zuberbühler, Müller and Habegger [ed.], 2nd ed. 2013, n. 4 ad Art. 22; Lalive, Poudret and Reymond, *Le droit de l'arbitrage interne et international en Suisse*, 1989, n. 3(a) ad Art. 25 CA p. 140; Philipp Habegger, Commentaire bâlois, *Schweizerische Zivilprozessordnung*, 2nd ed. 2013, n. 58 ad Art. 373 CPC; Christoph Müller, *Kommentar zur Schweizerischen Zivilprozessordnung (ZPO)*, Stutter-Somm, Hasenböhler, Leuenberger [ed.], 3rd ed. 2016, n. 16 ad Art. 373 CPC), even if it is usual to do so (Fouchard, Gaillard, Goldman, *Traité de l'arbitrage international*, 1996, n. 1261; Andreas Bucher, Commentaire romand, *Loi sure le droit international privé – Convention de Lugano* – 2011, n. 19 ad Art. 182 PILA). Finally and more generally, it must be pointed out that this Court must review the issue of compliance with the right to be heard in the context relevant to each arbitration without forgetting that a specific waiver of this guarantee *ex ante* is admissible insofar as the decision in this respect is taken knowingly (Bucher, *op. cit.*, n. 41 ad. Art. 182 PILA and n. 90 ad Art. 190 PILA: Göksu, *op. cit.*, n. 1280, p.

[16] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/partial-violation-right-be-heard-leads-partial-annulment-award

397; Berger and Kellerhals, *op. cit.*, n. 1128; Urs Zenhäusern, Schweizerische Zivilprozessordnung (ZPO), Baker & McKenzie [ed.], n. 20 ad Art. 373 CPC). This means that, depending on the circumstances, different conclusions may be drawn as to compliance with the same aspect of the guarantee at issue, provided of course that its core element was not affected.

4.1.3. It behooves the allegedly aggrieved party to demonstrate why oversight by the arbitrators prevented it from being heard as to an important issue in its appeal against the award. It must establish on one hand that the arbitral tribunal did not examine certain factual elements, evidence, or legal arguments regularly presented in support of its submissions and, on the other hand, that these elements were such as to impact the outcome of the dispute. Such demonstration shall be made based upon the reasons stated in the award under appeal (ATF 133 III 235 at 5.2, p. 248).

4.1.4. Considering the formal nature of the right to be heard, the violation of this guarantee results in the annulment of the award under appeal (ATF 133 III 235 at 5.3, p. 250 *in fine*).

4.2. The various arguments submitted by the Appellants as to the violation of their right to be heard in contradictory proceedings and the breach of equal treatment of the parties shall be examined hereafter in the light of this case law and considering the Respondent's arguments to attempt to rebut them.

4.2.1. The Appellants submit first that the Arbitral Tribunal failed to take into account pertinent facts they submitted regularly which would have made it possible to discern their true intent during the negotiation and the conclusion of the contracts in dispute, whilst taking into consideration the witness statements submitted by the Respondent in this respect, without allowing them to state their views as to the claims and arguments of that party (appeal n. 65/66).

The argument is doomed. First, its admissibility is dubious as the Appellants did not explain how the omission arose from Arbitrator oversight or misunderstanding (see 4.1.1, 1st § and 4.1.3, above). Be this as it may, the Respondent demonstrates in its answer to the appeal (n. 66 to 69) that the facts claimed by the Appellants did not escape the Arbitral Tribunal, which took them into consideration, at least implicitly. These facts are, on the one hand an email of May 14, 2003, by which Mr. V._____, Turkish counsel for the Appellants, sent a first draft of the DA to the Respondent's representative, which specifically referred to the SPA to be signed at the same time (exhibit C-24) and on the other hand, a letter of May 29, 2013, in which the same lawyer reminded the Respondent's representative that the DA was essential to the SPA (exhibit C-4). These were stated at n. 28 and n. 51 of the Statement of Claim. The Respondent expressed its views in this respect in its answer (n. 263 to 269 and 299 to 302). As to the Arbitral Tribunal, whilst not specifically referring to the aforesaid statements of the Appellants, it did not overlook the theory they developed on this basis, which it mentioned in the award (n. 158), whilst pointing out that it was disproved by the behavior of the parties during the contract negotiations, which consisted – as the Respondent wanted – to gradually separate the obligations germane to the DA from those of the SPA (n. 170/171).

The Appellants' criticism of the Arbitral Tribunal is therefore unfounded.

4.2.2. The Appellants then addressed the refusal of the Arbitral Tribunal to order a second exchange of briefs. The criticize in particular the three reasons upheld by the Arbitral Tribunal in support of this refusal in its decision of March 4, 2015. In their view and contrary to the Arbitrators' opinion, the Procedural Timetable was not clear; furthermore, according to them, its interpretation did not limit them to a mere discussion of the next steps in the proceedings. Finally, it was wrong to apply the principle that contradictory proceedings do not imply an unlimited right of rebuttal. Therefore, the Arbitral Tribunal violated their right to be heard, including the right to reply by failing to grant their "*immediate, repeated and detailed request*" for a second exchange of briefs (appeal n. 71 to 93).

