4A_294/2019 and 4A_296/2019[1]

Judgment of November 13, 2019

First Civil Law Court

Federal Judge Kiss, presiding,
Federal Judge Klett,
Federal Judge Hohl,
Clerk of the Court: Leemann (Mr.)

Parties:

4A_294/2019

A._____ Ltd,
represented by Tamir Livschitz und Lukas Beeler,
Claimant and Appellant,

v.

1. B._____ A.S.,
2. C._____ A.S.,
both represented by Messrs. Matthias Scherer and Pierre-Olivier Allaz, with Ms. Caroline dos Santos,
Defendants and Respondents

4A_296/2019

1. B._____ A.S.,
2. C._____ A.S.,
both represented by Messrs. Matthias Scherer and Pierre-Olivier Allaz, with Ms. Caroline dos Santos,
Defendants and Appellants,

v.

A._____ Ltd,
represented by Mr. Tamir Livschitz and Mr. Lukas Beeler,
Claimant and Respondent

[1] Translator's Note: Quote as A._____ *v.* B._____ and C._____, 4A_294/2019 and B._____ and C._____ *v.* A._____, 4A_296/2019.
The decision was issued in German. The full text is available on the website of the Federal Tribunal, www.bger.ch.

Facts:

A.
A.a. A._____ Ltd (Claimant) is a company organized under Israeli law with its registered office in U._____, Israel.

B._____ A.S. (Defendant 1) is a company organized under Turkish law with its registered office in V._____, Turkey.

C._____ A.S. (Defendant 2) is likewise a company organized under Turkish law with its registered office in W._____, Turkey.

A.b. On November 21, 2014, Defendant 2 entered into an agreement with the General Directorate of Security (GDS), a division of the Turkish Ministry of the Interior, for delivery of 60 armored vehicles to the GDS ("Tender Contract"). On January 15, 2015, Defendant 2 designated Defendant 1 as a sub-contractor.

Defendant 1, in turn, by Agreement dated January 25, 2015, engaged the Claimant to specifically develop, design, manufacture, and deliver the 60 armored vehicles (including three prototypes) for the GDS, in exchange for consideration totaling USD 26 million ("Agreement"). Delivery was to take place on July 27, 2015, although the delivery date was also contingent on Defendant 1 itself making certain parts available in a timely manner. In addition, the Agreement contained an arbitration clause as well as a choice-of-law clause in favor of Swiss law. Subsequently, in the context of performance of the Agreement, differences of opinion arose in various respects.

On December 3, 2015, the Claimant entered into an Amended Agreement with Defendant 1 and Defendant 2, by which the Agreement of January 25, 2015, was specifically amended to provide that Defendant 2 was being added as a Party to the Agreement and modifying both the scope of work (now 50 instead of 60 vehicles) and the price (now USD 24.96 million instead of USD 26 million) ("Amended Agreement").

Subsequently, in the course of performing the Agreement, once again differences of opinion between the Parties arose.

By Letter dated December 15, 2017, the Claimant gave notice to the Defendants that it was partially voiding the Tender Contract of January 25, 2015, as amended on December 3, 2015 ("Partial Avoidance").

B.
On June 8, 2017, the Claimant initiated an arbitration against the Defendants under the rules of the International Chamber of Commerce (ICC). In its Request for Arbitration, it requested the following relief (which was modified over the course of the proceedings):

1. The Tribunal shall declare the 4x4 Armored Tactical Vehicle Contract dated 25 January 2015, as amended, partially avoided with regard to the goods and rights of Claimant that were not yet delivered to Respondents;

2. The Tribunal shall declare that Claimant is entitled to sell to any third party the goods and rights of Claimant that were not yet delivered to Respondents under the 4x4 Armored Tactical Vehicle Contract dated 25 January 2015, as amended;

3. The Tribunal shall declare Respondents, severally and jointly, liable to compensate Claimant for any and all damages incurred as a result of Respondents' breaches of contract resulting in Claimant's partial avoidance of the 4x4 Armored Tactical Vehicle Contract dated 25 January 2015, as amended;

4. The Tribunal shall declare Respondents, severally and jointly, liable to compensate Claimant for any and all damages (including disgorgement of profits) to be incurred - or, as an alternative, any and all damages to be incurred plus any and all profits to be made by Respondents - as a consequence of Respondents' use of Claimant's IP rights and know-how related to the ATV in violation of the Agreement, as amended;

