4A_124/2020[1]

Judgement of November 13, 2020

First Civil Law Court

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

A.A._____ Co. Ltd.,
represented by Dr. Balz Gross and Dr. Stefanie Pfisterer,
Appellant,

v.

1. C._____ Pte. Ltd.,
2. D._____ Pte. Ltd.,
3. E.E._____ Company Ltd.,
4. E.F._____ Ltd.,
5. E.G._____ Ltd.,
6. H._____ Ltd.,
all represented by François Bellanger and Antoine Boesch,
Respondents,

A.B._____ Co. Ltd.,
represented by Nadja Jaisli Kull and Nadine Wipf,
Further party

Facts:
A.
A.a. A.B._____ Co. Ltd. Co. Ltd. (Claimant, Further party) is a company with its registered office in the Republic of Korea.

C._____ Pte. Ltd (Defendant 1, Respondent 1) is a company with its registered office in Singapore.

[1] Translator's Note: Quote as X._____ v. Y._____, 4A_124/2020.
The decision was issued in German. The full text is available on the website of the Federal Tribunal, www.bger.ch.

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D._____ Pte. Ltd (Defendant 2, Respondent 2) is a company with its registered office in Bangladesh/Singapore (the seat of the company is a disputed matter and is to be resolved in the course of the arbitration).

E._____, E.F._____ Ltd, E.G._____ Ltd and H._____ Ltd (Defendants 3-6, Respondents 3-6) are companies with their registered office in Bangladesh.

A.A._____ Co. Ltd. (in the arbitration: "the Additional Party"[2], Appellant) is a company with its registered office in the Republic of Korea.

A.b. Due to the scarcity of electrical power, which was the prevailing condition at the time, in 2009 the government of Bangladesh resolved to permit privately-operated power plants. Against this background, the Defendants commenced their operations in the field of power generation.

On July 15, 2010, the competent authorities of Bangladesh concluded a contract with E.E._____ Company Ltd. for the supply of electrical power. Pursuant to the contract, E.E._____ Company Ltd undertook to construct and operate a power plant at V._____, Bangladesh, in cooperation with A.B._____ Co. Ltd.

On July 15, 2010, A.B._____ Co. Ltd. (as the Supplier) concluded a contract with C._____ Pte. Ltd (as the Purchaser) and E.E._____ Company Ltd (as the Guarantor) by which the first of these undertook to plan, procure, construct, and deliver a diesel power plant at V._____, in exchange for payment of USD 24'265'000 (V._____ Contract).

On August 8, 2012/January 22, 2013, acting as a supplier, A.B._____ Co. Ltd. also concluded three further supply contracts with various Defendants (W._____ I Contract, W._____ II Contract and X._____ Contract).

The four Supply Contracts each contained an arbitration clause:

> Article 21: Dispute resolution
>
> Any disputes arising out of this Contract should be settled through friendly negotiation between both Parties. If the Parties cannot reach an agreement by negotiation, the dispute shall be finally settled, to the exclusion of legal proceedings, under the Rules of Arbitration of the International Chamber of Commerce in Paris by an arbitral tribunal composed of three arbitrators, appointed under such rules.
>
> The venue of the arbitration shall be Geneva, Switzerland. The arbitration proceedings and the award shall be in English. During the arbitration proceedings, both Parties shall continue to execute their obligations under the Contract except in respect of the matter under arbitration.

In addition, each of the Contracts contained a clause on choice of law in favour of Swiss law.

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

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The diesel engines for the power plant were to be supplied by a sub-contractor. Following the conclusion of the V._____ Contract, A.B._____ Co. Ltd. and A.A._____ Co. Ltd. (as Sub-Contractor) thus concluded a supply contract on November 19, 2010 (hereinafter, "the Supply Contract"), by which the latter company undertook to supply seven Type A._____-X._____ diesel engine units at a price of South Korean won (KRW) 14.175 billion (corresponding to roughly USD 12 million).