4.2.2.1. As was already pointed out above (see 2.3), the Arbitral Tribunal held the following in the conclusion of its decision of March 4, 2015, to which it refers at n. 40 *i.f.* of its award: "[The Arbitral Tribunal] *finds that the parties agreed to limit the submissions on the compound contract issue to a single round*."[17] This finding as to the existence of an agreement pursuant to which the parties agreed with the Arbitral Tribunal to limit the first phase of the arbitration to one single exchange of briefs concerns the progression of the arbitral proceedings and more precisely the will of the parties as expressed throughout them. In order to reach it, the Arbitral Tribunal does not resort to objective interpretation of the statements of the parties and their behavior. Instead, it inferred a real and common will of the parties as to the number of briefs to be included in the arbitration file directly from the content of the correspondence exchanged with its chairman. In other words, the Arbitral Tribunal deduced from some procedural facts (*i.e.* the will expressed by the parties throughout the proceedings in their respective letters) another procedural fact (*i.e.* the existence of a restrictive agreement of the aforesaid scope). The result of this inference is a conclusion in the realm of facts and consequently binds this Court (see 3, above).

The proved existence of the aforesaid agreement deprives the arguments by which the Appellants seek to demonstrate the alleged lack of clarity of the Procedural Timetable and the erroneous interpretation the Arbitrators gave of the last sentence of this document of any pertinence. It also eliminates the argument that the Appellants believed to be able to draw from the contents of the SPR because, assuming the aforesaid agreement would derogate from these specific rules of procedure, it would prevail over them as a *lex specialis*.

4.2.2.2. It has been seen that the guarantee of the right to be heard in arbitration does not carry an absolute right to a double exchange of briefs (see 4.1.2, above). From this point of view, nothing opposes, therefore, acknowledging the agreement by which the parties, with the approval of the Arbitral Tribunal, limited the first phase of the arbitration to one exchange of briefs only. Therefore, the Appellant invoked their right of reply to attempt to paralyze the agreement which they entered into freely in vain. Moreover, the parties were able to assess the scope and the consequences of this agreement. Indeed, when they participated in the phone conference held by the Arbitral Tribunal on May 6, 2014, their respective positions as to the essential issues of the dispute were already well known. The Respondent stated its own position

[17] Translator's Note: In English in the original text.

in its Answer to the Request for Arbitration of December 23, 2013, specifically discussing the issue of the interdependence of the SPA and of the DA (n. 75 to 84), then summarized it in an attachment of March 19, 2014, with a view to its being included in the Terms of Reference. This did not escape the attention of the Arbitral Tribunal, which, in its decision of May 6, 2014, clearly invited the parties to state their factual and legal arguments in detail as to the termination of the SPA and the issue of a compound contract, including any possible evidence (legal exhibits, witness evidence and expert reports) concerning the history of the contractual negotiations and the commercial purpose assigned to this contract. It was therefore knowingly that the parties decided to proceed with just one exchange of briefs on the issue of the legal basis of the claim and accepted that the Arbitral Tribunal would decide the issue after the Respondent's answer was submitted.

The Appellants rightly object that logically they could not know in advance the content of exhibits such as the witness statements that the Respondent attached to its answer or the statements and legal submissions that brief would contain (appeal n. 89). However, the objection is not admissible in the case at hand because it is inconsistent with the purpose of the procedural agreement that the parties entered into in full knowledge of all aspects of the matter, an agreement which involved a waiver by the Appellants in advance of the right to challenge in a subsequent brief the soundness of the statements in the Statement of Defense, and the pertinence of the evidence adduced with it, in particular the witness statements. In other words, the Appellants could not but be aware that the Respondent may attach to its future Statement of Defense some witness statements concerning the history of the negotiations before the SPA and the DA were concluded. Knowing this, they could have either set aside the agreement at issue or submitted with their Statement of Claim all evidence that could substantiate their statements as to the content of the contractual negotiations. More precisely in this respect, one does not understand what would have prevented them from filing a witness statement by V._____, the Turkish lawyer who conducted the negotiation on their behalf, since they appear to give particular weight to what he says. Complaining *ex post* of the consequences of a procedural agreement knowingly and freely entered into as they do in their appeal is hardly consistent with the rules of good faith.

Therefore, it must be admitted that the Appellants validly waived their right of reply. Consequently, the Arbitral Tribunal did not violate their right to be heard by refusing a second exchange of briefs.

4.2.2.3. The Appellants also submit that by refusing to authorize them to submit some rebuttal witness statements and a rebuttal expert opinion, the Arbitral Tribunal breached not only the procedural rules agreed upon by the parties but also and above all, their right to be heard (appeal n. 93). The argument refers to the principle of contradiction more specifically as part and parcel of this formal guarantee but is unfounded.