5. The Tribunal shall order Respondents, severally and jointly, to compensate Claimant for any and all costs of arbitration, including its lawyer's fees and any further costs and expenses incurred by Claimant in connection with these arbitral proceedings;

6. The Tribunal shall dismiss any and all claims of Respondents.[2]

The Defendants disputed, *inter alia*, the admissibility of the Partial Avoidance. In addition, they raised a counterclaim, stating the following as their Request for Relief (which was likewise amended in the course of the proceedings) (numbering as per post-hearing brief):

806.1 declare that it has no jurisdiction to hear the claims regarding the alleged infringement of the IP Rights, regarding both xxx and yyy vehicles;

806.2 dismiss the Claimant's claims in their entirety;

806.3 declare that the 'partial avoidance' declared by the Claimant on 15 December 2017 null and void;

806.4 declare that the Claimant's application for the cancellation of its export license was unlawful;

806.5 declare that the Claimant is not entitled to sell to any third party the goods and rights that were not yet delivered to the Respondents under the Agreement (as amended) until it fully returns the 35% of the Agreement Price to the Respondents and pays the additional amounts to be ordered by the Tribunal in its award;

806.6 declare that the Respondents have already paid the entire contractual consideration under the Agreement (as amended);

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

806.7 declare that as the transfer of IP Rights does not require an export license, these rights should be deemed automatically transferred to C._____ AS as of 31 January 2016 or at the latest at the date of the award;

806.8 linked to the above request, even though the Claimant has failed to deliver the know-how, declare that the Claimant has no right to practice and make use of the know-how that was supposed to be delivered to the Respondents. This declaration should expressly state that the Claimant is precluded from using this know-how and should not be allowed to manufacture vehicles with the specifications set out in the SOW [Scope of Work] or any similar vehicles. The Respondents request this declaration, whether or not the IP Rights are deemed transferred or not;

806.9 order the Claimant to return the Respondents 35% of the Agreement Price, which corresponds to USD 8,732,500 in addition to the delay penalty and other damages which are sought for in this arbitration;

806.10 order the Claimant to compensate the Respondents' damages and losses incurred corresponding to a total amount of USD 8,504,533.74;

806.11 order the Claimant to bear all arbitration costs, including the Respondents' counsel's cost and expenses;

806.12 order the Claimant to pay interest at the rate of 5% per annum on all amounts mentioned in Section 3.1.5 in accordance with the explanations made thereof; and

806.13 make order for any further and/or additional reliefs as the Tribunal may deem appropriate.[3]

By Arbitral Award dated May 6, 2019, the ICC Arbitral Tribunal seated in Zurich ruled as follows:

a. the Tribunal DECLARES that:

i. The Respondents fundamentally breached the Agreement / Amended Agreement by failing to provide an End User Certificate at the time of delivery, and by failing to inform the Claimant about the termination of the Tender Contract;

ii. The Respondents are jointly and severally liable to compensate the Claimant in the amount of USD1,605,521.37, for damages incurred as a result of the Respondents' contractual breaches of the Agreement / Amended Agreement;

iii. The Claimant is entitled to partially avoid the Amended Agreement with regard to future deliverables and has validly declared such partial avoidance as from 30 December 2017;

iv. Pursuant to the declaration of partial avoidance, the Claimant is liable to pay to the Respondents an amount of USD 6,585,958 by way of restitution;

v. Pursuant to the declaration of partial avoidance, the Claimant is entitled to sell the 10 Serial Vehicles, the remaining Raw Materials and the third Prototype to third parties;

vi. The Claimant is not entitled to sell or transfer IP Rights to third parties;

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

vii. The Claimant is entitled to make use of the remaining undelivered Know How, to the extent that use of such Know How does not violate the Respondents' IP Rights in the Vehicles;

viii. The Claimant's application for the cancellation of its Defence Export License was lawful;

ix. The Tribunal has jurisdiction to hear and decide the Claimant's IP Rights infringement claim regarding the yyy vehicles;

x. The Respondents have infringed the Claimant's IP Rights and Know How in relation to the Vehicle prior to their declaration of set off on 28 March 2017;

xi. The Respondents are not liable to compensate the Claimant in respect of such infringement of IP Rights and Know How related to the Vehicle;

xii. The Claimant has breached its obligations under the Amended Agreement;

xiii. The Claimant is liable to compensate the Respondents for damages and losses (including interest thereon) suffered by the Respondents as a consequence of the Claimant's breaches. Such losses and damages, quantified at Section VI.D of this Award, have been paid in their entirety by virtue of the Respondents' declaration of set-off and their draw-down of excess amounts under the Claimant's Bank Guarantee.

