4A_27/2021[1]

Judgment of May 7, 2021

First Civil Law Court

Federal Judge Kiss (Ms.), presiding,
Federal Judges Niquille (Ms.),
Federal Judge Rüedi (Mr.),
Clerk of the Court: Mr. Leeman.

A._____ A.G., represented by Dr. Urs Weber-Stecher and Flavio Peter,
Appellant,

v.

B._____ L.P., represented by Dr. Urs Zenhäusem,
Respondent

Facts:

A.
A.a. On May 10, 2018, B._____ L.P. (Claimant, Respondent), with its registered office in U._____, initiated an arbitration with the Swiss Chambers' Arbitration Institution (SCAI) against the predecessor in law of A._____ AG, V._____ (Defendant, Appellant).

The arbitration related to the performance of a "Sale and Purchase Agreement" of October 3, 2013, and is connected with an arbitral award dated November 3, 2017, which was issued in connection with prior arbitration proceedings (600368/2014) ("previous award"). The particular issue in question was whether the Claimant validly rescinded the Sale and Purchase Agreement.

The conclusion of the Sale and Purchase Agreement dated October 3, 2013, is, in turn, based on the agreement referred to as the "3-Way-Agreement", Art. 7.3 of which contains the following arbitration clause, to which the Parties are indisputably bound:

> The parties hereto agree for them and their successors in title that any suit action or proceedings and settlement of any disputes which may arise out of or in connection with this agreement shall be exclusively and finally settled to the exclusion of the ordinary courts by arbitration under the Swiss Rules of International Arbitration of the Swiss Chambers of

[1] Translator's Note: Quote as A._____ *v.* B._____, 4A_27/2021.
The decision was issued in German. The full text is available on the website of the Federal Tribunal, www.bger.ch.

Commerce ('Swiss Rules') in force on the date when the Notice of Arbitration is submitted in accordance with these Rules by three arbitrators. The language to be used in the arbitral proceedings shall be English. Place of jurisdiction shall be Zurich.

The requests for relief, which were amended over the course of the proceedings (by Reply Brief of June 7, 2019, and written submission of the Claimant dated October 6, 2019) read as follows:

> Claimant [...] respectfully requests the Tribunal to:
>
> A. declare that:
>
> a) Claimant has, on 24 November 2017 (alternatively at a date determined by the Tribunal), effectively and validly withdrawn from the Sale and Purchase Agreement between Claimant and Respondent as perfected by the Previous Award;
>
> b) As a result of this withdrawal, the Sale and Purchase Agreement was nullified with retroactive effect (ex tunc) as of 3 October 2013 (alternatively at a date determined by the Tribunal), thereby eliminating all claims of Respondent against Claimant under the Sale and Purchase Agreement as perfected by the Previous Award;
>
> c) No option rights were transferred under Part 2 of the Previous Award from Claimant to Respondent based upon Respondent's provision of cheques to Claimant's counsel on 9 November 2017 or by Respondent's proposal of an escrow agreement on 21 November 2017.
>
> B.1. declare that:
>
> a) Claimant has a right against Respondent that the exchange facilitated by Decision of the Tribunal de première Instance in Geneva, dated 13 February 2019, docket number C/13582/2018 is reversed by way of Respondent transferring to Claimant 28,200 Shares (stocks) of C._____ N.V., W._____ (registered under dossier number xxx); as of 4 March 2019 with a market value of EUR 123.1 million (alternatively an amount determined by the Tribunal), against concurrent payment of EUR 77,171,733.36.
>
> b) In addition to B.1.a) above, Respondent is obliged to pay to Claimant all dividends paid by C._____ N.V., W._____ (registered under dossier number xxx), proportionately on the 28,200 Shares, and all interest paid by D._____ GmbH on the 25 Bond Certificates numbered 1 - 25, issued by D._____ GmbH, X._____ (FN yyy) on 4 March 2011, with a nominal value of EUR 500.000.- per Bond Certificate, in the event such payments occurred after 26 February 2019 plus 8 % interest above the respective reference rate per year from 4 March 2019.
>
> B.2. order Respondent:
>
> a) to transfer to Claimant 28,200 Shares (stocks) of C._____ N.V., W._____ (registered under dossier number xxx), with a nominal [value] of EUR 1.25, amounting to a share capital of 51.09% of C._____ N.V. or any other amount of Shares representing 51.09% of the voting and participation rights in C._____ N.V.
> b) This transfer shall take place within 7 days against concurrent payment by Claimant of EUR 77,171,733.36.
> [...]

