4A 187/2020[1]

Judgment of February 23, 2021

First Civil Law Court

Composition

Federal Judge Kiss (Mrs.), Presiding
Federal Judge Niquille (Mrs.)
Federal Judge Rüedi (Mr.)
Clerk of the Court: Mr. O. Carruzzo

Parties to the proceedings

X._____,
Represented by Mr. Jean-Marie Vulliemin, Mr. Jean Marguerat and Mr. Tomàs Navarro Blakemore
Appellant

v.

1. _____
2. _____
3. _____
4. _____
5. _____
6. _____
7. _____
8. _____
9. _____
10. _____

[1] Translator's Note: Quote as A._____ *v.* 1. _____ to 26. _____ , 4A 187/2020. The original decision was issued in French. The full text is available on the website of the Federal Tribunal, www.bger.ch

11. _____
12. _____
13. _____
14. _____
15. _____
16. _____
17. _____
18. _____
All represented by Mrs. Nathalie Voser, Mrs. Anya George, Mr. Sebastiano Nessi and Mr. Damien Clivaz
19. _____
20. _____
21. _____
22. _____
23. _____
24. _____
25. _____
26. _____
All represented by Allen & Overy, LLP
Respondents

Facts:

A.

In 1997, A._____ passed a law establishing a special regime to promote renewable energy sources. The details of this special scheme were regulated in several successive decrees. Decree xxx, issued in 2007, set the Feed-in-Tariff (FIT) for photovoltaic electricity. It provided for an attractive FIT for the first 25 years of operation of the photovoltaic installations, and a lower FIT for the subsequent years. In order to compensate for inflation, the FIT could be adjusted annually on the basis of the national consumer price index. In order to be able to sell the electricity produced at the FIT provided for in the said decree, renewable energy producers had to register with the appropriate authority within a certain period.

Following the adoption of the aforementioned decree, the 26 commercial operators mentioned in the first page of this judgment (hereinafter, the investors), all of whom have their registered office or

domicile in a Member State of the European Union (EU), made substantial investments and took the necessary steps to be able to sell the electricity produced at the advantageous tariff set out in the decree.

As early as 2010, A._____ took various legislative measures affecting the remuneration of renewable energy producers. In 2013, it adopted a new regulation that ended the previous incentives for photovoltaic installations.

B.

B.a. On November 16, 2011, the investors, relying on Art. 26 4(b) of the Energy Charter Treaty of December 17, 1994 (TCE; RS 0.730.0), brought arbitration proceedings against A. for the purpose, among others, of obtaining payment of damages for violation of Art. 10 (1) TCE.

The defendant argued that the appeal should be rejected in its entirety.

A three-member Arbitral Tribunal was established pursuant to the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL) under the auspices of the Permanent Court of Arbitration (PCA) and its seat was fixed in Geneva.

B.b. The Arbitrators, after consultation with the parties, issued Procedural Order No. 4 on February 28, 2013, in which they decided, among other things, to split the proceedings and to first consider the five preliminary objections to the jurisdiction of the Arbitral Tribunal raised by the Respondent.

After receiving the parties' submissions and holding a hearing to consider its jurisdiction, the Arbitral Tribunal issued a Preliminary Award on October 13, 2014, in the operative part of which it declared that it had jurisdiction to hear the dispute between the parties to the present proceedings.

In particular, the Arbitral Tribunal rejected the third argument of lack of jurisdiction put forward by the Respondent, according to which intra-Community disputes between a company headquartered in an

EU Member State and an EU Member State concerning TCE-covered investments made by the former in the territory of the latter cannot be decided by arbitration (hereinafter, the intra-Community exception).