xiv. In light of the determination at {xiii} above, the Respondents are liable to reimburse to the Claimant an amount of USD 1,270,659.10;

xv. The Respondents have validly declared set-off on 28 March 2017;

xvi. Pursuant to the declaration of set-off, the Respondents have paid the entire Contract Price due under the Amended Agreement on 28 March 2017;

xvii. The IP Rights in the Vehicles stand automatically transferred to the Respondents on the date of setoff i.e. on 28 March 2017;

b. On the basis of the above declarations, the Tribunal ORDERS:

xviii. The Claimant to pay to the Respondents a net amount of USD 3,709,777.53, being the difference between the restitution amount payable by the Claimant to the Respondents and the amounts payable by the Respondents to the Claimant by way of damages and reimbursement;

xix. The Respondents to reimburse to the Claimant an amount of USD 22,920 towards the costs of the arbitration and of CHF 23,287 of Claimant's Party Costs; and

c. DISMISSES any and all other claims and counterclaims.[4]

C.

Both of the Parties have filed an Appeal with the Federal Tribunal against the Award of May 6, 2019, of the ICC Arbitral Tribunal seated in Zurich.

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

C.a. In case 4A_294/2019, the Claimant requests the Federal Tribunal set aside the Rulings numbered a.ii, a.iv., a.vi., a.vii., a.xi., a.xii., a.xiii., a.xiv., a.xv., a.xvi., a.xvii., b.xviii. and b.xix. of the Award of May 6, 2019 and to remand the matter to the Arbitral Tribunal for re-adjudication.

The Defendants request the Federal Tribunal reject the Claimant's Appeal. In the alternative, the Defendants request the Federal Tribunal to set aside Rulings a.ii. and b.xviii. and otherwise reject the Appeal. The Arbitral Tribunal has waived its right to submit comments.

The Parties have submitted Reply and Rejoinder briefs.

C.b. In case 4A_296/2019, the Defendants request the Federal Tribunal to set aside Rulings a.ii., a.xiii., a.xiv., b.xviii. and b.xix. of the challenged Award of May 6, 2019, and in the alternative, set aside the challenged Award in its entirety.

The Claimant and the Arbitral Tribunal have waived their right to submit comments.

D.
By Order of August 28, 2019, the Federal Tribunal has granted suspensory effect to the Appeal in Case 4A_294/2019.

By written submission dated October 4, 2019, the Claimant requested the Federal Tribunal withdraw the suspensory effect granted.

By written submission dated October 24, 2019, the Defendants requested the Federal Tribunal reject the Claimant's request.

Reasons:

1.
1.1. Where – as here – the case involves the same parties, and the same facts form the basis for the Appeals, the Federal Tribunal will, as a rule, deal with the various submissions by way of a single judgement. Thus, under the present circumstances, the Federal Tribunal finds it appropriate to merge the two appeals, 4A_294/2019 and 4A_296/2019.

1.2. According to Art. 54(1) BGG[5] the Federal Tribunal issues its decisions in an official language,[6] as a rule in the language of the decision under appeal. When that decision is in another language, the Federal Tribunal resorts to the official language chosen by the parties. The Award being challenged here is in English. As that is not one of the official languages, and, in accordance with Art. 42(1) BGG in conjunction

[5] Translator's Note: BGG is the most commonly used German abbreviation for the Federal law of June 6, 2005 organising the Federal Tribunal (RS 173.110).

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

with Art. 70(1) BV[7], the Parties have submitted their briefs to the Federal Tribunal in German (Claimant) and in French (Defendants), the judgment of the Federal Tribunal is being issued in the language of the appeal brief, as is standard practice (BGE 142 III 521,[8] at 1). In the present case, in which both the Claimant and the Defendants have filed Appeals of the Award of May 6, 2019, the Federal Tribunal considers it justified, taking into account the fact that the Claimant submitted its Appeal Brief first and in light of the current workload on the Court's docket, to issue the Federal Tribunal's judgement in German.