A.b. By Procedural Order No. 1 dated October 30, 2018, the Arbitral Tribunal with its seat in Zurich informed the Parties that the Arbitral Tribunal had been constituted and requested they pay an advance on costs of CHF 425'000 each.

By Letter dated October 31, 2018, the Defendant informed the Arbitral Tribunal that it would not be paying the advance on costs.

On December 3, 2018, the Arbitral Tribunal confirmed its receipt of the advance on costs in the amount of CHF 850'000, the full amount of which was paid in by the Claimant.

A.c. On January 11, 2019, the Claimant requested the Arbitral Tribunal require the Defendant to refund its share of the advance on costs, *i.e.* totaling CHF 425'000 plus interest, to the Claimant by way of a partial award.

The Defendant requested the Arbitral Tribunal reject the Claimant's application, in the alternative, it requests dismissal thereof. In the sub-alternative, in the event that the Arbitral Tribunal should follow the Claimant's view, the Defendant requested that the Arbitral Tribunal issue not a partial award but rather an order for interim measures and to require the Claimant to pay security for any possible party compensation.

On July 25, 2019, the Court of Arbitration of the Swiss Chambers Arbitration Institution (Court of Arbitration) informed the Arbitral Tribunal of its consent to an increase of the advance on costs.

On August 7, 2019, the Arbitral Tribunal requested the Parties to pay a further advance on costs of CHF 125'000 each. The Defendant informed the Arbitral Tribunal that same day that it would not be paying any further advance on costs.

On September 12, 2019, the Arbitral Tribunal asked the Claimant to pay the Defendant's share of the advance on costs. That payment was subsequently received.

On September 27, 2019, the Claimant applied for an increase in the amount of its relief requested; it said that an order in the form of a partial award should be made requiring the Defendant to pay damages accordingly in the amount of CHF 550'000, plus interest. The Defendant submitted comments on this on December 16, 2019.

By written submissions dated June 15, 2020, and July 31, 2020, the Defendant submitted an alternative counterclaim.

By letter dated August 21, 2020, the Court of Arbitration consented to a further increase in the advance on costs by CHF 100,000 to a total of CHF 1.2 million.

On August 24, 2020, the Arbitral Tribunal asked the Parties to pay a further advance of CHF 50'000 each.

On September 8-11, 2020, the Parties each transferred their respective shares of the additionally requested advance on costs.

By written submissions dated September 27, 2019, the Claimant submitted the following (amended) Request for Relief:

> Based on the above, Claimant respectfully requests the Tribunal to issue a Partial Award for Reimbursement pursuant to Article 32(1) Swiss Rules
>
> (a) to order Respondent to pay Claimant the amount of CHF 550'000, plus statutory interest of 5% p.a. on the amount of CHF 425'000 from 30 November 2018 and on the amount of CHF 125'000 from 7 September 2019;
>
> [...].

On December 16, 2019, the Defendant submitted the following requests for relief:

> The Arbitral Tribunal is kindly requested to:
>
> 1. reject Claimant's Extension of the Request as inadmissible;
> 2. In the alternative, to dismiss Claimant's Extension of the Request;
> 3. In the further alternative,
>
> a. not to render a partial award but to issue an order on provisional measures only and, in said case,
>
> b. to order Claimant to provide security for costs.

A.d. By Partial Award on Costs and Order of November 27, 2020, the Arbitral Tribunal with its seat in Zurich found that it had jurisdiction to adjudicate the requests for relief in the Statement of Claim A.(a), A.(b), B.1.(a), B.1.(b), B.2.(a) and B.2.(b) in accordance with the Reply Brief of June 7, 2019, amended by the Claimant's Letter dated October 6, 2019 (paragraph 1 of operative portion of Award). The Arbitral Tribunal stated that it would rule at a later phase of the arbitration regarding its jurisdiction over the further requests for relief and the alternative counterclaims asserted by the Defendant (paragraph 2 operative portion of Award).