Pursuant to Art. 4 of the Supply Contract, the A.B._____ Co. Ltd. was to supply the diesel engines on December 10, 2010. Art. 7 provided that the formal acceptance of the engines was to be carried out at A.A._____ Co. Ltd.; the Contract also granted both the Purchaser and its clients the right to attend the formal acceptance test.

A.c. The diesel engine blocks were subsequently delivered and thereafter installed at the electrical power plant in V._____.

On July 12, 2011, E.E._____ Company Ltd notified A.B._____ Co. Ltd. that technical problems had arisen in respect of a subset of the installed engines, and demanded comprehensive investigations.

On July 20, 2011, A.B._____ Co. Ltd. replied that it had made contact with Sub-Contractor A.A._____ Co. Ltd and that both of the companies would guarantee the quality of the engines (Exhibit R-22: "A.A._____ and A.B._____ will guarantee the quality of the engine").

On October 24, 2011, Sub-Contractor A.A._____ Co. Ltd. notified E.E._____ Company Ltd. that its engineers had managed to identify the origin of the technical problems. In addition, the Sub-Contractor stated that its management was prepared to visit the power plant in V._____ in order to discuss the quality issues together.

On December 19, 2011, I._____ (then-President and CEO of A.B._____ Co. Ltd. and A.A._____ Co. Ltd.) wrote a letter on behalf of both companies to E.E._____ Company Ltd. (Exhibit R-25). In that letter, he stated that the companies were dispatching specialised engineers to the power plant; he stated that the companies were doing everything possible to remedy the problems.

On December 27, 2011, a representative of A.B._____ Co. Ltd. confirmed that, in light of the problems which existed at power plant V._____, three further specialists were being sent to the power plant.

On March 21, 2012, A.A._____ Co. Ltd. notified E.E._____ Company Ltd. regarding the problems that had been discovered in the course of an inspection of one engine cylinder. In addition, that company gave notice that it was going to undertake an inspection of the entire engine at power plant V._____ between April 1 and 7, 2012.

On August 14, 2012, A.A._____ Co. Ltd., A.B._____ Co. Ltd. and E.E._____ Company Ltd concluded an agreement on the supply of spare parts for power plant V._____ through A.A._____ Co. Ltd.

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On August 21, 2012, there was an exchange of emails between Sub-Contractor A.A._____ Co. Ltd. and the Defendants regarding the damage to one of the engines. In those emails, A.A._____ Co. Ltd. made demand on the Defendants to ship the defective parts to it so that it would be able to investigate the cause of the defect.

Between February 24 and 26, 2014, there was a meeting regarding power plant V._____, which was attended by the representative of the Defendants, A.B._____ Co. Ltd. and A.A._____ Co. Ltd. On September 29, 2014, a further meeting of this kind took place, at which further technical issues were discussed.

The parties were unable to resolve their differences of opinion. The Defendants subsequently refused to comply with their payment obligations to A.B._____ Co. Ltd. under the Supply Contracts they had concluded (V._____ Contract, W._____ I Contract, W._____ II Contract and X._____ Contract).

B.
On March 5, 2018, A.B._____ Co. Ltd. filed a request for arbitration under the International Chamber of Commerce (ICC) rules against the Defendants.

Following this, the Defendants requested joinder of Sub-Contractor A.A._____ Co. Ltd as a party to the arbitration because they (in addition to the Claimant) wished to have recourse against it in the arbitration for losses which were allegedly suffered.

On July 30, 2018, A.A._____ Co. Ltd. commented on the Defendants' request to join it as a party to the arbitration. It disputed the jurisdiction of the Arbitral Tribunal.

On November 22, 2018, the Claimant gave notice that it was waiving the right to comment on the question of whether the Arbitral Tribunal's jurisdiction also extended to A.A._____ Co. Ltd.

On December 3, 2018, the Arbitral Tribunal decided to initially limit the proceedings to the question of jurisdiction with regard to Sub-Contractor A.A._____ Co. Ltd.

