4A_342/2019[1]

Judgement of January 6, 2020

First Civil Law Court

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

A._____ Co. Ltd.,
represented by Dr. Christopher Boog, Philippe Bärtsch, and Dr. Philip Wimalasena,
Appellant,

v.

B._____ GmbH.,
represented by Dr. Martin Bernet,
Respondent

Facts:

A.

A.a. B._____ GmbH (Claimant, Respondent) is a company organised under German law with its registered office in U_____. It is the parent company of the B._____ Group, a corporate group which is active globally, particularly in the sectors of automotive technology, consumer goods, industry, energy and building services technology.

A._____ Co. Ltd. (Defendant, Appellant) is a company organised under South Korean law with its registered office in V._____. It is a company belonging to the A._____ Group and it operates particularly in the realm of developing and manufacturing display screens, including for the automotive sector.

A.b. The Claimant asserted a claim for damages from the Defendant in connection with a competitive bidding procedure initiated by the Claimant in June/July 2015, in which the Claimant was awarded the contract on the Defendant's estimated requirements for its clients C._____ /D._____ for so-called

[1] Translator's Note: Quote as A._____ v. B._____, 4A_342/2019.
The decision was issued in German. The full text is available on the website of the Federal Tribunal, www.bger.ch.

thin-film transistor (TFT) displays for the period 2017-2021, totalling roughly 6 million units ("A-IVI Project").

On June 16, 2015, the Claimant sent Communiqué No. 1 to seven companies (including the Defendant) who had the technical ability to deliver TFT displays. The Claimant set out its intentions and the conditions for the competitive bidding procedure in that communique.

Communiqué No. 1 also referred to the contractual terms governing purchases, thus *inter alia* to the Claimant's Corporate Agreement ("CA"), the Claimant's General Terms of Purchase ("Terms of Purchase"), and its Quality Assurance Agreement ("QAA").

Art. 23.4 CA contained the following arbitration clause:

> The courts of Stuttgart have jurisdiction over contractual disputes if all the disputing parties have their registered office in Germany. In all other cases, contractual disputes shall be definitely adjudicated in accordance with the arbitration rules of the International Chamber of Commerce by one or more arbitrators appointed in accordance with such rules. The place of arbitration is Zurich, Switzerland, unless otherwise agreed by the parties in dispute. The arbitration language is English. However, documents drafted in German may be submitted in their original language. The parties in dispute shall treat in confidence all information which they receive with regard to arbitration proceedings in accordance with this provision, including the existence of arbitration proceedings. In the court and/or arbitration proceedings, they shall only disclose such information to the extent that this is necessary to exercise their rights. The chairman or sole arbitrator must be of different nationality to the parties in dispute. Subject to any other ruling returned by the arbitration tribunal, the parties in dispute shall continue to perform the contracts affected by the dispute.

Art. 9(3) QAA provides as follows:

> […] If all parties in a dispute have their headquarters in Germany, the sole place of jurisdiction for any contract dispute is Stuttgart. For processes in front of district courts, Stuttgart District Court (70190 Stuttgart) is the responsible court in this case. In all other cases, contract disputes shall be settled definitively in accordance with the Rules of Arbitration of the International Chamber of Commerce by one or several arbitrators appointed in accordance with this ordinance. The place of arbitration is Zurich, Switzerland, unless the parties in dispute agree a different location. The language for the arbitral proceedings is English. The parties in dispute shall handle all information that they receive in respect of arbitral proceedings in accordance with this provision with the utmost confidence, including the existence of arbitral proceedings. In a court and/or arbitral proceeding, they shall only disclose such information as is required to exercise their rights. The chairman or arbitrator must be a different nationality to the parties in dispute. The parties in dispute shall continue to meet their agreements affected by the dispute subject to a different decision by the arbitral court.

Both the CA and the QAA contained a choice-of-law clause in favour of German law, and excluding application of the CISG (UN Convention on Contracts for International Sale of Goods [SR 0.221.211.1]).

A.c. As early as the end of 2014, the parties had begun to specifically negotiate on the CA, which is a framework agreement the Claimant uses for all of its suppliers. The purpose of the CA is to provide rules

governing all projects with the supplier in question (including future projects). Following several rounds of negotiations on the CA, on June 27, 2015, the Defendant proposed limiting the parties' discussions to the three most important points; these included the issues of warranty, insurance and cancellation of bindingly-placed orders.