Furthermore, the Arbitral Tribunal upheld the application of the Claimant for a refund of its advance on costs in general respects and ordered the Defendant to pay damages of CHF 550'000 plus default interest of 5% on CHF 425'000 as from December 1, 2018, and on CHF 125'000 as from September 7, 2019 (paragraph 3 operative portion of Award). The Arbitral Tribunal dismissed the Defendant's request for security for potential party compensation (paragraph 4 of the operative portion of Award). In addition, the ruling on costs was reserved for the final award (paragraph 5 of the operative portion of Award).

B.
By civil law appeal, the Defendant has requested the Federal Tribunal to set aside the Award of the Arbitral Tribunal with its seat in Zurich dated December 2, 2020 [*recte*: November 27, 2020], and to find that the Arbitral Tribunal lacked jurisdiction.

The Respondent requests dismissal of the Appeal. The Arbitral Tribunal has waived the right to submit comments.

On January 13, 2021, the Arbitral Tribunal issued an explanatory decision regarding the challenged Partial Award of November 27, 2020.

On January 25, 2021, the Appellant submitted an addendum to its Appeal to the Federal Tribunal.

The Appellant has submitted a Reply Brief to the Federal Tribunal and the Respondent has submitted a Rejoinder Brief.

C.
By Order of January 19, 2021, the Appellant's application for suspensory effect was dismissed.

Reasons:

1.
Pursuant to Art. 54(1) BGG,[2] the judgement of the Federal Tribunal is issued in an official language,[3] as a rule in the language of the decision under appeal. Where the decision is in another language, the Federal Tribunal resorts to another official language used by the Parties. The challenged award was rendered in the English language. Because English is not one of the official languages, the judgement of the Federal Tribunal will be issued in the language of the Appeal Brief, as is standard practice (BGE 142 III 521[4] at 1).

2.
In the field of international arbitration, a civil law appeal is possible under 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. At least one of the Parties' registered offices were located outside Switzerland at the time (Art. 176(1) PILA). As the Parties did not expressly opt out of the provisions of Chapter 12 PILA, the provisions of that Chapter are applicable (Art. 176(1) PILA).

The challenge relates to paragraph 1 of the operative portion of the Award dated November 27, 2020, by which the Arbitral Tribunal found that it had jurisdiction over certain requests for relief, constitutes a partial award on jurisdiction, which may be challenged by appeal pursuant to Art. 190(3) PILA (BGE 143 III 462[6]

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[2] Translator's Note: BGG is the most commonly used German abbreviation for the Federal law of June 6, 2005 organizing 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: https://www.swissarbitrationdecisions.com/atf-4a-98-2017

at 2.2; 130 III 66 at 4.3). To the extent that the Arbitral Tribunal upheld the claims in the Request for Payment of Damages in the amount of CHF 550'000 plus interest (paragraph 3 of operative portion of award), this constitutes a final award in the form of a partial arbitral award (Art. 188 PILA), which relates to one of multiple objectively cumulated requests for relief; appeal under Art. 190(2) PILA is admissible against such an award (*see* BGE 143 III 462 at 2.1; *see also* Judgement 4A_58/2020 of June 3, 2020, at 1.2.3).

2.2. A civil law appeal within the meaning of Art. 77(1) BGG is, in principle, of a purely cassatory nature, *i.e*. it may only seek to set aside the decision under challenge (*see* Art. 77(2) BGG, ruling out the applicability of Art. 107(2) BGG insofar as this empowers the Federal Tribunal to adjudicate the matter itself). To the extent the dispute relates to the jurisdiction of the arbitral tribunal or its composition, there is an exception which applies such that the Federal Tribunal may itself rule on the jurisdiction or lack of jurisdiction of the arbitral tribunal and/or on the challenge of the arbitrator in question (BGE 136 III 605[7] at 3.3.4, with references). The Appellant's application for a finding of a lack of jurisdiction of the arbitral tribunal is accordingly admissible.

2.3. Under Art. 77(3) BGG, the Federal Tribunal reviews only the grievances raised and reasoned in the appellate brief; this corresponds to the duty to provide reasons in Art. 106(2) BGG for the violation of constitutional rights and of cantonal and intercantonal law (BGE 134 III 186[8] at 5, with references). Criticisms of an appellate nature are inadmissible (BGE 134 III 565[9] at 3.1; 119 II 380 at 3b).