On August 20, 2019, an oral hearing on the issue of jurisdiction was conducted in London. By Partial Final Award on Jurisdiction of January 24, 2020, the ICC Arbitral Tribunal with its seat in Geneva found that it had jurisdiction with respect to the claims asserted by the Defendants under the V._____ Contract against A.A._____ Co. Ltd. (Ruling No. 1). By contrast, with respect to the claims asserted by the Defendants against it under the W._____ I Contract, the W._____ II Contract and the X._____ Contract, the Arbitral Tribunal found that it lacked jurisdiction (Ruling No. 2).

C.
By civil law appeal, A.A._____ Co. Ltd. has asked the Federal Tribunal to set aside Ruling No. 1 from the Partial Final Award on Jurisdiction of the ICC Arbitral Tribunal with its seat in Geneva dated January

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24, 2020, and to find that the Arbitral Tribunal lacked jurisdiction over the Appellant. In the alternative, the Appellant asks the Federal Tribunal to remand the matter to the Arbitral Tribunal for readjudication.

The Respondents request dismissal of the appeal. The Arbitral Tribunal has waived its right to submit comments on the appeal.

The additional party, A.B._____ Co. Ltd., has waived the right to actively participate in the proceedings.

On May 29, 2020, the Appellant submitted a Reply Brief to the Federal Tribunal. On 29 May 2020, the Respondents submitted a further written submission to the Federal Tribunal.

D.
By Order dated March 12, 2020, suspensory effect was granted to the Appeal on an interim basis.

By Order dated May 1, 2020, the Appellant's request to order suspension of the arbitration in its entirety (*i.e.* including with respect to the W._____ I and II Contracts and the X._____ Contract) was dismissed.

By Order of May 7, 2020, the request of the Respondents to suspend the arbitration in its entirety by way of preliminary injunctive relief was likewise dismissed.

By Order dated July 2, 2020, Federal Tribunal granted suspensory effect to the Appeal.

Reasons:

1.
According to Art. 54(1) BGG[3] the Federal Tribunal issues its decisions in an official language,[4] 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 challenged Award was rendered in English. As English is not one of the official languages of this Court and because the Parties submitted their written submissions to the Federal Tribunal in German (Appellant) and French (Respondents), in line with its past practice, the Federal Tribunal will consequently issue its decision in the language of the Appeal Brief (BGE 142 III 521[5] at 1).

[3] 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).
[4] Translator's Note: The official languages of Switzerland are German, French, and Italian.
[5] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/federal-tribunal-upholds-independence-members-cms-network

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2.
In the field of international arbitration, a civil law appeal is possible under the requirements of Art. 190-192 PILA[6] (SR 291) (Art. 77(1)(a) BGG).

2.1.
The seat of the Arbitral Tribunal in the present case is located in Geneva. The challenged Ruling No. 1 is an arbitral award by which an arbitral tribunal found that it had jurisdiction, a decision which may be challenged by an 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 the setting aside of the decision subject to 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[7] at 3.3.4 p. 616 with references). It is likewise not possible to rule out the possibility that the Federal Tribunal will remand the matter to the arbitral tribunal (Judgments 4A_418/2019 of May 18, 2020 at 2.3;4A_294/2019 of November 13, 2019 at 2.2; 4A_462/2018 of July 4, 2019 at 2.2).

The applications of the Appellant are thus admissible and the prerequisites to adjudication do not prompt the Tribunal to make any further comments on them. Thus, 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[8] at 5, p.187, with reference). Criticism of an appellate nature is not allowed (BGE 134 III 565[9] at 3.1, p.567; 119 II 380 at 3b, p.382).

2.3. The Federal Tribunal bases its judgements on the factual findings of the arbitral tribunal (Art. 105 (1) BGG). This includes the findings as to the facts upon which the dispute is based and those concerning the courts of the first instance proceedings, i.e. the findings as to the content of the case which include, in particular, the submissions of the parties, their factual allegations, their legal arguments, statements in