On July 9, 2015, the Claimant sent Communique No. 2 to the companies participating in the competitive bidding process. In that Communique, it described the further sequence of the proceedings: each company was to complete a bidding form by providing certain details. On that basis, the Claimant created a ranked list; only the three top-ranked bidders would be admitted to the second round of bidding.

On July 16, 2015, the Defendant submitted its bid for the A-IVI Project, together with its completed bidding form and its undertaking to sign the QAA. On July 23, 2015, at the auction in Japan, the Claimant made a counter-offer to the Defendant. Based on that document dated July 23, 2015, which was signed by both parties, the Defendant was awarded the contract by the Claimant as the supplier on this project. This was once again confirmed by letter of the Claimant on August 4, 2015. Although the parties had exchanged various further emails, the parties were unable to reach any consensus on the three points that remained open with respect to the CA.

After the Contract Award was signed, the Parties exchanged further correspondence regarding compensation, the open issues for the CA, the general terms of purchase and the models which were to be supplied. In addition, technical modifications were discussed.

On November 27, 2015, the parties met in W._____. They discussed the open issues under the CA which remained.

On December 17, 2015, the Claimant forwarded a draft of a "Multi-Year Contract" to the Defendant, in which the contractual terms of the bidding procedure were set out. The document was not signed. By contrast, on January 27, 2016, the Defendant signed the QAA together with the Addendum to it, and the Claimant signed it on March 21, 2016.

Subsequently, the parties attempted to reach agreement on the rules governing the remaining open issues with respect to the CA and the Terms of Purchase. However, they were unable to reach any agreement, for which reason neither the CA nor the Terms of Purchase were ever signed.

At a meeting on June 15, 2016, and by letter dated June 29, 2016, the Defendant informed the Claimant of its decision to abandon the A-IVI Project, and asked the Claimant to find another supplier. As its justification for this, the Defendant stated that it was abandoning the business segment in question due to insufficient competitiveness. It simultaneously gave notice that it would be ceasing deliveries as of December 31, 2017.

By letter dated July 7, 2016, the Claimant refused to accept this termination of deliveries and demanded that the Defendant reconsider. At subsequent meetings, the Claimant threatened to assert claims for damages in the event that the Defendant was definitively refusing to make deliveries. By letter dated August 4, 20156, the Defendant expressed the opinion that the Contract Award of July 23, 2015, did not

constitute a binding obligation to make deliveries; in addition, it argued, it was justified in any event to terminate the A-IVI Project. It accordingly rejected the Claimant's claim for damages. The Claimant responded to this by letter dated August 8, 2016, affirming its view that the contract award of July 23, 2015 constituted a legal obligation.

As the parties had been unable to resolve the matter, the Claimant sought a new supplier.

B.
By written submission dated October 27, 2017, the Claimant initiated an arbitration against the Defendant under the rules of the International Chamber of Commerce (ICC).

On January 19, 2018, the Secretary General of the ICC Court of Arbitration confirmed the two party-appointed arbitrators. On February 22, 2018, he confirmed the Chairman of the Arbitral Tribunal. The parties subsequently reached agreement to bifurcate the arbitration into two parts – "jurisdiction and liability" and "quantum of damages."

By Order No. 1 of March 22, 2018, the Arbitral Tribunal ordered bifurcation of the arbitration.

On October 4 and 5, 2018, hearings took place in Cologne.

By Decision of June 3, 2019 ("Partial Award on Jurisdiction and Liability"), the ICC Arbitral Tribunal, seated in Zurich, found both that it had jurisdiction (Ruling No. 1) and that the Defendant was liable in principle (Ruling No. 2).

C.
By civil law appeal, the Defendant has asked the Federal Tribunal to set aside the Award of the ICC Arbitral Tribunal seated in Zurich dated June 3, 2019, and to hold that the Arbitral Tribunal lacks jurisdiction to adjudicate the dispute in Case. No. 23188. The Respondent requests, as a primary matter, dismissal of the Appeal. The Arbitral Tribunal has waived its right to submit comments.

The parties have submitted Reply and Rejoinder briefs.

D.
By Order of August 8, 2019, the Federal Tribunal has noted that the sum of CHF 80'000 demanded by the Respondent as security for potential party compensation has been paid into the treasury of the Federal Tribunal.

Reasons:

1.
According to Art. 54(1) BGG[2] the Federal Tribunal issues its decisions in an official language,[3] 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 (BGE 142 III 521[4] at 1). The challenged Award was issued in English. Because that is not one of the official languages and the parties used German in the proceedings before the Federal Tribunal, the judgment of the Federal Tribunal shall be issued in German.