In interpreting the TCE in accordance with the rules of the Vienna Convention of May 23, 1969, on the Law of Treaties (RS 0.111), the Arbitrators found that the EU, itself a party to the TCE, had not expressed any reservations with regard to the possibility of submitting an intra-Community dispute to arbitration under Art. 26 TCE. The EU's declaration of accession to the TCE makes no provision for a special regime to be applicable to such disputes falling within the scope of the TCE. The Arbitral Tribunal notes that the parties to the TCE have, however, expressly reserved certain provisions contained in other treaties, when they considered it necessary to regulate the relationship between the TCE and those treaties. It further notes that the TCE does not contain a "disconnection clause", allowing the member parties of a regional organization, such as the EU, not to apply the rules of the TCE in their mutual relations. Neither the EU nor its members have therefore expressed any intention to exclude the dispute resolution mechanism of the TCE. The Arbitrators further consider that Art. 344 of the Treaty on the Functioning of the EU (TFEU), according to which Member States shall not submit a dispute concerning the interpretation or application of the Treaties to a method of settlement other than those provided for therein, does not exclude the right to arbitration. This rule applies only to disputes between two Member States. Indeed, the European treaties do not contain rules on arbitration between a Member State and an investor. Moreover, Art. 344 TFEU does not prevent a priori the submission of certain disputes falling within the scope of the TCE, which do not concern the interpretation or application of European law, to an arbitral tribunal. In addition, the Court of Justice of the EU (CJEU) does not have a monopoly in the field of interpretation and application of European law. Therefore, there is no incompatibility between the arbitration procedure under Art. 26 TEC and the role of the CJEU. The other elements put forward by the Respondent do not lead to a different conclusion. In particular, the position taken by the European Commission (EC) in various arbitration proceedings relating to intra-Community disputes cannot be regarded as an interpretation shared by all parties to the TCE as to the meaning to be given to certain provisions of the Treaty. At the

end of their analysis, the Arbitrators considered that they had jurisdiction under Art. 26 TCE to hear intra-Community disputes, while noting that such a solution is in line with that adopted by other arbitral tribunals that had to decide the same question.

The Preliminary Award was not the subject of a Civil appeal or a request for revision.

B.c. Following the issuing of the Award, the Arbitral Tribunal continued the hearing of the case. On August 13, 2018, the Respondent requested the Arbitral Tribunal to consider a "new jurisdictional objection" based on "new facts" and to open a new hearing on this issue and to allow the Respondent to submit the following three documents in support of this objection (hereinafter, collectively referred to as the Achmea documents):

- the decision of March 6, 2018, of the CJEU in Achmea v. Slovakia (C-284/16), in which the CJEU ruled on the compatibility of the arbitration clause contained in a bilateral investment treaty with the TFEU;

- a communication of July 19, 2018, from the EC, entitled "Intra-EU Investment Protection", calling on EU Member States in particular to "draw all necessary conclusions from the Achmea judgment" by formally terminating their bilateral investment treaties;

- a fact sheet published on July 19, 2018, in which the EC emphasized that investor-state arbitration under bilateral investment treaties between EU Member States was not compatible with EU law.

After allowing two rounds of written submissions between the parties on these requests, the Arbitral Tribunal issued Procedural Order No. 19 (hereinafter, PO 19) on October 15, 2018, entitled "Decision on the Respondent's Request to Open a New Jurisdictional Phase"[2], in which it rejected the requests. In the Order, it pointed out, among other things, that the Respondent had already raised several jurisdictional objections, which had been rejected in the Preliminary Award of October 13, 2014. According to Swiss

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

law applicable to the *lex arbitri*,[3] the award is *res judicata*[4] or partakes of conclusive and preclusive effects comparable to res judicata ("the 2014 Preliminary Award has thus res judicata effect or conclusive and preclusive effects comparable to res judicata[5]"[6]; PO 19, no. 27). In the opinion of the Arbitrators, the Respondent is, in referring to the Achmea documents, in essence seeking to have the already-rejected intra-Community exception reconsidered. The Arbitral Tribunal considers that the documents referred to by the Respondent do not alter the nature of the objection already raised, but merely add possible legal arguments in support of it. This being the case, the so-called "new" argument of lack of jurisdiction is the same as the one already raised at the beginning of the proceedings, so that the conclusions reached by the Arbitral Tribunal in its Preliminary Award are binding. The Arbitral Tribunal then makes some observations on the conditions for requesting a revision of the Preliminary Award, insofar as the parties raised this point in their respective submissions. It notes that such a request for revision would be doomed to failure. In this respect, it points out in particular that the Achmea documents do not constitute "facts".

PO 19 was not the subject of a Civil appeal or a request for revision. Nor did the defendant raise any objections of that order in the subsequent proceedings of the Arbitration case.