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

[7] 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

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

[9] 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

the case, evidence and proffers of evidence, the content of a witness statement or 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 (Art. 77(2) BGG, ruling out the applicability of Art. 97 BGG and Art. 105(2) BGG). Even in cases of jurisdictional objections, it will only 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, where new evidence is taken into consideration (BGE 144 III 559[10] at 4.1, p. 563; 142 III 220 at 3.1, 239 at 3.1; 140 III 477[11] at 3.1, p. 477; each with references). An appeal from an interim award due to a lack of jurisdiction of the arbitral tribunal (Art. 190(2)(b) PILA) must be assessed by the Federal Tribunal on the basis of those findings of fact by the arbitral tribunal which would withstand any objections of the violation of fundamental procedural rights. In connection with any such appeal further grievances under Art. 190 (2) PILA may be asserted, provided that they directly relate to the jurisdiction of the arbitral tribunal (BGE 140 III 477 at 3.1, 520 at 2.2.3 p.525).

3.
The Appellant raises the grievance that the Arbitral Tribunal wrongly found it had jurisdiction to adjudicate the claims the Respondents had raised against it under the V._____ Contract (Art. 190(2)(b) PILA).

3.1.
3.1.1. Pursuant to Art. 190(2)(b) PILA, the Federal Tribunal freely reviews jurisdictional objections as to legal objections, including to preliminary substantive issues upon which the determination of jurisdiction depends (BGE 146 III 142[12] at 3.4.2 p.148; 144 III 559 at 4.1; 142 III 139 at 3.1). The question of the arbitral tribunal's jurisdiction also encompasses the question of the subjective scope of the arbitration clause. In the course of its adjudication, the arbitral tribunal must ascertain which persons are bound by the arbitration clause (BGE 145 III 199 at 2.4, p. 202; 134 III 565 at 3.2 p. 567 with references).
Pursuant to Art. 178 (2) PILA, the substantive validity and the objective scope of an arbitration clause must be assessed under the law chosen by the parties, under the law applicable to the dispute (in particular: the law governing the main contract) or under Swiss law (BGE 140 III 134[13] at 3.1; 138 III 29[14] at 2.2.2). The subjective scope of an arbitration clause is likewise determined in accordance with Art. 178 (2) PILA (BGE 145 III 199 at 2.4 p. 202; 134 III 565 at 3.2 p. 567; 129 III 727 at 5.3.1 p. 736).

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[10] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/atf-4a-396-2017-2

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

[12] Translator's Note: The English translation of this decision is available here: https://www.swissarbitrationdecisions.com/atf-4a-306-2019

[13] 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

[14] 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

The Arbitral Tribunal interpreted the arbitration clause in Art. 21 of the V._____ Contract under Swiss law and made an assessment as to whether the clause should also apply to the Appellant. The parties' joint assumption is that the interpretive principles of Swiss law apply here.

3.1.2. An arbitration clause is an agreement by which two or more defined or definable parties agree to entrust an arbitral tribunal or a sole arbitrator – in lieu of the state court that would otherwise have jurisdiction – with the task of issuing a binding award on one or several disputes in existence or arising in the future (BGE 140 III 134 at 3.1 p. 138; 130 III 66 at 3.1 p. 70). What is decisive is the intention of the Parties to vest jurisdiction for specific disputes in an arbitral tribunal, i.e. in a non-state court (BGE 142 III 239[15] 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 clause follows the generally applicable principles of interpretation of 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 concordant intent of the parties with respect to the arbitration clause has been established, then the arbitration clause must be interpreted based on the principle of reliance, *i.e*. the presumed intent of the parties is to be determined as that which could have been understood and should have been understood by the respective recipient of the declaration in good faith under the circumstances (BGE 142 III 239 at 5.2.1; 140 III 134 at 3.2; 138 III 29 at 2.2.3). In interpreting the arbitration clause, the Court must take into account its legal nature; in particular: it should be noted that a waiver of state court jurisdiction would severely restrict the remedies of the parties. Such an intent to waive state court jurisdiction cannot be assumed lightly, pursuant to the jurisprudence of the Federal Tribunal, which is why, in cases of doubt, the Court must favour a restrictive interpretation (*see* BGE 144 III 235 at 2.3.4 p. 246; 140 III 134 at 3.2 p. 139; 138 III 29 at 2.3.1; 129 III 675 at 2.3 p. 680-681).