2.
In the field of international arbitration, a civil law appeal is admissible subject to the requirements of Art. 190-192 PILA[5] (SR 291) (Art. 77(1)(a) BGG).

2.1. The seat of the Arbitral Tribunal in the present case is located in Zurich. The challenged Award is an interim award on jurisdiction, which may be challenged by appeal under Art. 190(3) PILA (BGE 143 III 462 at 2.2; 130 III 66 at 4.3 p. 75).

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 to set aside the challenged decision (*see* Art. 77(2) BGG, ruling out the applicability of Art. 107(2) BGG empowering 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, 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[6] at 3.3.4, p. 616, with references).

Accordingly, the Appellant's appeal is admissible. Provided that the appeal is sufficiently substantiated (Art. 77(3) BGG), it is appropriate for the Federal Tribunal to adjudicate on the appeal.

2.2. Pursuant to 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 under Art. 106(2) BGG for the violation of constitutional rights and of cantonal and intercantonal law (BGE 134 III 186[7] at 5, p187, with reference).

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[2] 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).

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

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

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

[6] 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

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

Criticism of an appellate nature is not allowed (BGE 134 III 565[8] at 3.1, p.567; 119 II 380 at 3b, p.382).

2.3. 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 Appellant goes beyond this in its Reply, its statements will not be taken into consideration.
2.4. The Federal Tribunal bases its judgement on the factual findings of the arbitral tribunal (Art. 105(1) BGG). This includes the findings as to the life circumstances which are the basis of the dispute and those as to the course of the previous proceedings, *i.e.* the findings as to the subject of the case, to which belong, in particular, the submissions of the parties, their factual allegations, legal arguments, procedural statements and offers of evidence, the content of a witness statement, an expert report, or the findings as to a visual inspection (BGE 140 III 16 at 1.3.1 with references).

The Federal Tribunal may not rectify or supplement the factual findings of the arbitral tribunal, even where they are blatantly inaccurate or based on a violation of the law within the meaning of Art. 95 BGG (*see* Art. 77(2) BGG, ruling out the applicability of Art. 97 BGG and Art. 105(2) BGG). However, the Federal Tribunal may review the factual findings of the arbitral award under appeal when some admissible grievances within the meaning of Art. 190(2) PILA are raised against them or, exceptionally, when new evidence is taken into consideration (BGE 142 III 220 at 3.1, 239 at 3.1; 140 III 477 at 3.1, p. 477; 138 III 29[9] at 2.2.1, p. 34 each with references).

Because the Federal Tribunal adjudicates an appeal from an interim award (Art. 190(3) PILA) based on a lack of jurisdiction on the part of the Arbitral Tribunal (Art. 190(2)(b) PILA), on the basis of those findings of fact made by the Arbitral Tribunal that withstand any potential grievance that fundamental procedural rights have been violated, it is possible in the context of an appeal of this kind for further grievances under Art. 190(2) PILA to be raised, provided that they directly relate to the Arbitral Tribunal's jurisdiction (BGE 140 III 477 at 3.1, 520 at 2.2.3, p. 525).

Whoever wishes to claim an exception to the rule that the Federal Tribunal is bound by the factual findings of the arbitral tribunal and seeks to rectify or supplement the factual findings on that basis must show with reference to the record that the corresponding factual allegations were raised during the arbitral proceedings in accordance with the usual rules (*see* BGE 115 II 484 at 2a, p. 486; 111 II 471 at 1c, p. 473; both with references; *see also* BGE 140 III 86 at 2, p. 90).

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[8] 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

[9] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/jurisdiction-of-the-cas-upheld-a-pathological-clause-has-to-be-s

2.5. These principles are overlooked by the Appellant where it prefaces its legal submissions with an extensive description of the facts of the case, in which it describes the background to the legal dispute between the parties and the course of the arbitration from its own perspective, and, in so doing, departs in various respects from the findings of fact in the challenged Award, or expands on them without providing substantiated justifications for making exceptions to the rule that the Federal Tribunal is bound by the findings of fact of the Arbitral Tribunal.

Similarly, in its further Grounds of Appeal, the Appellant expounds, in part, its view of matters, departing from the Arbitral Tribunal's findings of fact or expanding on them without satisfying the legal requirements for a legally sufficient fact-based grievance. For example, it expresses views regarding the alleged knowledge of the Respondent at the time of signing the QAA, submitting that the Respondent knowingly chose a narrow wording in respect of the disputes covered. No consideration can be given to the remarks in question.