B.d. On February 12, 2019, the Respondent sought leave to place on the Arbitration record a declaration of January 15, 2019, signed by twenty-two EU Member States, relating to "the legal consequences of the Achmea judgment of the Court of Justice and the protection of investments in the European Union" (hereinafter, the Declaration of the 22).

After ordering a further exchange of submissions, the Arbitral Tribunal granted the request.

[3] Translator's Note: In Latin in the original text. The expression means "law of the arbitration".
[4] Translator's Note: In Latin in the original text. The expression means "a matter decided".
[5] Translator's Note: In Latin in the original text.
[6] Translator's Note: In English in the original text.

On March 7, 2019, the Respondent invited the Arbitral Tribunal to review its jurisdiction on its own motion in light of the Declaration of the 22. After hearing from the plaintiffs, the Arbitral Tribunal retained this request for judgment.

B.e. By award of February 28, 2020, the Arbitral Tribunal found that the defendant had breached Art. 10 1 TCE and ordered it to pay various amounts to certain plaintiffs totaling more than EUR 91 million.

The Arbitrators denied the request to reconsider the issue of their jurisdiction, stating among other things (Award, no. 543-544):

> "543. (...) It is undisputed that the Preliminary Award was not challenged. As a result, that Award binds the Tribunal and has thus a res judicata effect or conclusive and preclusive effects comparable to res judicata. The Tribunal stated this position on repeated occasions throughout these proceedings, including in Procedural Order No. 19 issued on 15 October 2018 ("PO19"). In PO19, the Tribunal denied ...'s request to "open a new jurisdictional phase" as a consequence of the judgment rendered by the CJEU in Achmea and the related communication and fact sheet issued by the European Commission, as it considered that the Respondent was seeking to re-litigate the same intra-EU objection, which the Tribunal had already denied in the Preliminary Award.
>
> 544. The Tribunal considers that the situation is no different here, as the Respondent requests that the Tribunal "reconsider ex officio its jurisdiction" in relation to the same intra-EU jurisdictional defense which... raised at the outset of the proceedings and on which the Tribunal ruled in the Preliminary Award. In PO19, the Tribunal considered that the Achmea judgment, the EC communication, and the fact sheet did not change the nature of the intra-EU objection already resolved by the Tribunal, as its essence remained the same. It can reach no different conclusion in this instance. Indeed, the Declarations which... now invokes purport to provide an interpretation on "the legal consequences of the Judgment of the Court of Justice in Achmea and on investment protection in the European Union". Thus, in no way do they alter the intra-EU objection. They simply add possible legal arguments in support of it. This being so, the Tribunal is of the view that its holdings in the Preliminary Award in respect of the intra-EU jurisdictional objection continue to be binding upon the Tribunal and cannot be re-opened. This conclusion is further consistent with the accepted principle that the relevant time for determining jurisdiction is the date of initiation of the proceedings."[7]

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

C.

On 27 April 2020, the defendant (hereinafter: the Appellant) submitted a Civil appeal with the Federal Tribunal, together with a request for suspensory effect, in order to obtain the annulment of the Final Award of February 28, 2020.

In their reply, Respondents 1 to 3 and 5 to 9 argued that the appeal should be rejected to the extent that it was admissible and that the request for suspensory effect should be rejected.

Respondents 4 and 10 to 18 indicated that they did not intend to submit comments.

The other Respondents did not submit an Answer and did not come to a decision on the request for suspensory effect.

The Arbitral Tribunal referred to its Award and did not take a position on the request for suspensory effect.

The Appellant submitted a voluntary reply, which prompted a rejoinder from Respondents 1 to 3 and 5 to 9. A stay enforcement was granted for the appeal by order of the Presiding Judge on February 20, 2017.

Reasons:

1.

According to Art. 54 (1) LTF[8] the Federal Tribunal issues its judgment in an official language[9], as a rule, in the language of the award under appeal. When the decision was issued in another language, the Federal Tribunal uses the official language chosen by the parties. Before the Arbitral Tribunal, they used

[8] Translator's Note: LTF is the French abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173.110.
[9] Translator's Note: The official languages of Switzerland are German, French and Italian

English, while, in the appeal briefs sent to the Federal Tribunal, the Appellant used French, pursuant to the requirements of Art. 42 (1) LTF in conjunction with Art. 70 (1) Cst.[10] (ATF 142 III 521 at (1). According to its practice, the Federal Tribunal shall consequently issue its judgment in French.