3.2. The Arbitral Tribunal initially pointed out that the Respondents, in the course of the arbitration, had abandoned the arguments for binding the Appellant to the arbitration clause based on agency, lifting of the corporate veil or on the "Group of Companies" theory. In the proceedings before the Arbitral Tribunal, no consideration could be given to any apparent mixing of the spheres of group companies, as found in the case BGE 137 III 550 *et seq*: even if the corporate names of the Appellant and the Claimant were similar, they had different registered offices, factories/business locations and had only had the same management (in part) for the period of one year. In addition, such things as the email addresses of the staff of the two companies were clearly distinct. In contrast to this, it was, the Arbitral Tribunal stated, necessary to look into the question of whether an extension of the arbitration clause might arise from the fact that the Appellant had intervened to such an extent in the conclusion and performance of the main contract (*i.e*. the V._____ Contract) that one would have to regard this as a declaration of consent to the arbitration clause on a good faith basis.

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

The Arbitral Tribunal found that it was proven that representatives of the Appellant had been present at the first meeting between the E._____ Group and the A._____ staff members in the summer of 2009. The President of J._____ Co. Ltd., who had introduced Mr. E._____ to A._____, referred expressly in his correspondence with Mr. E._____ to the "X._____" engine and to the "X._____" factory in Y._____ […] located in Z._____, which could only be the Appellant; this is particularly due to the fact that it is not disputed, the Arbitral Tribunal noted, that the engine in question was manufactured by it. Accordingly, the Arbitral Tribunal found that the presence and/or participation of the Appellant at the first meeting was proven.

The Arbitral Tribunal further found that the Appellant had supplied Annex IV to the V._____ Contract, which contained the "Guarantee Values" and the "Performance Test Procedure" for the engine manufactured by it. In this way, the Arbitral Tribunal found, it was involved in the conclusion of the Contract. Following the execution of the V._____ Contract of July 15, 2010, the Arbitral Tribunal found that representatives of the Respondents' corporate group and a governmental delegation from Bangladesh had visited the Appellant's factories to inspect the engines. During the installation phase, the Appellant had replaced or adapted various parts of the engines which were fitted at the V._____ plant. In particular, in July 2011, specialists from the Appellant had been dispatched to the V._____ power plant to replace certain parts. The Arbitral Tribunal noted that when a problem with the engines arose, the Appellant had dispatched its engineers to V._____ to remediate the defects, as the examples of November 19 and December 27, 2011, showed. In addition, the Arbitral Tribunal noted, the Appellant had sent several of its reports in connection with the defects that had arisen with respect to the engines directly to the Respondents and had also at times corresponded directly with them.

The Arbitral Tribunal went on to say that, when viewed in isolation, these elements would not suffice to justify extending the arbitration clause to the Appellant. When viewed in the aggregate, however, these circumstances led the Arbitral Tribunal to conclude that the Appellant had intervened to such an extent in the conclusion and performance of the V._____ Contract that the Parties were entitled, in good faith, to regard this as the intent to be bound by the arbitration clause contained in that Contract. In particular, the Arbitral Tribunal considered the fact material that one of the main technical documents under the V._____ Contract was a document from the Appellant. Although this did make sense, since the Appellant was responsible for the engines, Art. 2 of the V._____ Contract provided as follows: "Supplier agrees to sell and deliver the Equipment and services, as required by and in accordance with the Appendices mentioned above." In other words, the V._____ Contract itself provided that the portion of the Contract relating to the engines had to be performed in accordance with the specifications which originated with the Appellant. Against this background, the Arbitral Tribunal stated that it was not persuaded that the Appellant had no knowledge of the content of the V._____ Contract, and in particular its arbitration clause. Rather, the documents that were introduced by the Respondents indicated the opposite. Thus, the Arbitral Tribunal stated, the order placed by A.B._____ Co. Ltd. with the Appellant under the Supply Contract itself provided that the terms of payment and warranty corresponded to those of the contract between A.B._____ Co. Ltd. and the "end user", *i.e.* Respondents 1 and 3. For this reason, the Arbitral Tribunal's assumption was that the Appellant was involved in the conclusion of the V._____ Contract and that it had knowledge of that Contract, together with the arbitration clause. In respect of the Appellant's involvement with the performance of the