2.4. The appeal must be fully submitted within the time limit for appeal, with a fully reasoned appellate brief (Art. 42(1) BGG). If there is a second round of pleadings, a claimant may not use its reply to supplement or correct its appeal (*see* BGE 143 I 42 at 3.3.4). The reply may only be used to comment on the statements made in the answer of another participant in the proceedings (*see* BGE 135 I 19 at 2.2).

To the extent the Appellant goes beyond this in its Reply Brief, the Federal Tribunal may not give any consideration to its remarks. The Federal Tribunal must exclude from consideration the addendum to the Appeal dated January 25, 2021, which was submitted after the expiry of the time limit for the appeal. The grant of a further time limit for supplementing the grounds of appeal, as requested by the Appellant, is only provided for in the realm of international mutual assistance in criminal matters (Art. 43 BGG). For this reason, the Federal Tribunal was unable to grant the procedural applications to this effect (paras. 4 and 5). By the issuance of the explanatory decision of January 13, 2021, the request for suspension of the appellate proceedings until receipt of that decision (paragraph 3) also became moot.

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[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

2.5. The Federal Tribunal bases its decision on the factual findings of the arbitral tribunal (Art. 105(1) BGG). This includes the findings upon which the dispute is based and those concerning the course of the arbitration, *i.e.* the findings regarding the subject matter of the arbitration, which specifically include the submissions of the parties, their factual allegations, legal arguments, statements in the case and offers of evidence, the contents of a witness statement or an expert report, or the findings of visual inspections (BGE 140 III 16 at 1.3.1 with references).

The Federal Tribunal may not rectify or supplement the findings of the arbitral tribunal, even when 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). The Federal Tribunal 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, when new evidence is taken into consideration (Art. 99 BGG; 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).

2.6. The Appellant fails to take account of these principles where it prefaces its legal arguments with a detailed narrative of the facts of the case in which it describes the background to the dispute and the course of the arbitration from its own perspective, referring to numerous exhibits, and departs in various respects from the findings of fact in the challenged Award or expands on these without providing any substantiation for making exceptions to the rule which binds the Federal Tribunal to the facts found by the arbitral tribunal.

In its further Grounds of Appeal, the Appellant likewise partially submits its view of matters to the Federal Tribunal without meeting the statutory requirements for a legally sufficient objection to fact-finding. Thus, for example, under the heading "*c) regarding the declaratory Relief Requested, in particular, B.1.(b)*" it describes the Parties' arguments from its own perspective, refers to the amended Request for Relief by the Respondent as having been inadmissible on that basis and asserts that, based on Sec. 13 of the allegedly applicable "*Terms and Conditions*", a separate dispute resolution clause is applicable.

The Federal Tribunal must disregard the corresponding remarks.

3.
The Arbitral Tribunal rejected the Appellant's objection that the claim for reimbursement of the advance on costs should not be admitted. The arbitral proceedings had, it said, already reached an advanced stage and the Parties had had sufficient opportunity to present their points of view; in particular, the objection of a lack of jurisdiction raised by the Appellant was, it said, addressed in almost every submission. There was not, the Arbitral Tribunal said, any apparent reason to refrain from evaluating the objections raised, even if the Arbitral Tribunal had not initially granted the Appellant's request to rule by

[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: https://www.swissarbitrationdecisions.com/arbitration-clause-not-rescinded-subsequent-"showpiece"-contract

a separate decision on the question of jurisdiction in advance. The Respondent based its claim for restitution on the arbitration agreement made by the Parties. The Arbitral Tribunal was thus required first to rule on its jurisdiction in order to be able to assess whether the Respondent was entitled to restitution from the Appellant.