3.
The Appellant claims that the Arbitral Tribunal wrongly found that it had jurisdiction (Art. 190(2)(b) PILA).

3.1. Pursuant to Art. 190(2) PILA, the Federal Tribunal freely reviews jurisdictional objections as to legal issues, including preliminary substantive issues upon which the determination of jurisdiction depends (BGE 144 III 559 at 4.1; 142 III 239[10] at 3.1; 134 III 565 at 3.1; 133 III 139 at 5, p. 141). In the framework of an appeal concerning jurisdiction, the Federal Tribunal reviews the factual findings of the award under appeal only when some admissible grievances within the meaning of Art. 190(2) PILA are raised against such factual findings or when some new evidence (Art. 99 BGG) is exceptionally taken into account (BGE 144 III 559 at 4.1; 142 III 220 at 3.1, 239 at 3.1; 140 III 477 at 3.1, p.477; 138 III 29 at 2.2.1; each with references).

Pursuant to Art. 178(2) PILA, the validity of an arbitration agreement in substantive respects and as to its objective scope is governed by the law chosen by the parties as applicable to their dispute, in particular the law applicable to the main contract, or Swiss law (BGE 140 III 134[11] at 3.1, p.138; 138 III 29 at 2.2.2). The Arbitral Tribunal interpreted the arbitration clause in Art. 9(3) QAA implicitly under Swiss law. Both the parties concur in assuming that the principles of interpretation of Swiss law apply. The Respondent likewise does not, for example, rely on provisions from any foreign legal system (such as German law, which was applicable pursuant to the choice-of-law clause in the QAA), which would potentially be applicable in the specific case and be more advantageous than Swiss law in terms of the substantive validity of the arbitration clause.

3.2. An arbitration clause is an agreement by which two or more identified or identifiable parties agree to entrust an arbitral tribunal or a sole arbitrator with the task of issuing a binding award on one or several awards in existence or arising in the future, whilst simultaneously excluding the jurisdiction of the original

[10] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/unsigned-arbitration-clause-upheld

[11] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/arbitration-clause-survives-termination-its-scope-be-interpreted-liberally

state courts (BGE 140 III 134 at 3.1 p. 138; 130 III 66 at 3.1 p. 70). What is decisive is that the parties intend to vest jurisdiction for specific disputes in an arbitral tribunal, *i.e.* in a body which is not a state court (BGE 142 III 239 at 3.3.1 p. 247; 140 III 134 at 3.1 p. 138; 138 III 29 at 2.2.3 p. 35; 129 III 675 at 2.3 p. 679 f.).

The interpretation of an arbitration agreement follows the generally applicable principles of interpretation governing private declarations of intent. What is thus decisive is, first of all, identifying the common and actual intent of the parties (BGE 142 III 239 at 5.2.1; 140 III 134 at 3.2 p. 138; 130 III 66 at 3.2 p. 71 with references). This subjective interpretation is based on an assessment of the evidence which, in principle, is excluded from the scope of the Federal Tribunal's review (BGE 142 III 239 at 5.2.1 with references).

Where no actual intent of the parties can be ascertained, the arbitration clause is to be interpreted based on the principle of reliance, *i.e.* the presumed intent of the parties should be determined as that which could and should have been understood by the respective declarants in good faith under the circumstances (BGE 142 III 239 at 5.2.1; 140 III 134 at 3.2; 138 III 29 E.2.2.3). In interpreting the arbitration clause, the court must take into account its legal nature; in particular, it should be noted that the waiver of recourse to a state court would severely restrict the parties' legal remedies. Such a waiver cannot be assumed lightly, according to the jurisprudence of the Federal Tribunal, for which reason, in cases of doubt, the courts must favour a restrictive interpretation (*see* BGE 140 III 134 at 3.2 p. 139; 138 III 29 at 2.3.1; 129 III 675 at 2.3 p. 680 f.). If, in contrast, the interpretation establishes that the intent of the parties is to exclude jurisdiction of state courts and to opt for the jurisdiction of an arbitral tribunal with respect to a matter in dispute, but there is still disagreement regarding the handling of the arbitration procedure, as a basic matter the principle of utility will be applicable; under that principle, the courts will seek an interpretation of the contract that favours the arbitration agreement (BGE 140 III 134 at 3.2 p. 139; 138 III 29 at 2.2.3 p. 36; 130 III 66 at 3.2).