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V._____ Contract, the Arbitral Tribunal stated that it should be particularly noted that in the event of quality issues of the engines arising, the Appellant had dispatched its specialist engineers in each case to remediate these problems; the persons delegated by the Appellant had directly communicated with the Respondents. These actions confirmed that the quality of the engines supplied under the V._____ Contract fell into the Appellant's scope of responsibility, which the Respondents rightly assumed to be the case. The Arbitral Tribunal noted that determinative factors for this observation were the Exhibits R-22 and R-25, submitted by the Respondents. These, the Arbitral Tribunal noted, were important documents form which Respondents 1 and 2 were entitled under good faith principles to infer that the Appellant was involved with respect to the engines supplied under the V._____ Contract. Pursuant to Exhibit R-22, representatives of A.B._____ Co. Ltd. confirmed to the Respondents with regard to the V._____ Contract on July 20, 2011, after having spoken to representatives of the Appellant, that it, together with the Appellant, will guarantee the quality of the engines ("A.A._____ Co. Ltd. and A.B._____ Co. Ltd. will guarantee the quality of the engine"). In addition, A.B._____ Co. Ltd. confirmed that the Appellant would assume warranty obligations for the problems in respect of the drive shaft of Engine No. 2 at V._____. The Arbitral Tribunal noted that on December 19, 2011, the then-Chairman of the Board and CEO of A.B._____ Co. Ltd. and A.A._____ Co. Ltd., I._____, followed this with a letter to E.E._____ Company Ltd (Exhibit R-25) on behalf of those two companies. The Arbitral Tribunal found this letter was particularly significant because it originated from a representative of both of the companies and was expressly prepared on behalf of both of them. In that letter, I._____ (i) offered a path for communications in the event of problems arising, (ii) indicated that engineers were being dispatched to remediate the problems which had arisen, (iii) apologised for the quality issues, and (iv) promised "to take care of this matter with our best attention".

In its email, A.B._____ Co. Ltd. expressly noted that it had talked with the Appellant ("Regarding this matter, we had talked with A.A._____ Co. Ltd."), meaning that its knowledge was proven. The Arbitral Tribunal stated that there was no reason to doubt that this letter constituted an expression of its grant of authority to A.B._____ Co. Ltd. to provide the representations in question. The understanding of the Respondents, which was based on principles of good faith, was, the Arbitral Tribunal stated, also supported by the letter dated December 19, 2011, in which I._____ made no distinction between A.B._____ Co. Ltd. and the Appellant, but rather wrote on behalf of both companies. For these reasons, the Arbitral Tribunal stated, the assumption is that the Appellant had intervened in such a way in the conclusion and performance of the V._____ Contract that the other Parties to that Contract were entitled to assume in good faith that it was consenting to the arbitration clause contained in it. With respect to the other Supply Contracts (W._____ I Contract, W._____ II Contract and X._____ Contract), there were, by contrast, no indications of this kind, for which reason the Arbitral Tribunal lacked jurisdiction to adjudicate the claims based on those agreements.

The question of whether the jurisdiction of the Arbitral Tribunal might arise from an assignment of contractual rights and obligations of A.B._____ Co. Ltd. to the Appellant under Art. 17 of the V._____ Contract ("Assignment") or, potentially, on the basis of Art. 364(2) Swiss Code of Obligations (German acronym: CO) was left open by the Arbitral Tribunal, in light of the fact that it had found that it had jurisdiction for other reasons.

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3.3. In respect of the question of whether the Appellant is bound by the arbitration clause contained in the V._____ Contract, the Arbitral Tribunal did not base its ruling on actual concordant declarations of intent of the parties, but rather extended the arbitration clause to the Appellant based on its interpretation of the Appellant's declaratory conduct under the principle of reliance. The question of whether this normative interpretation is correct is one which the Federal Tribunal reviews in its free discretion as a question of law.

