4A_292/2019[1]

Judgement of October 16, 2019

First Civil Law Court

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

A._____ AG,
represented by Alexander Cica and Tanja Kessler,
Appellant,

v

B._____ Limited,
represented by Dr. Myriam A. Gehri,
Respondent

Facts:

A.
A.a. B._____ Limited (Seller, Claimant, Respondent) is a company organised under Turkish law with its registered office in U._____, Turkey.

A._____ AG (Purchaser, Defendant, Appellant) is a company organised under Swiss law with its registered office in V._____.

A.b. The parties' legal dispute goes back to an Agreement between the parties dated February 20, 2012, which was designated "CONTRACT No. 02/2012". That Agreement contained an arbitration clause which envisaged that, for claims filed by the Purchaser, jurisdiction shall be vested in an *ad hoc* arbitral tribunal with its seat in Wollerau/SZ.

[1] Translator's Note: Quote as A._____ *v.* B._____, 4A_292/2019.
The decision was issued in German. The full text is available on the website of the Federal Tribunal, www.bger.ch.

B.

B.a. By submission dated June 19, 2018, the Claimant applied to the Höfe District Court for appointment of Michael Lazopoulos as an arbitrator and appointment of a second arbitrator after the Defendant had declined to make any corresponding proposal.

The Defendant objected to the Claimant's request by letters dated July 5, 2018 and August 27, 2018.

By Order dated November 20, 2018, the Höfe District Court appointed Michael Lazopoulos as arbitrator for the Claimant; the fact put forward by the Defendant that he had previously worked in the same law firm as Claimant's counsel did not, in the view of the Court, adversely affect his independence. In addition, the Court appointed Nadja Erk for the Defendant and ordered that the two party arbitrators were to jointly appoint a chairman.

Subsequent to this, the two party-appointed arbitrators appointed Marco Stacher as the chairman of the Arbitral Tribunal, who accepted that appointment by Declaration dated November 26, 2018.

B.b. On November 28, 2018, the Arbitral Tribunal forwarded its Order constituting the Arbitral Tribunal to the parties as well as the draft of supplemental procedural rules. At the same time, the Arbitral Tribunal proposed possible dates for a telephone conference.

On December 5, 2018, the Claimant communicated its available times for the preparatory telephone conference. The Defendant did not submit any comments.

On December 7, 2018, the Arbitral Tribunal ordered that the preparatory telephone conference was to take place on December 19, 2018. That Order was received by the Defendant on December 14, 2018.

On December 12, 2018, the Arbitral Tribunal was informed by the Swiss Post that the Defendant had not collected the letter dated November 28, 2018. That same day, the Arbitral Tribunal forwarded the letter once again to the Defendant by email and facsimile.

By written submission dated December 16, 2018, the Defendant notified the Arbitral Tribunal that, on December 13, 2018, it had taken note of the letters of December 7 and 12, 2018. Because it did not have either the original document that had been faxed to it on December 12, 2018, or the Court's Order with respect to the appointment of Nadja Erk as arbitrator, it was unable to comment any further and would thus likewise not be participating in the preparatory telephone conference. It stated that it would only do so when it had appointed counsel, but this would not be the case until it had the complete originals of all of the documents.

By email dated December 17, 2018, the Arbitral Tribunal communicated to the Defendant that it had received all of the relevant procedural documents and that the lack of certain original documents was due to its failure to collect the registered letter from the Arbitral Tribunal dated November 28, 2018, and that the Arbitral Tribunal's Order constituting the Tribunal had made clear how the members of the Arbitral Tribunal were being appointed. It stated that there was thus no reason to postpone the preparatory telephone conference of December 19, 2018. On December 17, 2018, the Arbitral Tribunal likewise

forwarded a registered letter to the Defendant containing an original of its letter of November 28, 2018, and the Order constituting the Arbitral Tribunal as well as the draft of the supplemental procedural rules.

On December 19, 2018, the preparatory telephone conference took place, in which the Claimant participated, while the Defendant was absent. During that telephone conference, deadlines for submission of the Statement of Claim and of the Statement of Defence were set.

By Procedural Order No. 1 dated December 19, 2018, the Arbitral Tribunal forwarded a demand to the Defendant by email *inter alia* requiring it to pay its share of the Advance on Costs on or before January 4, 2019.