The Arbitral Tribunal did not accept the Appellant's objection that the Respondent's claims related to enforcement matters falling within the exclusive jurisdiction of the local enforcement courts. The present proceedings were, the Arbitral Tribunal noted, preceded by arbitration proceedings which were concluded on November 3, 2017, by an arbitral award (the "previous award"). The previous award stated that the Parties were bound by the Sale and Purchase Agreement. The then Arbitral Tribunal had required the Respondent hand over various securities (25 "Call Option Certificates", 25 "Bond Certificates" and 3,200 shares in C._____ N.V.) concurrently against payment of EUR 78'996'000, plus interest. In the present arbitration proceedings, the main question was, the Arbitral Tribunal found, whether the Respondent had validly withdrawn from the Sale and Purchase Agreement based on circumstances which had occurred after the previous award. The Arbitral Tribunal therefore was called upon to decide whether the Respondent was still obliged to perform the Sale and Purchase Agreement. These were questions of a contractual nature. The relationship between the Parties was a contractual relationship. That relationship did not end with the making of the previous award; rather, it continued to exist because the Parties were required to perform the Sale and Purchase Agreement. That Agreement therefore formed the basis of the present arbitration proceedings. In order to decide whether the Respondent could validly withdraw from the Sale and Purchase Agreement, the Arbitral Tribunal had to assess a contract dispute relating to events that had occurred after the previous award was made. There had also been, the Arbitral Tribunal stated, no apparent circumvention of the jurisdiction of the local enforcement courts; rather, the Respondent was permissibly requesting an assessment of whether it had been entitled to refuse performance of the Sale and Purchase Agreement based on events that had occurred subsequently.

This assessment was also confirmed by the fact that, at the time of the Partial Award, the previous award had already been enforced by the local court. Thus, by Judgement of February 13, 2019, the Tribunal de Première Instance of Geneva had ordered Bank E._____ to hand over the securities in question to the Appellant against payment of the purchase price. On February 26, 2019, the securities were handed over against payment. However, the applications for relief requested had been maintained by the Respondent to-date. Had the sole purpose of its action been to prevent enforcement of the previous award, its requests would have become moot once enforcement had taken place and there would be no reason for them to continue with the present arbitration.

With regard to arbitrability, the Arbitral Tribunal pointed out that contract claims are, in principle, arbitrable under Art. 177 PILA. Since the claims asserted by the Respondent were contract claims, they could form the subject of arbitration proceedings. Irrespective of whether the claims filed were based on the Liechtenstein law governing enrichment or an analogous application of Art. 86 of the Swiss Federal Statute on Debt Enforcement and Bankruptcy [German acronym: SchKG], they were substantive claims and a requirement of arbitrability was met.

The claims asserted by the Respondent were also covered by the arbitration clause in Art. 7.3 of the 3-Way-Agreement. Such a broad arbitration clause ("*any disputes which may arise out of or in connection with this agreement*") would also cover contract claims in connection with the invalidity of termination of the Agreement or extra-contractual claims. The Arbitral Tribunal stated that the case under consideration concerned claims in connection with the alleged withdrawal from the Sale and Purchase Agreement due to circumstances that had occurred after the previous award, *i.e.* contract claims or contract-related claims which were covered by the Arbitration Agreement.

It follows, the Arbitral Tribunal found, that it has jurisdiction to hear and determine Claims A.a), A.b), B.1.a), B.1.b), B.2.a) and B.2.b) pursuant to the Reply Brief of June 7, 2019, and the Respondent's letter of October 6, 2019. The question of whether the Arbitral Tribunal had jurisdiction over the other claims and the counterclaim as well were left open; this, it stated, would be decided in the final award. For the question of jurisdiction with regard to reimbursement on the advance on costs, for purposes of the Partial Award, it was sufficient that the Arbitral Tribunal had jurisdiction to assess at least part of the claims.

4.
The Appellant raises the grievance that the Arbitral Tribunal wrongly (partially) found that it had jurisdiction (Art. 190(2)(b) PILA).

4.1. Pursuant to Art. 190(2)(b) PILA, the Federal Tribunal freely reviews jurisdictional objections as to legal issues, including to preliminary substantive issues upon which the determination of jurisdiction depends (BGE 146 III 142[12] at 3.4.1 p. 148; 144 III 559[13] at 4.1; 142 III 239[14] at 3.1). However, the Federal Tribunal may review the factual findings of the arbitral award under appeal even in the context of a jurisdictional objection, but only when some admissible grievances within the meaning of Art. 190(2) PILA are raised against such factual findings or, exceptionally, when some new evidence (Art. 99 BGG) is taken into consideration (BGE 144 III 559 at 4.1 S.563; 142 III 220 at 3.1, 239 at 3.1; 140 III 477[15] at 3.1; 138 III 29 at 2.2.1; each with references).