2.
In the field of international arbitration, a civil law appeal is possible under the requirements of Art. 190-192 PILA[9] (SR 291) (Art. 77(1)(a) BGG).

2.1. The seat of the Arbitral Tribunal in the present case is located in Zurich. At the time in question, the Parties had their registered offices outside Switzerland (Art. 176(1) PILA). As they have not expressly excluded the application of Chapter 12 PILA, the provisions of that chapter are therefore applicable (Art. 176(2) PILA).

2.2. A civil law appeal within the meaning of Art. 77(1) BGG is, in principle, of a purely cassatory nature, *i.e.* it may only seek the setting aside of the decision under challenge (see Art. 77(2) BGG, ruling out the applicability of Art. 107(2) BGG insofar as this empowers the Federal Tribunal to adjudicate the matter itself). To the extent that the dispute concerns the jurisdiction or the composition of the arbitral tribunal, however, there is an exception in this respect, providing that the Federal Tribunal may itself rule on the arbitral tribunal's jurisdiction or the lack thereof or on the removal of the arbitrator involved (BGE 136 III 605[10] at 3.3.4 p. 616 with references).

The fundamentally cassatory nature of an appeal against awards of arbitral tribunals does not constitute an obstacle to the requests by each of the Parties to set partially aside the challenged Award (see Judgement 4A_360/2011 of January 31, 2012 at 6.1). It may likewise be ruled out that the Federal Tribunal would remand the matter to the arbitral tribunal if it upheld the Appeal based on a violation of the Parties' right to be heard, particularly since Art. 77(2) BGG will only exclude the application of Art. 107 2) BGG insofar as that section permits the Federal Tribunal to itself rule on the matter (Judgements 4A_462/2018 of July 4, 2019 at 2.2; 4A_532/2016[11] of May 30, 2017 at 2.4; 4A_633/2014[12] of May 29,

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[7] Translator's Note: BV is the German abbreviation for the Swiss Federal Constitution.

[8] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/federal-tribunal-upholds-independence-members-cms-network

[9] Translator's Note: PILA is the most frequently used English abbreviation for the Federal Statute on International Private Law of December 18, 1987.

[10] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/independence-and-impartiality-of-a-party-appointed-arbitrator-in

[11] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/atf-4a-532-2016

[12] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/res-judicata-revisited

2015 at 2.3; 4A_460/2013[13] of February 4, 2014 at 2.3, with references). To this extent, the applications of the Parties are admissible.

2.3. The decision may only be challenged on one of the grounds which are exhaustively listed in Art. 190(2) PILA (BGE 134 III 186[14] at 5, p. 187; 128 III 50 at 1a, p. 53; 127 III 279 at 1a, p.282). Under Art. 77(3) BGG, the Federal Tribunal reviews only the grievances raised and reasoned in the Appeal Brief; this corresponds to the duty to provide reasons in Art. 106(2) BGG for the violation of constitutional rights and of cantonal and intercantonal law (BGE 134 III 186 at 5, p187, with reference). Criticisms of an appellate nature are inadmissible (BGE 134 III 565[15] at 3.1, p.567; 119 II 380 at 3b, p.382).

2.4. The Appeal Brief must be filed with fully reasoned arguments within the time limit for appeal (Art. 42(I) BGG). If there is a second exchange of briefs, the Appellant may not use its Reply to supplement or improve its Appeal Brief (BGE 132 I 42 at 3.3.4). The Reply must only be used to make points connected to the arguments in the briefs of another participant in the proceedings (*see* BGE 135 I 19 at 2.2).

Insofar as the Claimant goes beyond this in its Reply, its statements will not be taken into consideration.

Appeal by the Claimant (4A_294/2019)

3.
The Defendants wrongly deny that the Claimant has a legally protected interest in setting aside Rulings a.ii. and b.xviii. of the Challenged Arbitral Award. One cannot dismiss the Claimant's argument that the damages awarded to it in Ruling a.ii. (although limited to the sum of USD 1'605'521.37) would prevent it from asserting any further claims for damages against the Defendants in other proceedings, due to the *res judicata* effects of the Award.

The Claimant thus has a protectable interest in the setting aside of Ruling a.ii. and Ruling b.xviii, which likewise takes account of the payment of damages awarded to it (see Art. 76(1)(b) BGG).