Likewise on December 19, 2018, the Defendant responded to the Arbitral Tribunal's email, which it had received, stating that it was unable to comment on the matter before it had verified that the Arbitral Tribunal was appointed in accordance with the Rules.

On December 20, 2018, the Arbitral Tribunal, for the sake of good order, forwarded the Order of the Höfe District Court dated November 20, 2018, regarding appointment of the arbitrators to the Defendant, even though the District Court had already directly served that document on the parties.

B.c. On January 18, 2019, the Claimant submitted its Statement of Claim to the Arbitral Tribunal, with the request for an award requiring the Defendant to pay USD 66'000 plus 5% interest as from August 20, 2012.

In response to a corresponding demand to pay its share of the advance on costs, the Defendant notified the Arbitral Tribunal on January 18, 2019, that it would not be making any payment and would not take further action, if any, before February 2019.

By Procedural Order No. 2 of February 7, 2019, the Arbitral Tribunal found that the Defendant had not paid its share of the advance on costs and asked the Claimant to advance the amount in question, which subsequently was indeed done.

By written submission of February 15, 2019, the Defendant limited itself to asserting grounds of challenge with regard to arbitrators Lazopoulos and Stacher.

On February 18, 2019, the Arbitral Tribunal issued Procedural Order No. 3, ordering that a second preparatory telephone conference would be held on February 25, 2019. That same day, arbitrators Lazopoulos and Stacher, by separate letters, rejected the grounds of challenge which had been asserted against them.

By written submission dated February 20, 2019, the Claimant applied to the Arbitral Tribunal to dismiss the challenges and to continue the proceedings.

By Procedural Order No. 4 dated February 21, 2019, the Arbitral Tribunal found that it lacked jurisdiction to decide on the Defendant's challenge applications, for which reason it was unable to grant the

Claimant's application dated February 20, 2019. Nevertheless, the Arbitral Tribunal found that, in its view, all of the members of the Arbitral Tribunal were impartial and independent. On February 25, 2019, the Defendant informed the Arbitral Tribunal that it had petitioned the Höfe District Court for dismissal of arbitrators Lazopoulos and Stacher. At the same time, it stated that it would only submit its Statements in Defence after the issue of its challenge had been resolved. The scheduled conference call took place on February 25, 2019, without participation of the Defendant.

By Procedural Order No. 5 dated February 25, 2019, the Arbitral Tribunal found that the Defendant had failed to file a Statement of Defence within the time limits and had not requested an extension of the time limit, and that the challenged arbitrators were not prevented from continuing the arbitration proceedings and issuing an award. Accordingly, the Arbitral Tribunal declared the proceedings closed, subject to a well-founded request on the part of the Defendant for reinstatement of the time limit.

By written submission dated February 26, 2019, the Defendant announced that it would be submitting its response when a final decision had been made on its challenge application, and took the view that its constitutional rights would be violated if the Arbitral Tribunal ruled on the merits of the case without assessing its arguments.

By Procedural Order No. 6 dated February 26, 2019, the Arbitral Tribunal accepted the Defendant's submission as a request for reconsideration regarding the closure of the proceedings and dismissed the request.

By letter dated March 4, 2019, the Höfe District Court informed the Defendant that the requirements for renewed challenge proceedings had not been met.

On March 5, 2019, the Defendant filed a Statement of Defence with the Arbitral Tribunal. The Claimant commented on that Statement of Defence by written submission dated March 12, 2019.

By Procedural Order No. 7 dated March 25, 2019, the Arbitral Tribunal held that the prerequisites for reopening the proceedings were not met.

After various further submissions, the Arbitral Tribunal, by Procedural Order No. 8 dated April 9, 2019, order the parties to submit their cost notes and, at the same time, set a deadline for them to subsequently comment on the other party's cost note.

On April 15, 2019, the Claimant filed its cost note together with exhibits. By contrast, the Defendant did not submit a cost note.