2.

In the field of international arbitration, Civil appeals are admissible against the decisions of arbitral tribunals under the conditions set out in Art.190 to 192 of the Federal Law on Private International Law of December 18,1987, (PILA[11]; RS 291), in accordance with Art. 77 (3) (1) LTF.

The seat of the arbitration is in Geneva. Neither of the Parties was based or domiciled in Switzerland at the relevant time. The provisions of Chapter 12 of the PILA are therefore applicable (Art. 176 (1) PILA).

3.

3.1. Appeals in international arbitration can only be submitted for one of the reasons enumerated exhaustively in Art. 190 2 PILA (Art. 77 (1) LTF).

An Appeal Brief for an arbitration award must satisfy the requirement of giving reasons as it follows from Art. 77 LTF in connection with Art. 42 (2) LTF and the case-law relating to this latter provision (ATF 140 III 86 at 2 and references). This presupposes that the Appellant discusses the reasons for the award sought and indicates precisely why it considers that the author of the award has misapplied the law (Judgment 4A 522 /2016 of December 2, 2016, 3.1) This can only be done within the limits of the admissible arguments against the said award, i.e., only with regard to the grievances listed in Art. 190 PILA where the arbitration is international in nature. Moreover, as this reason must be contained in the appeal, the Appellant cannot use the procedure to ask the Federal Tribunal to refer to the allegations,

[10] Translator's Note: CST is the French abbreviation for the Swiss Federal Constitution.
[11] Translator's Note: PILA is the most frequently used abbreviation for the Swiss Private International Law Act of December 18, 1987

evidence or offers of evidence contained in documents from the arbitration file. In addition, the Appellant may not rely on arguments of fact or of law that were not submitted in a timely manner, that is, before the expiry of the non-extendible time-limit for instituting proceedings (Art.100 (1) LTF in conjunction with Art. 47(1) LTF) to supplement, outside of the prescribed period, an insufficiently reasoned submission (Judgment 4A 34/2016 of April 25, 2017, at 2.2).

3.2. The Federal Tribunal adjudicates on the basis of the facts found in the award under appeal (see Art.105). (1) LTF. It may not rectify or supplement of its own motion the findings of the arbitrators, even if the facts have been established in a manifestly inaccurate manner or in violation of the law (see Art. 77 (2) LTF, ruling out the applicability of Art. 105 (2) LTF). The findings of the arbitrator as to the course of the proceedings also bind the Federal Tribunal, subject to the same reservations, whether they relate to the parties' submissions, the alleged facts or the legal explanations given by the parties, the statements made in the course of the proceedings as well as to the contents of a testimony or an expert opinion or the information gathered during an on-site visit (Judgement 4A 322/2015 of June 27, 2016, at 3, and the case-law cited).

When a Civil law appeal against an international arbitral award is submitted, its mission does not consist of deciding with full power of review, like an appellate jurisdiction—but only to consider whether the admissible grievances raised against the award are justified or not. Allowing the parties to state facts other than those found by the arbitral tribunal, apart from the exceptional cases reserved by case law, would no longer be compatible with such a mission, even though these facts may be established by evidence contained in the arbitration file (decision 4A 386 / 2010 of January 3, 2011, at 3.2). 3.2)

4.

4.1. The Civil appeal covered in Art. 77 (3)(1)(a) LTF, in connection with Arts.190 to 192 PILA is admissible only against an award. The legal instrument that may be challenged can be a final award, which terminates the arbitral proceedings on substantive or procedural grounds, a partial award, which

relates to a quantitatively limited part of a disputed claim or to one of the various claims at issue, or which terminates the proceedings with respect to one of the parties (ATF143 III 462 at 2.1; Judgment 4A 222/2015 of January 28, 2016, at 3.1.1), or even a preliminary or interlocutory award, which settles one or more preliminary questions of substance or procedure (on these concepts, see ATF 130 III 755 at 1.2.1, p 757). On the other hand, a simple procedural order that can be modified or revoked during the course of the proceedings is not subject to appeal (ATF 138 II 217 at 2.1; 136 III 200 at 2.3.1 p 203; 136 III 597 at 4.2; Judgment 4A 596/2012 of April 15, 2013, at 3.3).