3.3.1. Under the principle of the relative nature of contractual obligations, an arbitration clause in a contract of obligation will, as a basic principle, only be binding on the parties to that contract. However, the Federal Tribunal has long found that, subject to certain prerequisites, an arbitration clause may also be binding on persons who have not signed the contract and who are likewise not mentioned in it, such as in the case of assignment of a receivable, in the case of (simple or cumulative) assumption of indebtedness, or where a party has acceded to a contract (BGE 145 III 199 at 2.4 p. 202; 134 III 565 at 3.2 p. 567-568; 129 III 727 at 5.3.1 p. 735). Also in the case of a third party who intervenes in the performance of a contract containing an arbitration clause, it will be assumed that that party had, by its tacit act, consented to the arbitration clause (BGE 145 III 199 at 2.4 p. 202; 134 III 565 at 3.2p. 568; 129 III 727 at 5.3.2 p. 737).

As a basic principle, the Arbitral Tribunal was correct in noting this fact.

3.3.2. However, as the Appellant correctly points out, it should be noted in the case under consideration here that it was a sub-contractor of A.B._____ Co. Ltd., who was incidentally also expressly referred to in Annex 1 of the V._____ Contract ("Vendor List") as a vendor or a supplier of a portion of the deliverable works, specifically the diesel engines. If, as a sub-contractor, it was delivering the engines required for the power plant which was the obligation under the main contract, then it is hardly surprising that the guarantee values and the performance test procedure contained in Annex IV of the V._____ Contract for these engines originated with the Appellant and/or that they corresponded to the terms of its supply agreement with A.B._____ Co. Ltd. In principle, this fact was also acknowledged by the Arbitral Tribunal; however, to the extent that it nevertheless views this as involvement in the conclusion of the Contract, which it views as support for the Appellant's consent to the arbitration clause to the V._____ Contract, the Federal Tribunal is unable to follow it. In addition, it is an obvious point that in the context of the large-scale project in question, the payment terms of the supply contract as well as the warranty terms would be reconciled with the terms contained in the main contract. This no more constitutes an intervention in the conclusion of a contract than does the fact mentioned in the challenged Award that a representative of the Appellant was also present at the first meeting with the Respondents in the summer of 2009 or that apparently, a certain type of engine from the Appellant was, already at an early stage, one of the primary candidates the Respondents were considering. Subsequently, the V._____ Contract was concluded solely between A.B._____ Co. Ltd., on the one hand, and Respondents 1 and 3; the Appellant was not a party to that Contract. Pursuant to the reasons given in the challenged Award, there was likewise no appearance of a mixing of corporate spheres between A.B._____ Co. Ltd. and the Appellant; rather, despite similar company names and temporary overlap of management staff, it was clearly possible to distinguish the two companies, which indeed is no longer being called into question in the Reply to the Appeal.

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Accordingly, the Respondents had to be aware that the Appellant was not a party to the V._____ Contract, but was rather a vendor to A.B._____ Co. Ltd. for certain components of the power plant that had been ordered, specifically the diesel engines, which the Appellant correctly points out. In its role as a sub-contractor, it was also involved in the performance of the main contract, as one would expect, in that it supplied a significant component of the diesel power plant which A.B._____ Co. Ltd. was obliged to deliver. In light of the significance of these components, it does not appear unusual for representatives of the Respondents to attend a test of the diesel engines at the Appellant's factory subsequent to the conclusion of the main contract. Indeed, Art. 7 of the Supply Contract between the Appellant and A.B._____ Co. Ltd. itself provided that representatives of the Respondents had the right to attend the inspection of the engines at the Appellant's factory. Contrary to the decision under appeal, the fact that the Appellant replaced various engine components at the V._____ plant cannot be considered intervention in the performance of the V._____ Contract in the sense of implied consent to the arbitration clause contained in that Contract. The remediation measures on the part of the Appellant referred to in the Award, which were undertaken after problems had arisen with the diesel engines it had supplied, were undertaken in its role as the sub-contractor with responsibility for the engines. It was a part of its duties as a sub-contractor to perform such warranty work directly at the end customer's premises, which the Appellant correctly points out in its Appeal Brief.