On April 19, 2019, the Defendant commented on the Claimant's cost note. In its comments, it reemphasised its grounds of challenge asserted against arbitrator Lazopoulos. It stated that Chairman Stacher should likewise be removed as he had been appointed with the vote of Lazopoulos. In that context, the Defendant emphasised that the invoice from Claimant's counsel showed that arbitrator Lazopoulos had discussed questions of applicable law with Claimant's counsel directly, without the

participation of the other arbitrators or the Defendant, which confirmed that Lazopoulos was not independent and/or impartial.

In this regard, on April 21, 2019, the Arbitral Tribunal stated that Lazopoulos had phoned counsel to ascertain whether the Agreement between the parties contained a choice of law clause, and that this inquiry had been made in order to enable the two co-arbitrators to select a suitable chairman. In addition, the Arbitral Tribunal stated that Lazopoulos had made the telephone call with the prior consent of co-arbitrator Erk and that Chairman Stacher had been subsequently informed of the call.

By written submission dated April 23, 2019, the Defendant reiterated its reservations with respect to Chairman Stacher and also argued that arbitrator Erk was biased and prejudiced against it. Erk rejected the accusations by letter dated April 25, 2019. The Defendant replied by submission dated April 26, 2019, announcing that it would submit the question of the arbitrators' independence and impartiality to the competent court.

B.d. By Arbitral Award dated May 13, 2019, the Arbitral Tribunal with its seat in Wollerau ordered the Defendant to pay the Claimant USD 66'000, plus interest at 5% as from August 20, 2012.

In response to the Defendant's challenge, the Arbitral Tribunal held that the employment relationship between arbitrator Lazopoulos and Claimant's counsel at the same law firm between 2007 and 2009, which the Defendant had raised, did not constitute grounds for challenge. The Defendant had already asserted a Cause of Action against Lazopoulos in the proceedings before the Höfe District Court regarding the appointment of the two arbitrators. In his Order dated November 20, 2018, the *juge d'appui* had ruled that the fact asserted did not justify a challenge under Art. 180 PILA.[2] Overall, the Court found that the Defendant had not raised any facts which might call the arbitrators' independence and impartiality into question.

C.
The Defendant, by civil law appeal, asks the Federal Tribunal to set aside the decision of the *ad hoc* Arbitral Tribunal seated in Wollerau/SZ of May 13, 2019 and to remand the matter back to the Arbitral Tribunal for re-adjudication. In addition, the Defendant requested an order requiring that arbitrator Lazopoulos resign.

The Respondent requests the Federal Tribunal order that the matter is not capable of appeal or, in the alternative, to dismiss the Appeal. The Arbitral Tribunal in essence applies for dismissal of the Appeal.

The Appellant submitted an unsolicited Reply Brief to the Federal Tribunal.

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

D.
By Order of August 14, 2019, the Federal Tribunal granted suspensory effect to the Appeal. In contrast, the Federal Tribunal rejected the request on the part of the Respondent to require the Appellant to furnish security.

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 Award being challenged here is in English. As that is not one of the official languages, the Federal Tribunal will issue its decision in the language of the Appeal Brief, as is its standard practice (BGE 142 III 521[5] at 1).

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

2.1. The seat of the Arbitral Tribunal in the present case is located in Wollerau/SZ. At the time in question, Respondent had its registered offices outside Switzerland (Art. 176(1) PILA). As the parties have not expressly excluded the application of Chapter 12 PILA, the provisions of that chapter are applicable (Art. 176(2) PILA).

2.2. A civil law appeal within the meaning of Art. 77(1) BGG is, in principle, of a purely cassatory nature, *i.e.* it may only seek 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 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[6] at 3.3.4 p. 616 with references).

However, it cannot be ruled out that the Federal Tribunal would remand the matter to the arbitral tribunal if it upheld the Appeal based on a violation of the parties' right to be heard, particularly since Art. 77(2) BGG will only exclude the application of Art. 107(2) BGG insofar as that section permits the Federal

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

Tribunal to rule itself on the matter (judgements 4A_462/2018 of July 4, 2019 at 2.2; 4A_532/2016[7] of May 30, 2017 at 2.4; 4A_633/2014[8] of May 29, 2015 at 2.3; 4A_460/2013[9] of February 4, 2014 at 2.3, with references). The application of the Appellant is admissible to that extent.