4.2. The Appellant initially argues that the Arbitral Tribunal lacked jurisdiction to adjudicate the Respondent's requests for relief in the Request for Arbitration dated May 10, 2018, and in the Statement of Claim dated January 18, 2019. In its remarks, the Appellant has overlooked the fact that in the challenged Award, the Arbitral Tribunal found that it solely had jurisdiction with respect to the claims expressly listed in paragraph 1 of the operative portion of the Award, A.(a), A.(b), B.1.(a), B.1.(b), B.2.(a) and B.2.(b) pursuant to the Reply Brief dated June 7, 2019, amended by Claimant's Letter of October 6, 2019. The Arbitral Tribunal neither expressly not implicitly found that it had jurisdiction over the Respondent's claims for relief in the Notice of Arbitration dated May 10, 2018, and the Statement of Claim

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[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/atf-4a-396-2017-2

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

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

dated January 18, 2019. This is, incidentally, expressly also confirmed in the Arbitral Tribunal's explanatory decision of January 13, 2021. Thus, the remarks along these lines in the appeal are, from the very outset, devoid of substance.

4.3. The Appellant raises the grievance that the Arbitral Tribunal lacks jurisdiction to adjudicate the requests for relief of the Respondent in its Reply Brief dated June 7, 2019, modified by its letter of October 6, 2019.

4.3.1. In this context, it also deals with requests for relief which were made neither in the Reply Brief nor in the Letter of October 6, 2019, including, in particular, with the applications pursuant to the written submission dated March 6, 2019. Because the Arbitral Tribunal, in the challenged Decision, did not – expressly or implicitly – rule on the question of whether it had jurisdiction to adjudicate on these applications, the remarks in the Appeal relating to this are of no relevance to our decision.

To the extent that the Appellant argues before the Federal Tribunal that, pursuant to Art. 20 of the Swiss Rules, the Arbitral Tribunal should not have admitted the new and amended requests for relief submitted with the Reply Brief of June 7, 2019, it does not assert a grievance which is admissible under Art. 190(2) PILA (*see* BGE 129 III 445 at 4.2.1; 126 III 249 at 3b).

4.3.2. In addition, the Appellant is unable to make out any violation of Art. 190(2)(b) PILA where it asserts that the Arbitral Tribunal lacked jurisdiction over the original claims and takes the position that an Arbitral Tribunal which lacks jurisdiction does "not subsequently and suddenly acquire jurisdiction" as a result of a later amendment of the claim. The Federal Tribunal is unable to follow the Appellant where it argues, with reference to Stacher (*Einführung in die internationale Schiedsgerichtsbarkeit der Schweiz*, 2015, margin no. 191), that the jurisdiction of the Arbitral Tribunal must be present, as a procedural prerequisite, from the very outset and "cannot only be created in the course of proceedings of the case". To the contrary: the above-referenced author expressly points out in the passage cited by the Appellant that the procedural requisites must be fulfilled when the arbitral award is made (as to the relevant point in time, Judgement 4A_414/2012[16] at 2.3.1.1 with reference to BGE 116 II 9 at 5, p. 13, 209 at 2b/bb, p. 211). Thus, the objection that the Arbitral Tribunal's approach contradicts "the fundamental considerations regarding the question of jurisdiction of an Arbitral Tribunal *ratione temporis*" likewise comes to nothing.

To the extent that the Appellant criticizes the procedural approach of its opponent and once again argues that the Arbitral Tribunal should not have admitted the new legal claims under Art. 20 Swiss Rules, it fails here, as well, to demonstrate a violation of Art. 190(2)(b) PILA in this context.

4.4. The Appellant further argues that the claims in the Reply Brief of June 7, 2019, as amended by the Letter of October 6, 2019, does not fall within the objective scope of the arbitration clause agreed by the Parties.