First of all, the procedure resulting from the specific agreement concluded by the Appellants and the Respondent under the guidance of the Arbitral Tribunal – which, as has been seen, prevailed upon any specific rules to the contrary in the SPR (see 4.2.2.1, 2nd §) – stated that, should the parties wish to rely on

evidence, on written statements, and on expert opinions in connection with the legal basis of the claim, they should be produced with the Statement of Claim and the Statement of Defense, respectively.

Moreover, and in any event, the Arbitral Tribunal proceeded to asses in advance the evidence submitted by the Appellants and reached the conclusion that it was not pertinent to decide the dispute (see B.c, *in fine*, above). Furthermore, the Federal Tribunal may not review such an assessment except from the limited point of view of procedural public policy (see 5.2.1, hereunder).

4.2.3. The Appellants raise the same criticism from the point of view of equal treatment. As the principle hardly differs from the guarantee of the right to be heard (judgment 4A_2/2007 of March 28, 2007, at 4 and the references), such criticism is just as doomed as that which was rejected as to this guarantee. Indeed, the parties agreed to limit the proceedings to one exchange of briefs and the Appellants complain without valid reason that they would not have had the same opportunities as the Respondent to submit their arguments. Be this as it may, it is legitimate in organizing a procedure that the Claimant, due to its position, should speak first and the Respondent last. This cannot constitute unequal treatment (Bernard Corboz, Commentaire de la LTF, 2nd ed. 2014, n. 135 ad Art. 77 LTF).

5.
In the alternative, the Appellants argue that the Arbitral Tribunal violated public policy within the meaning of Art. 190(2)(e) PILA, both substantively and procedurally.

5.1. An award is inconsistent with public policy if it disregards the essential and broadly recognized values which, according to prevailing Swiss theories, should constitute the basis of any legal order (ATF 132 III 389 at 2.2.3). Substantive public policy is distinct from procedural public policy.

Procedural public policy within the meaning of Art. 190(2)(e) PILA is only a subsidiary guarantee (ATF 138 III 270[18] at 2.3), and provides the parties with the right to an independent judgment as to the submissions and facts submitted to the arbitral tribunal in conformity with applicable procedural law; procedural public policy is violated when some fundamental and generally recognized principles were violated, leading to an insufferable contradiction with notions of justice, such that the decision appears incompatible with the values recognized in a state under the rule of law (ATF 132 III 389 at 2.2.1).

An award is contrary to substantive public policy when it violates some fundamental principles of substantive law and therefore becomes no longer consistent with the determining legal order and system of values; among such principles are in particular the sanctity of contracts, compliance with the rules of good faith, the prohibition of abuse of rights, the prohibition of discrimination, or expropriation without compensation, and the protection of incapable persons (same judgment, *ibid*.).

[18] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/an-international-arbitral-tribunal-seating-in-switzerland-is-gen

5.2. Examined in light of these principles of case law, the Appellants' criticism fails to demonstrate any violation of substantive or procedural public policy by the Arbitral Tribunal.

5.2.1. As to the violation of procedural public policy, the Appellants criticize the anticipated assessment of the evidence, which the Arbitral Tribunal resorted to in order to reject the evidence they adduced. In their view, the refusal to admit the evidence would violate their right to be heard by preventing them from stating their position as to the Respondent's arguments, from discussing its evidence and rebutted by their own.

Such circular reasoning cannot be followed. Indeed, the Appellants seek to demonstrate that the assessment of the evidence in advance by the Arbitral Tribunal, which does not violate the right to be heard according to federal case law (see 4.1.1, 2nd §, above), would nonetheless infringe upon this right *in casu*. Furthermore, in order to prove their point, they omit the procedural agreement they entered into with the Respondent, which required both parties to state all pertinent facts and to present all evidence in one brief.

5.2.2. The alleged violation of substantive public policy by the Arbitral Tribunal is not any clearer. The explanations the Appellants give in support of the corresponding agreement with a view to demonstrating an alleged violation of the principle of good faith are not convincing at all insofar as they too gloss over the procedural agreement entered into by the parties and merely consist of presenting some arguments already rejected above (to the extent that they were admissible) from a different perspective. No matter what the Appellants say moreover, the Arbitral Tribunal did not behave in a manner at all contrary to the rules of good faith in its relationship with the parties but simply implemented the common will they had expressed as to the progression of the first phase of the proceedings.

6.
Considering the fate of the appeal, the Appellants must be ordered severally to pay the judicial costs (Art. 66(1) and (5) LTF) and to compensate the Respondent for its costs (Art. 68(1)(2) and (4) LTF).

Therefore, the Federal Tribunal pronounces:

1.
The appeal is rejected insofar as the matter is capable of appeal.

2.
The judicial costs set at CHF 100'000 shall be borne by the Appellants severally.

3.
The Appellants shall severally pay to the Respondent an amount of CHF 150'000 for the federal judicial proceedings.

4.
This judgment shall be notified to the parties and to the chairman of the ICC tribunal.

Lausanne, April 26, 2016

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

Presiding Judge:	Clerk:
Kiss (Mrs.)	Carruzzo