2.3. The decision may only be challenged on one of the grounds which are exhaustively listed in Art. 190(2) PILA (BGE 134 III 186[10] at 5, p. 187; 128 III 50 at 1a, p. 53; 127 III 279 at 1a, p.282). Under Art. 77(3) BGG, the Federal Tribunal reviews only the grievances raised and reasoned in the Appeal Brief; this corresponds to the duty to provide reasons in Art. 106(2) BGG for the violation of constitutional rights and of cantonal and intercantonal law (BGE 134 III 186 at 5, p187, with reference). Criticisms of an appellate nature are inadmissible (BGE 134 III 565[11] at 3.1, p.567; 119 II 380 at 3b, p.382).

3.
The Appellant asserts the grievance that the arbitrator Lazopoulos proposed by the Respondent was not independent and impartial, for which reason the Arbitral Tribunal's composition was unlawful (Art. 190(2)(a) PILA).

3.1. Just as a state court judge, an arbitrator must furnish sufficient guarantees of his independence and impartiality. Where the Arbitral Tribunal lacks independence or impartiality, it is deemed to have been irregularly composed, and/or the sole arbitrator in question is deemed to have been unlawfully appointed within the meaning of Art. 192(2)(a) PILA. For the purposes of assessing whether an arbitrator satisfies these requirements, the courts are required to focus on the constitutional principles which were developed for the state courts, though when assessing the individual case, they must not fail to take note of the special features of arbitration – specifically of international arbitration (BGE 142 III 521[12] at 3.1.1; 136 III 605[13] at 3.2.1 p. 608 with references; *see also* BGE 129 III 445 at 3.1 p. 449).

Pursuant to Art. 30(1) BV and Art. 6(1) ECHR, any person whose legal claim is subject to adjudication will have a right to adjudication of their dispute by a judge who is unbiased, unprejudiced and impartial. This is intended to ensure that no extraneous circumstances lying outside the proceedings have an improper impact on the court's judgement in favour of or to the detriment of a party. Art. 30(1) BV is supposed to ensure the openness of the proceedings required for a proper and fair trial in individual

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

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

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

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

[11] 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

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

[13] 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

cases and thus facilitate a just decision (BGE 144 I 159 at 4.3; 142 III 732 at 4.2.2 p. 736; 140 III 221 at 4.1; 139 III 120 at 3.2.1 p. 124, 433 at 2.1.2).

The guarantee of a constitutional judge is infringed if, in objective respects, there are circumstances which would potentially establish a perception of bias or risk of partiality. In this regard, partiality and bias are assumed in court jurisprudence if, in the individual case, in light of all the factual and procedural circumstances, there are circumstances present which are apt to cast doubt on the impartiality of a judge. In this regard, the focus is not on the subjective perceptions of a party. Rather, the doubts as to the judge's impartiality must appear to have an objective basis. It will suffice if there are circumstances present which, in an objective view, create a perception of bias and prejudice. For the removal of a judge, there is no requirement that the judge actually be biased (BGE 144 I 159 at 4.3; 142 III 521 at 3.1.1; 140 III 221 at 4.1 p. 222; 139 III 433 at 2.1.2 p. 436; each with references).

3.2. The Appellant argues that the arbitrator Lazopoulos proposed by the Respondent and counsel for the Respondent worked for a period of three years (specifically from 2007 to 2009) at the same law firm in Zurich. Although, when viewed objectively on its own, their collaboration over a period of several years would not suffice to create doubts as to the independence of the arbitrator, the Appellant argues that this view of matters is changed drastically if one finds that precisely this arbitrator was in telephone contact with his former work colleague and counsel for the Respondent *after* his appointment (and thus that there was no clear reason for the contact). Irrespective of how the description of that conversation is worded in the cost note submitted, the Appellant argues that the mere fact that contact was initiated and material aspects of the case were discussed raises significant doubts as to the arbitrator's independence. The fact that neither the arbitrator in question nor the other arbitrators deemed it necessary to inform the Appellant at the time regarding that conversation shows, the Appellant argues, that this telephone call should by no means be assessed as unproblematic, even if the Arbitral Tribunal tried, in a few words, to justify this unilateral contact after the appointment of the arbitrator in question by saying that they were trying to find a chair of the Arbitral Tribunal who would be suitable to both of the parties. Rather, the Appellant argues, it would have been appropriate to submit this question to both parties in writing.