It is likewise not apparent why the Claimant should have no protected interest within the meaning of Art. 76(1)(b) BGG in the setting aside of Ruling a.xi. of the challenged Award. Contrary to what the Defendants appear to assume, the issue of the Defendants' liability in the context of the violation of intellectual property rights and proprietary knowledge would be reopened if Ruling a.xi. were set aside. Even if one otherwise assumed, in line with the Defendants' argument, that in the event of a dismissal, the only options would be to dismiss the Claimant's Request for Relief or to reject the claim as being not capable

[13] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/violation-right-be-heard-upheld-federal-tribunal

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

[15] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/extension-of-arbitration-clause-to-non-signatories-case-of-a-gua

of adjudication, the Claimant would be in a better position if the case were set aside, particularly because in the event that the Federal Tribunal ruled that the matter is not capable of appeal (in contrast to the substantive decision rendered by the Arbitral Tribunal), this would not give rise to any *res judicata* effect and a subsequent claim for payment would continue to be an option. In this regard, as well, the Defendants cannot deny that the Claimant has a legally protected interest.

4.
The Claimant asserts the grievance that the Arbitral Tribunal made rulings on points of dispute which had not been submitted to it (Art. 190(2)(c) PILA).

4.1. Pursuant to Art. 190(2) PILA, the objection may be raised against an arbitral award where that award has granted more or something other than what was requested (decision *ultra* or *extra petita*), or has failed to adjudicate on a request for relief (decision *infra petita,* BGE 120 II 172 at 3a p. 175; 116 II 639 at 3a).

Pursuant to the jurisprudence of the Federal Tribunal, there will be no violation of the principle of *ne eat iudex ultra petita partium* if the claim that is the subject of the litigation is, in legal terms, merely analyzed differently – wholly or in part – from the parties' arguments, provided that it is covered by the relief requested (BGE 120 II 172 at 3a p. 175; Judgment 4A_440/2010[16] of January 7, 2011, at 3.1, not published in BGE 137 III 85 et seq; 4A_284/2018 of October 17, 2018 at 3.1 4A_508/2017 of January 29, 2018 at 3.1; 4A_50/2017[17] of July 11, 2017 at 3.1; 4A_678/2015[18] of March 22, 2016 at 3.2.1; each with references; see also BGE 130 III 35 at 5 p. 39). However, the arbitral tribunal is bound by the subject matter and the scope of the relief requested, particularly if the claimant itself qualifies or limits its claims in formulating the relief requested (Judgements 4A_284/2018 of October 17, 2018 at 3.1; 4A_580/2017 of April 4, 2018 at 2.1.1; 4A_508/2017 of January 29, 2018 at 3.1; 4A_50/2017 of July 11, 2017 at 3.1; 4A_678/2015 of March 22, 2016 at 3.2.1; each with references).

The Federal Tribunal, in one decision, affirmed that the principle of *ne eat iudex ultra petita partium* will be found to have been violated where the arbitral tribunal has not only dismissed an action for a negative declaratory judgement, but has also awarded the defendant party the disputed claim (Judgement 4P.20/1991 of April 28, 1991 at 2b, not published in BGE 118 II 193 *et seq*.). It found that the grounds for appeal under Art. 190(2)(b) PILA were lacking in a case in which the arbitral tribunal had not limited itself to merely rejecting the negative declaratory action but had found that the disputed legal relationship existed (BGE 120 II 172 at 3a).

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[16] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/claim-of-award-ultra-petita-rejected-claim-of-violation-of-publi

[17] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/atf-4a-50-2017

[18] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/right-be-heard-does-not-encompass-right-accurate-decision

4.2. The Claimant initially asserts that in its Application No. 3 that it requested a declaratory judgement that the Defendants were jointly and severally liable for damages arising from the contractual breaches that led to the Partial Avoidance

> ("The Tribunal shall declare Respondents, severally and jointly, liable to compensate Claimant for any and all damages incurred as a result of Respondents' contractual breaches resulting in Claimant's partial avoidance of the 4x4 Armored Tactical Vehicle Contract dated 25 January 2015, as amended").[19]

Instead of ruling on this request for a declaratory judgement, the Arbitral Tribunal, in Ruling a.ii., found the Defendant – with joint and several liability – liable to pay damages totalling USD 1'605'521.37.