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[16] Translator's Note: The English translation of this decision is available here: https://www.swissarbitrationdecisions.com/alleged-inexistence-other-party-justifies-plea-lack-jurisdiction

Under the heading "*a) On the claims for declaratory relief A.(a) and A.(b)*" it presents the Parties' submissions in the arbitration proceedings from its own point of view, and based on this, takes the view that they are claims of an enforcement nature. Its submissions are mainly of an appellatory nature and do not sufficiently address the concrete considerations in the challenged Award. In any event, it is not clear how Requests for Declaratory Relief A.(a) and A.(b) should concern issues of repayment and deferral, which the Appellant considers are not covered by the Arbitration Agreement. Neither do the two declaratory relief claims cover the recovery of payments already made, for which reason the remarks in the Appeal Brief regarding Art. 86 SchKG likewise come to nothing. Furthermore, the Arbitral Tribunal only considered an analogous application of this provision (in addition to the Liechtenstein law on enrichment); there is no apparent concrete reference to debt enforcement proceedings here. In contrast to the claims stated in the Notice of Arbitration of May 10, 2018, and in the Statement of Claim of January 18, 2019, which are not covered by the contested award on jurisdiction, the Appellant does not sufficiently challenge the claims to be adjudicated here for a lack of arbitrability (Art. 177(1) PILA).

The fact that the Arbitration Agreement which was concluded covers disputes arising out of or in connection with the Sale and Purchase Agreement of October 3, 2013, is also not fundamentally disputed by the Appellant. The Appellant is unable to specifically demonstrate how the claims in question, which directly relate to the termination of the Sale and Purchase Agreement of October 3, 2013, are not covered by the objective scope of the broad arbitration clause ("*any disputes which may arise out of or in connection with this agreement*"). The Arbitral Tribunal has logically demonstrated that the case under consideration is a contractual or contract-related dispute due to subsequent events, which is based on the Sale and Purchase Agreement of October 3, 2013.

The Appellant does not demonstrate an incorrect interpretation of the arbitration clause agreed by the Parties with regard to its objective scope of application in connection with claims B.1.(a) and B.1.(b). In any case, the Appellant's statements on the latter are purely of an appellatory nature and thus are inadmissible (*see above* at 2.6). With regard to claims B.2.(a) and B.2.(b), the Appellant does no more than to make mere reference to its Statement on the Declaratory Claims, which has proven unhelpful.

5.
The Appellant alleges that the Arbitral Tribunal violated its right to be heard (Art. 190(2)(d) PILA).

5.1. Art. 190(2)(d) PILA only permits parties to challenge an arbitral award based on the mandatory procedural rules set out in Art. 182(3) PILA. The right to be heard codified in that section essentially corresponds to the constitutional right embodied in Art. 29(2) BV. Case law infers from this, in particular, the right of parties to state their views as to all facts important to the judgement, to state their legal arguments, to present suitable evidence supporting their factual allegations material to the judgement in a timely manner and in the proper format, to participate in the hearings and to access the record (BGE 142 III 360[17] at 4.1.1; 130 III 35 at 5, pp. 37-38.; 127 III 576 at 2c; each with references; Judgement 4A 332/2020 of April 1, 2021 at 3.1, intended for publication).

[17] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/agreed-upon-rules-procedure-do-bind-parties

Pursuant to past case law, the right to be heard in adversarial proceedings under Art. 182(3) and Art. 190(2)(d) PILA does not include the right to a reasoned international arbitral award (BGE 134 III 186[18] at 6.1 with references).

Nevertheless, this does give rise to a minimal obligation on the part of the arbitrators to examine and deal with the questions which are determinative for purposes of their decision. The Arbitral Tribunal violates this duty if, due to an oversight or a misunderstanding, it fails to take account of legally material assertions, arguments, evidence or evidentiary applications of a party (BGE 142 III 360 at 4.1.1; 133 III 235 at 5.2 with references).

5.2. The Appellant challenges the recital in the contested Award as being in conflict with its right to be heard, where it disputes the jurisdiction of the Arbitral Tribunal to assess the actual claims but does not contest the Arbitral Tribunal's jurisdiction with regard to the Claimant's request for partial decision on reimbursement of the advance on costs.

The grievance regarding the Appellant's right to be heard fails already because the Appellant merely states that it was contesting the Arbitral Tribunal's jurisdiction in general. However, it does not show by its submissions that it would have challenged the Arbitral Tribunal's jurisdiction to adjudicate on the relief requested in the Claim apart from the question of jurisdiction regarding the actual claims asserted.