Ultimately, the Appellant argues, it does not matter whether the Arbitral Tribunal's justifications for initiating contact on the part of the arbitrator in question were truthful or not. Rather, the Appellant argues, what is decisive here is that there were objective circumstances present which raised the appearance of bias and that could cause concerns that the arbitrator in question might act in a partial manner. This, the Appellant argues, is the case here, in respect of the 20-minute telephone call between arbitrator Lazopoulos and counsel for the Claimant. This is not changed by the fact that the guidelines on conflicts of interest in international arbitration of the International Bar Association (IBA Guidelines on Conflicts of Interest, approved on October 23, 2014, http://www.ibanet.org, under IBA Digital Content/Guides and free materials [visited October 3, 2019]) on the "Green List" (Part II, Sec. 4.4.1) which describe example scenarios which do not raise issues in respect of the independence of arbitrators, reference initiation of first contacts between an arbitrator and a party or its counsel, which is solely with a view to selecting the chairman or with respect to procedural aspects of the case. According to the Appellant, this is so because the example itself references that this case deals with initiation of contact *prior to* appointment of the arbitrator in question; the Appellant says that this was precisely not the case here, particularly as the

arbitrator in question had already been appointed by order dated November 20, 2018, whereas the telephone contact took place on November 22, 2018.

3.3. The Respondent initially argues in response to this that the Appellant is estopped from asserting a grievance of a lack of independence and impartiality after the state court had already made a finding on this in its appointment decision of November 20, 2018, and there was no challenge to the Interim Award of the Arbitral Tribunal dated November 20, 2018.

The Appellant correctly counters this saying that it only learned of the telephone conversation it was raising between arbitrator Lazopoulos and counsel for the Respondent in mid-April 2019, and in fact immediately raised this grievance subsequently by written submission dated April 19, 2019. By letter of April 26, 2019, the Appellant likewise announced that it would be submitting the question of the Arbitral Tribunal's independence and impartiality to the competent court. The Respondent itself does not assert that the Appellant was required to file a corresponding submission within the short period of time prior to the arbitral Award, let alone await a corresponding ruling by the state court before doing so. The Appellant's legally protected interest in such challenge proceedings lapsed at such time as the challenged Arbitral Award was issued, and instead of this, the Appellant was able to challenge the Arbitral Award for irregular composition of the Arbitral Tribunal under Art. 190(2)(a) PILA (Christian Oetiker, in: *Zürcher Kommentar zum IPRG*, Vol. II., 3rd ed. 2018, footnote 39 to Art. 180 PILA).

3.4. Unilateral contacts between a party or party's counsel and an arbitrator are not prohibited in all cases. Thus, for example, it is customary and does not raise any objections in principle for a party or counsel to enter into contact with a potential arbitrator to ascertain his or her suitability and availability or to discuss appointment of a chairman of an arbitral tribunal (for example, *see* Gary B. Born, *International Commercial Arbitration*, Vol. II, 2nd Ed. 2014, Sec. 12.03[A] pp. 1685 *et seq*). As to these issues, the following is listed in the so-called "Green List" – raising no concerns – of the IBA Guidelines on Conflicts of Interest referred to in the Appeal Brief (*see* BGE 142 III 521 at 3.1.2):

> 4.4 Contacts between the arbitrator and one of the parties
>
> 4.4.1 The arbitrator has had an initial contact with a party, or an affiliate of a party (or their counsel) prior to appointment, if this contact is limited to the arbitrator's availability and qualifications to serve, or to the names of possible candidates for a chairperson, and did not address the merits or procedural aspects of the dispute, other than to provide the arbitrator with a basic understanding of the case.[14]

No. 8 of the IBA Guidelines on Party Representation in International Arbitration (IBA-Guidelines on Party Representation, approved on May 25, 2013; <http://www.ibanet.org>, at IBA Digital Content/Guides and free materials [visited on October 3, 2019]) provides as follows:

> It is not improper for a Party Representative to have Ex-Parte Communications in the following circumstances:

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

> (a) A Party Representative may communicate with a prospective Party-Nominated Arbitrator to determine his or her expertise, experience, ability, availability, willingness and the existence of potential conflicts of interest.
>
> (b) A Party Representative may communicate with a prospective or appointed Party-Nominated Arbitrator for the purpose of the selection of the Presiding Arbitrator.[15]