3.3. The Arbitral Tribunal found that the arbitration clause in the QAA, at Art. 9(3), 4th sentence, should be regarded as formally valid under Art. II of the New York Convention of June 10, 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (SR 0.277.12), Art. 178(2) PILA and sec. 1031(1) of the German Code of Civil Procedure [German acronym: ZPO]. The Arbitral Tribunal found that it was not in dispute between the parties that the claims asserted by the Claimant in the Arbitral Tribunal did not arise out of the QAA. However, contrary to the Appellant's assertion, it found that the arbitration clause in Art. 9(3) QAA did not merely cover disputes relating to the narrow scope of application of that Agreement. Rather, the Arbitral Tribunal found that, under Art. 9(3) QAA, the parties had agreed to submit "contract disputes" between them to an arbitral tribunal. The legal validity of the CA and the question of whether the contract award which was made created a supply agreement between the parties are contract disputes within the meaning of Art. 9(3) QAA. This, the Arbitral Tribunal said, is apparent from an interpretation of the arbitration clause concluded between the parties, other terms of the QAA and the history of the parties' negotiations.

The Arbitral Tribunal noted that the interpretation of international arbitration agreements is usually based on the presumption that the parties intend to confer a comprehensive jurisdiction upon the arbitral tribunal. Whilst one cannot lightly assume that parties intend to confer jurisdiction on an arbitral tribunal, there is no reason to interpret an arbitration clause narrowly once it is established that the parties did agree to

vest jurisdiction in an arbitral tribunal. In the case under review, the Arbitral Tribunal was convinced that the parties wanted all disputes arising out of their business relationship to be settled by an ICC arbitral tribunal seated in Zurich, including disputes regarding the legal significance and effect of the contract award and the validity of the CA.

As an initial matter, the Arbitral Tribunal found that the parties' intent follows from the wording of the arbitration clause in Art. 9(3), 4th sentence, QAA, because the term "contract disputes" is not defined in the QAA, and the 4th sentence of Art. 9(3) QAA (by contrast with other paragraphs of Art. 9 QAA) does not require that such "contract disputes" must arise "out of or in connection with this Agreement", *i.e*. the QAA. It follows from this, the Arbitral Tribunal said, that the term "contract disputes" is not limited to contract disputes arising out of the QAA, but rather it encompasses all contract disputes, whether or not they arise out of the QAA or another contract forming a part of the business relationship between the parties. The result of this textual analysis is also confirmed by other aspects which constituted the expression of the intention of both parties to have their disputes resolved by an ICC arbitral tribunal based in Zurich: When the Respondent proposed general terms and conditions (GTCs) with a jurisdictional clause vesting jurisdiction in the courts in Stuttgart, the Appellant had wanted to adapt the GTCs in line with the CA, proposing an arbitration clause in favour of an ICC arbitral tribunal instead. The Respondent's Pricing Contract likewise contained an arbitration clause in favour of an ICC arbitral tribunal based in Zurich. These facts and circumstances, the Arbitral Tribunal found, showed that the clear and unambiguous intention of the parties was to have all disputes arising from their contractual supply relations adjudicated by an arbitral tribunal in accordance with the ICC Rules. The fact that the parties did not agree on admissibility of German-language documents did not alter their consensual intention to submit disputes to an ICC arbitral tribunal.

This view of the Arbitral Tribunal was furthermore confirmed in the Preamble to the QAA. Even if the preamble to a contract lacks legally binding effect, it can nevertheless provide an indication of the parties' motives for concluding the contract, which courts may take into account when interpreting the contract. The Preamble to the QAA provides that:

> …this agreement [and with it the ICC arbitration clause contained in Art. 9(3)] forms part of the supply agreement with B._____ and is binding for business relationships between the SUPPLIER and B._____.

This broad and all-encompassing wording – in particular the general reference to business relationships between the parties – shows that it was the parties' intention to apply the arbitration clause contained in Art. 9(3) to all disputes arising out of their business relations. This would also include disputes in the event (not anticipated at the time the QAA was concluded) that no CA was signed and the Appellant might terminate the Supply Agreement concluded by the parties with the document concerning the contract award of July 3, 2015.