The Claimant rightly raises the grievance that in Ruling a.ii., instead of ruling on the declaratory judgment request under Application No. 3, the Arbitral Tribunal ruled on a request for payment that the Claimant had never asserted in the arbitration. The Defendants also acknowledge this in their Reply. The grievance that Art. 190(2)(c) PILA was violated is well-founded, and after our setting aside of Ruling a.ii., the Arbitral Tribunal will have to make a new award on the Claimant's Request for a declaratory judgement under Application No. 3. In conjunction with this, it is appropriate for the Federal Tribunal to likewise set aside Ruling b.xviii., in which the Arbitral Tribunal considered the amount of USD 1'605'521.37 and awarded the Defendants merely the net amount to which they were entitled, as well as the decision as to costs under Ruling b.xix.

4.3.
4.3.1. The Claimant further submits that in Application No. 4, it has submitted a further request for a declaratory judgement. It argues that it requested a declaratory judgement that the Defendants are liable for damages resulting from the Defendants' use of proprietary knowledge, in violation of the Parties' Agreement. Whilst the Claimant says the Arbitral Tribunal does support the Claimant's view that the Defendants were not entitled (or only entitled in a very narrow scope) to use the proprietary knowledge in question prior to March 28, 2017, the Arbitral Tribunal nonetheless does, by way of a next step, reach the conclusion that the Defendants breached the Agreement by using the proprietary knowledge prior to that time, and *inter alia* had marketed an identical vehicle as their own in February 2017. The Claimant argues that the finding that the Defendants breached the Agreement entails the consequence of liability on the part of the Defendants for any damages arising out of the breach of the Agreement, based directly on the law. However, the Claimant asserts that instead of concluding its analysis at this point and upholding the Claimant's Request for declaratory judgement, the Arbitral Tribunal went on to scrutinise the matter and to determine whether any damage was present. The Claimant notes that, of course, proof of damage is not a condition precedent to issuing a declaratory judgement. Rather, the Claimant argues, the option of a declaratory judgement is practically tailor-made for situations in which a claimant is not yet able to conclusively quantify its damages. Here, too, the Claimant argues, the Arbitral Tribunal is thus not adjudicating the Claimant's Request for a declaratory judgement, but rather on a claim for payment of damages the Claimant did not make, and which the Arbitral Tribunal dismisses due to a lack of proof of loss. The Claimant argues that the Arbitral Tribunal thus violated Art. 190(2)(c) PILA in respect of Application No. 4, as well.

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

4.3.2. This grievance on the part of the Claimant is in error. The Arbitral Tribunal, in Ruling a.xi., notes the following:

> the Tribunal DECLARES that: [...] The Respondents are not liable to compensate the Claimant in respect of such infringement of IP Rights and Know How related to the Vehicle.[20]

Contrary to the view espoused in the Appeal Brief, it is not apparent to what extent the Arbitral Tribunal issued a money judgement which was not requested and thus departed from the scope of the declaratory judgement requested by the Claimant

> (Application No. 4: "The Tribunal shall declare Respondents, severally and jointly, liable to compensate Claimant for any and all damages [including disgorgement of profits] to be incurred - or, as an alternative, any and all damages to be incurred plus any and all profits to be made by Respondents - as a consequence of Respondents' use of Claimant's IP rights and know-how related to the ATV in violation of the Agreement, as amended").[21]

The Claimant does not assert that the Arbitral Tribunal was not entitled to issue a negative declaratory judgement. Rather, in its arguments, it criticises the grounds of decision of the challenged Award, by taking the position that, for the declaratory judgement requested by it, it would not be necessary for the Arbitral Tribunal to scrutinise any further prerequisites beyond the breach of contract. However, the Claimant does not thereby demonstrate any violation of the principle *ne eat iudex ultra petita partium*, but rather is impermissibly criticising the Arbitral Tribunal's substantive application of the law.

5.
In connection with Rulings a.iv., a.vi., a.vii., a.xii., a.xiii., a.xiv., a.xv., a.xvi., a.xvii. and b.xviii., the Claimant asserts a violation of substantive public policy (Art. 190(2)(e) PILA).