In order to judge the admissibility of the appeal, what is decisive is not the name of the order issued, but the content of it (ATF 143 III 462 at 2.1; 142 III 284 at 1.1. 1; Judgments 4A 222/2015, cited above, at 3.1.1).

4.2. Art. 186 (3) PILA provides that, in general, the arbitral tribunal shall rule on its jurisdiction by means of an interlocutory decision. Although this provision expresses a rule, it is not mandatory and absolute, and its violation is not subject to any sanction (Judgment 4A 222/2015, cited above, at 3.1.2 and references). The arbitral tribunal may depart from this if it considers that the argument of lack of jurisdiction is too closely related to the facts of the case to be judged separately from the merits (ATF 143 III 462 at 2.2; 121 III 495 at 6d p. 503).

If the arbitral tribunal, in considering the question of jurisdiction as a preliminary issue, declares that it lacks jurisdiction, thus putting an end to the proceedings, it makes a final award (ATF 143 III 462 at 3.1)

When it rejects an argument of lack of jurisdiction in a separate award, it issues an interlocutory decision (Art. 186 3 PILA), regardless of the name it gives to it (ATF 143 III 462 at 2.2; Judgment 4A 414/2012 of December 1, 2012, at 1.1) Pursuant to Art. 190 3 PILA, this decision, which the parties must initiate immediately (ATF 130 III 66, at 4.3), can only be challenged before the Federal Tribunal on the grounds of irregular composition (Art.190 (2)(a) of the PILA) or lack of jurisdiction (Art.190 (2)(b) of the PILA) of the arbitral tribunal. The grievances referred to in Art. 190 (2)(c) to (e) PILA can also be raised

against interlocutory decisions within the meaning of Art. 190 (3) PILA, but only to the extent that they are strictly limited to matters directly related to the composition or jurisdiction of the arbitral tribunal (ATF 143 III 462 at. 2.2; 140 III 477 at 3.1; 140 III 520 at 2.2.3).

5.

5.1. In the first part of its argument, the Appellant challenged PO 19 issued on October 15, 2018. According to it, the Arbitral Tribunal breached its right to be heard (Art. 190 2 (d) PILA) by refusing to examine its "new arbitration objection" and by rejecting its request for the production of Achmea documents to support the said objection. The Arbitral Tribunal also allegedly misapplied the principle of *res judicata*[12] by wrongly considering itself bound by the Preliminary Award it had made on October 13, 2014. Therefore, it breached procedural public policy (Art. 190 (2)(e) PILA).

5.2. In this instance, the Arbitral Tribunal, before deciding on the merits, issued two decisions in relation to the matter of its jurisdiction, namely the Preliminary Award of October 13, 2014, and PO 19. The Appellant did not directly challenge either of these decisions.

5.2.1. In the Preliminary Award, the three Arbitrators rejected all five jurisdictional objections raised by the Appellant, including the intra-community objection. As this interlocutory decision on jurisdiction, within the meaning of Art. 186, was not directly initiated by the Appellant (3) and 190 3 PILA, it can no longer be called into question at this stage.

5.2.2. Subsequently, the Appellant put forward an argument of lack of jurisdiction, based on new facts, i.e., the Achmea documents. After having heard the views of the Parties on this point, the Arbitral Tribunal issued PO 19 in which it rejected the supposed new objection as well as the related procedural submissions, such as the authorization to produce the Achmea documents and the opening of a hearing

[12] Translator's Note: In Latin in the original text.

on the new objection. It is therefore necessary to determine the nature of PO 19 and to draw the appropriate conclusions as to the admissibility of the arguments put forward by the Appellant.

In order to characterize that decision, it is necessary to disregard its title (of procedural order). As to its content, PO 19 has nothing to do with a mere procedural order which may be amended or withdrawn in the course of proceedings. Indeed, in this interlocutory decision, the Arbitral Tribunal refused to look again at the issue of its own jurisdiction and to order further investigation on this point, as it rightly concluded that the Appellant was attempting to have the same intra-Community objection already rejected in the Preliminary Award of October 13, 2014, reconsidered. PO 19 is thus a decision which clearly relates to jurisdiction and which the Arbitral Tribunal in no way suggests would be of an interlocutory nature. Such a decision, i.e., the refusal to reconsider an already-rejected argument of lack of jurisdiction, must be considered as an interlocutory decision on jurisdiction within the meaning of Art. 186 (3) PILA, the purpose of which is to confirm the Preliminary Award concerning jurisdiction.