The Appellant's objection that it would be nonsensical to extend the arbitration clause in Art. 9(3) QAA to the present dispute, because Art. 23.4 CA already contains an arbitration clause is not persuasive. Particularly for disputes such as the specific dispute to be adjudicated here, where the parties did not sign the CA, contrary to their expectation, such an extension would make sense. This is all the more the

case in view of the clear intention of the parties to exclude the jurisdiction of the state courts for all disputes arising out of their supply relations. Art. 9(3), 4th sentence, QAA thus constituted a 'fall-back clause' in the event that an arbitration clause in another contract was found to be invalid or had not yet been concluded. This interpretation is also confirmed by the fact that the parties signed the QAA, including the Addendum, without considering the status of negotiations of other contracts. Had it been the intention of the parties that the QAA, including the Arbitration Clause, should only become effective after final conclusion of all of the contracts with regard to the Award of the Supply Contract ("Award"), then they would have concluded all of their agreements at the same time or made them contingent on all of the other contracts being concluded.

3.4. Whether the Arbitral Tribunal found these statements to constitute a concordant *de facto* intent of the parties, as claimed by the Respondent, or interpreted the parties' statements in good faith, as alleged in the Appeal Brief, does not need further elaboration here, particularly as the Appellant does not assert a factual grievance nor is it able to show any incorrect application of the principles of objective interpretation of arbitration clauses, as we will discuss below.

Contrary to the Appellant's arguments, it cannot be inferred from the term "contract disputes" in Art. 9(3), 4th sentence, QAA – and even taking into account the fact that the draft contract originated from the Respondent – that the parties thus intended to only submit disputes arising out of the QAA to an arbitral tribunal, but to exclude disputes relating to the actual supply relationship. The other contractual documents which were prepared but not subsequently signed each contained an arbitration clause in favour of an ICC arbitral tribunal based in Zurich. The Appellant also insisted that the jurisdiction clause in the GTCs should be replaced by an arbitration clause. Furthermore, the version of Art. 23.4 CA proposed by the Appellant contained such an arbitration clause. The Appellant itself stresses that the QAA relates to certain specific points of the supply relations between the parties, namely quality assurance and corporate responsibility. Based on the fact raised by the Appellant itself that, in addition to Art. 9 QAA, the further contract documents (which were not signed) each contained an arbitration clause, one cannot infer that within one and the same supply relationship, the parties should have intended to apply independent dispute resolution mechanisms in each case for individual claims. Rather, from an objective point of view, one may assume that the parties intended to emphasise that the dispute resolution chosen for their overall supply relations was to vest jurisdiction in an ICC arbitral tribunal based in Zurich.

In view of the declarations of intent exchanged between the parties, the Appellant could not, in good faith, assume that claims regarding quality assurance in the context of the supply relationship would have to be asserted before an arbitral tribunal but that the state courts would retain jurisdiction for other disputes concerning the actual supply obligations. Contrary to the view expressed in the Appeal Brief, this is not a question of extending the arbitration clause to encompass further independent contracts, but rather of the fact that the Appellant was not entitled in good faith to interpret the arbitration clause in Art. 9(3) QAA in such a way that it only covered specific aspects of the supply relationship (*i.e.* quality assurance and corporate social responsibility). Rather, the Appellant would have to interpret it in such a way that the chosen form of dispute resolution was to apply to the parties' entire supply relationship. The fact that, as the Appellant argues, the QAA was only signed several months after the project was awarded does nothing to change this fact. Taking account of the specific circumstances in which the parties concluded

the Contract, and correctly interpreting Art. 9(3) QAA, the Arbitral Tribunal thus concluded that the term "contract disputes" used in the Arbitration Clause had to be understood as meaning all disputes relating to the supply relationship in question, including those relating to the existence of an obligation to supply products. An incorrect application of the principles governing interpretation of contracts under the principle of reliance cannot be discerned. The Appellant's grievance that its rights under Art. 190(2)(b) PILA were violated is not well-founded.

4.
The appeal is rejected, to the extent the matter is capable of appeal. Based on this outcome, the Appellant shall be liable to pay costs and party compensation (Art. 66(1) BGG).

Therefore, the Federal Tribunal pronounces:

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

2.
The judicial costs of CHF 85'000 shall be paid by the Appellant.

3.
The Appellant shall pay party compensation to the Respondent of CHF 120'000 for the proceedings before the Federal Tribunal. Party compensation in the amount of CHF 80'000 shall be disbursed from the security for costs paid into the court treasury of the Federal Tribunal.

4.
This decision shall be notified in writing to the parties and to the ICC Arbitral Tribunal with its seat in Zurich.

Lausanne, January 6, 2020

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

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