5.1. The substantive review of an international award by the Federal Tribunal is limited to the question of whether the award is consistent with public policy or not (BGE 121 III 331 at 3a p. 333). Adjudication of the merits of the claim will only violate public policy where it disregards some fundamental legal principles and therefore becomes incompatible with the essential and widely recognised values which, according to concepts prevailing in Switzerland, should be the basis of any legal system (BGE 144 III 120[22] at 5.1 p. 130). Among such principles are the sanctity of contracts (*pacta sunt servanda*), the prohibition on the abuse of rights, the principle of good faith, the prohibition on expropriation without compensation, the prohibition on discrimination, the protection of incapacitated persons and the prohibition of onerous contract obligations (see Art. 27(2) Swiss Civil Code), where this constitutes an obvious and serious violation of a party's rights. However, this list is not exhaustive. Promises of bribes are also contrary to public policy if proven, or, for example, a decision will be contrary to public policy where it disregards the

[20] Translator's Note: In English in the original text.
[21] Translator's Note: In English in the original text.
[22] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/atf-4a-260-2017

prohibition on forced labour (BGE 144 III 120 at 5.1 p. 130; 138 III 322[23] at 4.1 p. 327; each with references).

The challenged award will only be set aside if it violates public policy not merely in its reasoning but also in its result (BGE 144 III 120 at 5.1 p. 130; 138 III 322 at 4.1 and at 4.3.1/4.3.2; 132 III 389[24] at 2.2 p. 392 et seq; each with references).

5.2. The Claimant initially argues that the Challenged Arbitral Award constitutes "a clear a gross disregard and violation of Art. 163(2) CO" or a "manifest violation" of this provision with regard to the contract penalty awarded to the Defendants for failure to meet the delivery date. However, a violation of Art. 163 CO does not automatically constitute a violation of public policy within the meaning of Art 190(2)(e) PILA (see also Judgement 4A_508/2017 of January 29, 2018 at 4.4, with numerous references). In addition, the Claimant fails to recognize that the legislature, in providing for the limited grounds for appeal in Art. 190(2) PILA expressly intended to exclude the grievance of arbitrariness in appeals related to arbitration awards (Judgments 4A_236/2017[25] of November 24, 2017 at 4.2.2; 4A_74/2014[26] of August 28, 2014 at 3.2.6, not published in BGE 140 III 477).

Quite apart from this, in the case before us here, there is no question of any penalty for breach of contract, which is "*intended to confer an unlawful or improper promise*" (Art. 163(2) CO). Rather, the Claimant itself states in its Appeal Brief that, due to the termination of the Tender Contract between the GDS and Defendant 2, the certificate required for export (the so-called End User Certificate) became invalid and delivery under the contract thus impossible. Art. 163(2) CO expressly states that in the case of subsequent impossibility of performance, agreements between the Parties on forfeiture of the contract penalty may, exceptionally, be permitted. The comparison made in the Appeal Brief to promises to pay a bribe, which are illegal and null and void under Art. 19-20 CO by virtue of their 'defective' content (BGE 119 II 380 at 4b), thus fails for this reason alone.

Moreover, the Federal Tribunal is unable to concur with the Claimant where it claims that the Arbitral Tribunal ordered it to pay a contractual penalty because it had not illegally exported war materials. To the contrary: The Arbitral Tribunal emphasized in the challenged decision that the misconduct in connection with the export regulations for which the Defendants are responsible only came to light immediately prior to the intended export and they are no excuse for the delays in manufacturing and providing the vehicles which are attributable to the Claimant and which trigger contractual penalties.

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[23] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/landmark-decision-of-the-swiss-supreme-court-international-arbit

[24] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/violation-of-public-policy-notion-of-public-policy-exclusion-of-

[25] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/atf-4a-236-2017

[26] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/arbitration-clause-not-rescinded-subsequent-"showpiece"-contract

The grievance that the Challenged Arbitral Award is incompatible with public policy is thus not well-founded.

Appeal of the Defendants (4A_296/2019)

6.
The Defendants assert the grievance that the Arbitral Tribunal violated Art. 190(2)(c) PILA in multiple respects.

6.1. To the extent that the Defendants submit that Rulings a.ii. and b.xviii violate Art. 190(2)(c) PILA, the corresponding grievances asserted by the opposing Party have already been shown to be justified and it is proper for this Court to set aside the challenged Award in those respects (see supra at 4.2). Thus, to such extent the Defendants' Appeal is moot and we may dispense with any need to delve into the grievances of a violation of a right to be heard that the Defendants have raised.