As a result, the facts to be adjudicated in this case are fundamentally distinct from those which were the basis for BGE 129 III 727 at 5.3, which is variously cited in the Reply to the Appeal; in that decision, the third party to whom the arbitration clause was extended was not contractually involved in performing the main contract, but rather influenced the management of two of the companies involved in handling the construction project which was being realised on a piece of land that was (indirectly) held by that third party and on the basis of a construction permit issued to that third party, and also intervened in other ways in the performance of the contract for works and services in question (at 5.1.1 and 5.3.2). Thus, one cannot derive anything in favor of the Respondents from the decision cited in the Reply to the Appeal.

Against the background of the contractual role allocation on the infrastructure project in question, the notification by A.B._____ Co. Ltd. of July 20, 2011 (Exhibit R-22) stating that the Appellant guaranteed the quality of the engines could not be interpreted as an intervention by the Appellant in the sense that it intended to accede as a party to the V._____ Contract/to the arbitration clause contained in Art. 21 thereof. In light of the contractual involvement of the Appellant as a sub-contractor, based on its supply contract with A.B._____ Co. Ltd. dated November 19, 2010, the Respondents were likewise not entitled to regard the letter written on behalf of those two companies dated December 19, 2011 (Exhibit R-25), in which the then-Chairman of the Board and CEO promised, in particular, "to take care of this matter with our best attention", in good faith as a clear declaration of intent on the part of the Appellant to consent to the arbitration clause in the V._____ Contract and thus to give a waiver to the Respondents of its right of recourse to the jurisdiction of the state courts. To the contrary: in light of the contractual terms settled upon regarding the construction of the power plant, the Respondents should have been aware that the Appellant, as a sub-contractor, was not a party to the V._____ Contract, nor was it bound by the arbitration clause contained in Art. 21 thereof.

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3.3.3. Accordingly, and contrary to the Decision under review, the jurisdiction of the ICC Arbitral Tribunal with its seat in Geneva for adjudication of the claims asserted under the V._____ Contract cannot rely on any implied consent of the Appellant to the arbitration clause in question. The question of whether the Arbitral Tribunal's jurisdiction might potentially arise from the assignment of the obligations in question by A.B._____ Co. Ltd. to the Appellant under Art. 17 of the V._____ Contract ("Assignment"), as asserted by the Respondents, cannot be assessed due to the lack of findings of fact on this point in the Award under review. The Arbitral Tribunal left this question open, in light of its finding as to jurisdiction that it – wrongly – made on other grounds; it also failed to fully resolve the question of to what extent the Respondents' submissions in this respect were made in a timely manner and whether it was proper for the Arbitral Tribunal to hear such objections as a result. It is thus proper for the Federal Tribunal to set aside the challenged decision and to remand the matter to the Arbitral Tribunal for resolution of these questions.

4.
Partially upholding the Appeal, the Federal Tribunal finds that it is proper to set aside Ruling No. 1 of the challenged arbitral award dated January 24, 2020, and to remand the matter for readjudication to the ICC Arbitral Tribunal with its seat in Geneva.

In accordance with the outcome of the case, the Respondents shall be jointly and severally liable for the costs and party compensation (Art. 66(1) and (5) and Art. 68(2) and (4) BGG).

Therefore, the Federal Tribunal pronounces:

1.
The Appeal is upheld in part, Ruling No. 1 of the Partial Final Award on Jurisdiction of the ICC Arbitral Tribunal with its seat in Geneva, dated January 24, 2020, is hereby set aside and the matter is remanded to the Arbitral Tribunal for readjudication.

2.
The judicial costs of CHF 50'000 shall be paid by the Respondents, jointly and severally (and internally at a rate of one sixth each).

3.
The Respondents shall pay party compensation to the Appellant of CHF 60'000 for the proceedings before the Federal Tribunal (and internally at a rate of one sixth each).

4.
This decision shall be notified in writing to the Parties, to A.B._____ Co. Ltd., and to the Arbitral Tribunal with its seat in Geneva.

Lausanne, November 13, 2020

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

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

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