The Appellant could and should therefore have challenged PO 19 within 30 days. If one follows the argument it develops in its appeal, it could then have argued that the Arbitral Tribunal had wrongly refused to enter into the matter of its new arbitration objection, thus breaching Art. 190 (2)(b) PILA. As to the origin of this breach, it could have argued that the Arbitrators had not only refused to take into consideration the documents produced in support of the said objection, i.e., the Achmea documents, but had also disregarded the principle of res judicata by considering themselves bound by the Preliminary Award. The Appellant's grievances, based on the breach of Article 190 2(d) and (e) of the PILA, relate to points intrinsically linked to the jurisdiction of the Arbitral Tribunal. Consequently, the Appellant could and should have raised them immediately by directly challenging PO 19. Since it did not do so, it is now precluded from raising either of these grievances.

6.

In a second part of its argument, the Appellant argues that the Arbitrators issued a Final Award that infringed its right to be heard (Art. 190 2 (d) PILA) and was contrary to procedural public policy (Art. 190 (2)(e) PILA).

6.1. In its Final Award, the Arbitral Tribunal rejected a new request by the Appellant for a review of its jurisdiction on its own motion in respect of the Declaration of the 22. It did so for the same reasons as those which led it to reject the new objection to jurisdiction in PO 19. In this respect, the two Awards are of the same nature and differ only in their interlocutory or final character. As regards the rejection of the said request, the Final Award could have been the subject of a grievance of lack of jurisdiction of the Arbitral Tribunal (Art. 190 (2)(b) PILA). However, the Appellant does not make such an argument in its appeal. In its reply, it does put forward, for the first time, an argument relating to subjective arbitrability. Such an attempt to raise the argument of lack of jurisdiction in the reply is immediately doomed to failure. The appeal is therefore inadmissible insofar as it relates to matters directly within the jurisdiction of the Arbitral Tribunal.

It is questionable whether the Appellant, insofar as it argues that the Arbitral Tribunal wrongly refused to reverse its Preliminary Award of October 13, 2014, in the Final Award, can put forward an argument based on the breach of the right to be heard and of procedural public policy, even though it did not put forward an argument based on the Arbitrators' lack of jurisdiction. This seems very doubtful because, in so doing, the party concerned is only attacking the procedure relating to the rejection of its request for reconsideration of the Arbitral Tribunal's jurisdiction, or the reasons for that rejection, without calling into question the implicit confirmation by the Arbitrators of their jurisdiction. Be that as it may, both grievances, assuming they are admissible, must in any event be rejected.

6.2.

6.2.1. The Appellant argues, in support of the grievance that its right to be heard was breached, that the award under appeal constitutes a denial of justice because the Arbitral Tribunal refused, by misapplying the principle of res judicata, to examine the new arbitration objection that it had raised.

6.2.2. Such an argument is obviously incorrect. In the present case, the Appellant, on March 7, 2019, requested the Arbitral Tribunal to reconsider its jurisdiction on its own motion. After ordering a further exchange of submissions on this issue, the Arbitrators rejected this request and set out the reasons for this in the award under appeal. The Arbitral Tribunal therefore decided on the request for reconsideration of its jurisdiction that had been submitted to it. In these circumstances, the Arbitrators cannot be accused of having breached the Appellant's right to be heard or of having been guilty of denial of justice.

6.3.

6.3.1. The Appellant submits that the Arbitral Tribunal breached procedural public policy by misapplying the principle of res judicata. The Arbitrators had, on the face of it, wrongly considered that the objection to jurisdiction raised at last by the Appellant did not constitute a new argument of lack of jurisdiction but an attempt to obtain a new decision on an objection of the same nature already examined in the context of the Preliminary Award of October 13, 2014. By wrongly characterizing the Declaration of the 22 produced by the Appellant as a legal argument, and not a factual one, the Arbitral Tribunal wrongly considered itself bound by the Preliminary Award and thus refused to take into consideration this new factual element. Finally, the Arbitrators wrongly considered that the decisive moment for assessing their jurisdiction was the date of the commencement of the arbitration and not the date of the Final Award.