In support of its position, the Appellant cites only Sec. 4.4.1 of the IBA Guidelines on Conflicts of Interest, which limits permissible contacts in the time prior to the appointment of the arbitrator ("*prior to appointment*"), and points out that arbitrator Lazopoulos was already appointed as an arbitrator by Order dated November 20, 2018, whereas the challenged telephone contact with Claimant's counsel took place on November 22, 2018. However, as is emphasized in this Court's case law, it is broadly accepted that – subject to agreements to the contrary – the two co-arbitrators may be in contact with the nominating parties with a view to selecting a chairman; however, unilateral contacts are generally not permitted after appointment of the chairman (Born, *op cit*, Sec. 12.03[C] p.1698 *et seq*). The fact that the time of appointment of the co-arbitrator is not decisive as to permissibility of communications with regard to selecting a chair, is also pointed out in No. 8 of the IBA Guidelines on Party Representation, which clearly distinguishes permissible unilateral contacts with a (future *or previously appointed*) arbitrator (b) with regard to selection of a chairperson from other permissible communications with a (future) co-arbitrator with regard to his own appointment (a) (*see also* Born, *op cit*., Sec. 12.03[C] p. 1698 footnote 351, which points out that the wording "prior to appointment" in No. 4 of the IBA Guidelines on Conflicts of Interest, in connection with selection of a chair, is not well thought out and contradicts common practice). This view is also confirmed by Canon III/B.2 of the Code of Ethics for Arbitrators in Commercial Disputes of the American Arbitration Association dated March 1, 2004 (<https://www.adr.org/Arbitration>, under Other Links [visited October 3, 2019]), which reads as follows:

> In an arbitration in which the two party-appointed arbitrators are expected to appoint the third arbitrator, each party-appointed arbitrator may consult with the party who appointed the arbitrator concerning the choice of the third arbitrator.[16]

The Appellant is also unable to show why the contact that took place before the appointment of arbitrator Lazopoulos on November 20, 2018, should have been admissible, but not two days later on November 22, 2018, thus still four days before formal constitution of the Arbitral Tribunal, particularly as those proceedings only began from that point in time, and Respondent's initial Statement of Claim was not submitted until January 18, 2019. In view of the demonstrated chronological sequence of events, it is obvious – contrary to the view expressed in the Appeal Brief – that the contact was being made with a view to finding a suitable chairman. In this context, it seems understandable that the telephone contact regarding the applicable law, which had been agreed with the co-arbitrator in advance and regarding which the Chairman was informed subsequently, served the purpose of selecting a suitable chair, as the appointment decision of the Höfe District Court had not contained any indications regarding a possible choice of law, and that question was bound to have an impact on that choice (*see also* Comments to Guidelines 7-8 of the IBA Guidelines on Party Representation, p. 8(d) regarding permissible communications regarding agreements on applicable law; <http://www.ibanet.org>, at IBA Digital

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

Content/Guides and free materials [visited on October 3, 2019]). Furthermore, the Appellant now itself acknowledges in its Reply that the telephone call in question on November 22, 2018, was a conversation lasting only 12 minutes. This is also an argument against the suspicion expressed in the Appeal that the case was being discussed in an impermissible manner as regards its content. Overall, in view of the specific circumstances, upon an objective view, there are no circumstances present which could give rise to an appearance of conflicts of interest or to the risk of bias. The objection that the composition of the Arbitral Tribunal was improper is not well-founded.

4.
The appeal is rejected, to the extent the matter is capable of appeal. In line with the outcome of these proceedings, the Appellant shall be liable for costs and party compensation (Art. 66(1) and Art. 68(2) BGG).

Therefore, the Federal Tribunal pronounces:

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

2.
The judicial costs in the total amount of CHF 3'000 shall be paid by the Appellant.

3.
The Appellant shall pay party compensation to the Respondent in the amount of CHF 3'500 for the proceedings before the Federal Tribunal.

4.
This decision shall be notified in writing to the parties and the *ad hoc* Arbitral Tribunal with its seat in Wollerau.

Lausanne, October 16, 2019

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

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