6.2. The Defendants further submit that Rulings a.xiii and a.xiv (and associated with this, also Ruling b.xviii.) were made in violation of Art. 190(2)(c) PILA.

6.2.1. In their Application No. 806.10, the Defendants ask the Federal Tribunal to find the Claimant liable to pay damages in the amount of USD 8'504'533.74. Where, in Ruling a.xiii, the Arbitral Tribunal did find that the Claimant was liable for the contract breaches for which it was responsible but with regard to the scope of damages the Arbitral Tribunal assumed that the claim had ceased to exist based on full performance/the declaration of an offset, the Arbitral Tribunal made a ruling which remained within the scope of the relief requested. Contrary to what the Defendants appear to assume, for purposes of considering a claim for damages to have been lost as a result of full performance/offset it would not have been necessary for there to be a claim for payment on the part of the Claimant in an arbitration, rather, this arose out of the substantive adjudication of the Claimant's claim for damages in the context of the Relief Requested in Application No. 806.10.

Contrary to the view expressed in the Appeal Brief, there has been no decision *extra petita* in this case where the Arbitral Tribunal upheld the liability of the Claimant for the contractual breaches for which it was responsible, where the Arbitral Tribunal adjudicated the Defendants' claim for damages asserted by way of a Counter-Claim, but with regard to the scope of damages found that the Claim had been lost through full performance/declaration of offset.

6.2.2. However, in adjudicating the Defendants' claim for damages under Application No. 806.10, the Arbitral Tribunal did not merely consider that the Defendants' claim for damages had been lost due to the declared offset and thus finding that there were correspondingly no damages awardable to the Defendants (Ruling a.xiii). Rather, it also found that, following the offset, the Claimant was, for its part, entitled to a surplus of USD 1'270'659.10 and in Ruling a.xvi, it held the Defendants liable to pay this amount of money. In connection with this, it also took account of this amount when summarising the reciprocal payment obligations in Ruling b.xviii. However, and as the Defendants correctly argue, the Claimant had not filed any corresponding claim for payment.

In so ruling, the Arbitral Tribunal issued a decision which was *extra petita*. The grievance that Art. 190(2)(c) PILA was violated is well-founded.

7.
We partially uphold the Claimant's Appeal (4A_294/2019), thus setting aside Rulings a.ii, b.xviii and b.xix. of the challenged Award of May 6, 2019 by the ICC Arbitral Tribunal seated in Zurich and remand the matter for re-adjudication by the Arbitral Tribunal. The Defendants' Appeal (4A_296/2019) is likewise upheld in part, setting aside Ruling a.xiv. of the Challenged Arbitral Award. In further and other respects, we reject the Appeals, to the extent that the matters are capable of appeal. By our decision on the merits, the Defendants' request for withdrawal of the grant of suspensory effect is rendered moot.

In accordance with the outcome of these proceedings, the Federal Tribunal finds it justified to impose court costs totaling CHF 55'000.00 on the Parties at a rate of one-half each (Art. 66(1) and (5) BGG) and to decline to award the Parties any party compensation (Art. 68(1) BGG).

Therefore, the Federal Tribunal pronounces:

1.
Cases 4A_294/2019 and 4A_296/2019 are merged.

2.
The Appeals of the Claimant (4A_294/2019) and of the Defendants (4A_296/2019) are upheld in part.

Rulings a.ii., a.xiv., b.xviii. and b.xix. of the challenged Award of May 6, 2019 of the ICC Arbitral Tribunal seated in Zurich, are hereby set aside and the matter is remanded to the Arbitral Tribunal for re-adjudication. In all further and other respects, the Appeals are rejected, to the extent that the matter is capable of appeal.

3.
The judicial costs in the total amount of CHF 55'000.00 are imposed on the Claimant in the amount of CHF 27'500.00 and on the Defendants in the amount of CHF 27'500.00 (with joint and several liability and internally at a rate of one-half each).

4.
No party compensation is awarded.

5.
This decision shall be notified in writing to the Parties and the Arbitral Tribunal with its seat in Zurich.

Lausanne, November 13, 2019

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

Presiding judge:	Clerk of the Court:
Kiss	Leemann (Mr.)