It is not clear from the passage cited by the Appellant that it was contesting the jurisdiction of the Arbitral Tribunal over the claim for reimbursement even if that jurisdiction was upheld for the other claims, or a substantial part thereof. In any event, the Arbitral Tribunal also examined its jurisdiction with regard to the Claim for Reimbursement and did not merely affirm it on the basis that there had been no objection by the Appellant. The Appellant does not succeed in showing that the Arbitral Tribunal inadvertently disregarded its arguments on jurisdiction with regard to the claim for restitution, which were essential to the Award. The allegation that the Appellant's right to be heard was violated is without merit.

6.
The Appellant asserts the grievance that the Arbitral Tribunal violated procedural public policy (Art. 190(2)(e) PILA).

6.1. Public policy, within the meaning of Art. 190(2)(e) PILA, has both a substantive and a procedural aspect. A violation of procedural public policy occurs where fundamental and generally recognized procedural principles have been violated, the non-observance of which is in intolerable conflict with a sense of justice, such that the decision appears to be wholly incompatible with the legal order and values applicable in a state governed by the rule of law (BGE 141 III 229[19] at 3.2.1, 140 III 278[20] at 3.1; 136 III

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

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

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

345[21] at 2.1). However, an erroneous or even arbitrary application of procedural rules will not, in itself, be sufficient to constitute a violation of formal public policy. Rather, only a violation of a rule which is indispensable to ensuring the fairness of the proceedings will be considered in this regard (BGE 129 III 445 at 4.2.1; Judgment 4A_332/2020[22] of April 1, 2021, at 4.1 with references, intended for publication).

6.2. In its submissions, the Appellant does not succeed in demonstrating a violation of procedural public policy. Rather, with reference to various documents in the arbitral proceedings, it asserts criticisms of an appellate nature regarding the Arbitral Tribunal's conduct of the proceedings, describing the Respondent's actions as an abuse of law and claiming that the Arbitral Tribunal, by means of interim measures, lent a helping hand to thwarting enforcement of the previously issued arbitral award. The Appellant's arguments are of no merit. It is, in any event, undisputed that the aforementioned decision was enforced in February 2019. Moreover, the Appellant's argument that the Arbitral Tribunal disregarded the *res judicata* effect of a previous arbitral award does not evidence any connection with the recitals in the challenged Award, as this issue was not even adjudicated in that decision. The Appellant also repeats various objections to the jurisdiction of the Arbitral Tribunal, which have been shown to lack merit; in that context, it also wrongly assumes that the Arbitral Tribunal (implicitly) found that it had jurisdiction over the legal claims of the Respondent in the Notice of Arbitration of May 10, 2018, and the Statement of Claim of January 18, 2019.

With its further submissions on the course of the proceedings and various orders of the Arbitral Tribunal, the Appellant is likewise unable to show any violation of public policy. In particular, the fact that the Arbitral Tribunal initially refrained from bifurcating the proceedings and deferred the ruling on jurisdiction to a separate decision, cannot be seen as such, as a decision of this kind is not mandatory (*see* Art. 186(3) PILA, providing that the Arbitral Tribunal is to decide on its jurisdiction (as a rule) by way of a preliminary decision). With its arguments on the amounts of the legal costs incurred, the Appellant fails to raise any objections which are admissible under Art. 190(2) PILA. In overall respects, the Appellant is unable to demonstrate that its obligation to pay the advance on costs is contrary to public policy.

7.
The Appeal is rejected, to the extent the matter is capable of appeal. In accordance with the outcome of this case, the Appellant shall be liable for the judicial costs and for payment of party compensation (Art. 66(1) BGG as well as Art. 68(2) BGG).

Therefore, the Federal Tribunal pronounces:

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

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[21] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/setting-aside-of-award-for-violation-of-public-policy-principle-

[22] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/atf-4a-332-2020

2.
The judicial costs of CHF 200’000 shall be paid by the Appellant.

3.
The Appellant shall pay party compensation to the Respondent of CHF 220’000 for the proceedings before the Federal Tribunal.

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

Lausanne, May 7, 2021

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

Presiding Judge:	Clerk of the Court:
Kiss	Leeman