6.3.2. Public policy, within the meaning of Art. 190 2(e) PILA, contains two elements: substantive and procedural public policy. The latter, alone here at issue, guarantees the parties the right to an independent judgment on the findings and the established facts submitted to the Arbitral Tribunal in a manner consistent with the applicable procedural law. There is a breach of procedural public policy when fundamental and

generally accepted principles have been breached, leading to an intolerable contradiction with the sense of justice, so that the decision appears to be incompatible with the recognized values based on the rule of law (ATF 132 III 389 at 2.2.1). This guarantee is in the alternative: it can be invoked only if none of the arguments provided for in Art. 190 190 (2)(a)-(d) PILA are relevant. This is a precautionary standard for procedural defects that the legislature would not have considered by adopting the other paragraphs of Art. 190 (2) PILA (ATF 138 III 270 at 2.3).

An arbitral tribunal breaches procedural public policy if it rules without taking into account the res judicata power of an earlier decision or if it disregards, in its Final Award, the opinion it issued in an interlocutory award on a decisive question on the merits (ATF 136 III 345 at 2.1. p 348; 128 III 191 at 4a p.194 and the cited authors). Final awards have the force of *res judicata*[13]. As for preliminary or interlocutory awards, which settle preliminary questions of substance or procedure, they do not enjoy the authority of res judicata; the fact remains that, unlike simple procedural orders or directives which may be modified or revoked during the course of the proceedings, such awards are binding on the arbitral tribunal from which they emanate (ATF 128 III 191, at 4a; 122 III 492 at 1b/bb and references).

6.3.3. Considered in the light of the principles set out above, the grievance must be rejected.

It should be emphasized at the outset that the explanations given by the Appellant in its written submissions are singularly lacking in clarity and are, moreover, of a markedly appellatory nature. Be that as it may, the arguments put forward by the Appellant in no way show that the Arbitrators decided without taking into account a previous decision or that they departed, in their Final Award, from a previous preliminary decision, which is the only thing that matters here when it comes to establishing whether there is any possible conflict with procedural public policy. Under the guise of an alleged breach of the principle of res judicata, the Appellant is in fact content to criticize the reasons underlying the Arbitral Tribunal's decision not to reconsider its jurisdiction, without, however, calling into question the very principle of the

[13] Translator's Note: In Latin in the original text.

Arbitral Tribunal's jurisdiction, since it does not at any time raise the grievance of lack of jurisdiction. In this case, the Arbitrators considered that they were bound by the Preliminary Award that they had previously made. In these circumstances, they cannot be accused of having made an award that is incompatible with procedural public policy, whatever the reasons underlying this decision.

For the rest, insofar as it argues that the Arbitrators wrongly considered that they should have examined their jurisdiction at the time of the initiation of the arbitration proceedings and not at the time of the making of the award, the Appellant formulates a grievance which is not based on the principle of res judicata, but which relates to the jurisdiction of the Arbitral Tribunal. However, the Appellant did not put forward the argument of lack of jurisdiction in its Appeal Brief. There is therefore no need to examine this point.

7.

Ultimately, the appeal is rejected insofar as the matter is capable of appeal.

The Appellant, who is unsuccessful, will have to pay the costs of the federal proceedings (Art. 66 (1) LTF) and shall pay costs to Respondents 1 to 3 and 5 to 9, joint creditors, (Art.68 (1) and (2) LTF). The other Respondents are not entitled to costs.

For these reasons, the Federal Tribunal pronounces:

1.

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

2.

The judicial costs, set at CHF 200’000, are to be borne by the Appellant.

3.

The Appellant shall pay the Respondents 1 to 3 and 5 to 9, joint creditors, compensation of CHF 250'000 as costs.

4.

This judgment shall be communicated to the parties' representatives and to the Arbitral Tribunal with its seat in Geneva.

Lausanne, February 23, 2021.

On behalf of the First Civil Law Court of the Swiss Federal Tribunal

The Presiding Judge: The Clerk of the Court:

Kiss O. Carruzzo