4A_332/2020[1]

Judgement of April 1, 2021

First Civil Law Court

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

1. A._____ GmbH,
2. B._____ GmbH,
3. C._____ GmbH,
represented by Dr. Balz Gross and Dr. Michael Kottmann,
Appellants

v.

1. D.D._____,
2. E.D._____,
3. F.D._____,
4. G.D._____,
represented by Dr. Urs Weber-Stecher and Mr. Flavio Peter,
Respondents

Facts:

A.
A.a. D.D._____ (Claimant 1, Respondent 1), who is domiciled in U._____, is the widow and heir of H.D._____, who died on June 17, 2010. E.D._____, F.D._____ and G.D._____ (Claimants 2-4, Respondents 2-4), all of whom are domiciled in V._____, are the issue and heirs of the decedent H.D._____.

A._____, B._____ and C._____ (Defendants 1-3, Appellants 1-3) are companies established under German law whose registered office is located in W._____, Germany.

[1] Translator's Note: Quote as A.__, B.___, and C.__ *v.* D.D.__ E.D.__ F.D.__ and G.D.__ 4A_332/2020. The decision was issued in German. The full text is available on the website of the Federal Tribunal, www.bger.ch.

A.b. The Parties have direct and indirect equity interests in multiple companies. Their legal relations are contractually governed *inter alia* by a Framework Agreement dated November 5, 1987, which was amended on various occasions, and by the X._____ Agreement of May 10, 1988. Article 14 of the Framework Agreement contains an arbitration clause in favour of an arbitral tribunal with its seat in Zurich. The Parties are additionally in agreement that the referenced arbitration clause also applies to the X._____ Agreement.

By Letter dated June 28, 2017, the Defendants gave notice of extraordinary termination of the Framework Agreement and of the X._____ Agreement for good cause, with immediate effect.

By Letter of January 1, 2018, in the event that the Extraordinary Notice of Termination of June 28, 2017, should be deemed invalid, the Defendants gave notice of ordinary termination of the Framework Agreement and of the X._____ Agreement. Notice of that termination was given effective June 30, 2018, or in the alternative, upon further dates.

The Claimants disputed the validity of the Notices of Termination issued.

B.
B.a. On November 24, 2017, the Claimants initiated arbitration proceeding under the Swiss Rules of Arbitration (2012) of the Swiss Chambers' Arbitration Institution (Swiss Rules) against the Defendants and applied, in essence, for a ruling by the tribunal finding that the Framework Agreement and the X._____ Agreement continue to be valid.

The Defendants requested the Arbitral Tribunal dismiss the claim.

B.b. On March 7, 2018, the Secretariat of the Court of Arbitration of the Swiss Chambers' Arbitration Institution (SCAI) notified the two arbitrators designated by the Parties of their confirmation by the Court of Arbitration, requesting that they designate the chair of the tribunal within thirty days' time.

On April 24, 2018, the Secretariat notified the Parties of its confirmation of the Chair and confirmed that management of the proceedings had been transferred to the Arbitral Tribunal.

On May 29, 2018, the Arbitral Tribunal issued *inter alia* the procedural rules and the timetable for the proceedings.

On July 6, 2018, the Claimants submitted their Statement of Claim together with their exhibits. On August 27, 2018, the Defendants submitted their Statement of Defence. The Parties' further submissions followed this.

From March 25-27, 2019, the main hearings of the matter took place in U._____.

On May 3, 2019, the Parties submitted their closing submissions. On May 14, 2019, the arbitration was closed, subject to comments on the Parties' applications for costs.

B.c. On September 15, 2019, the Defendants submitted a challenge request against the arbitrator designated by the Claimants. In essence, they asserted that, due to various contacts with counsel for the Claimants, the arbitrator should be regarded as biased. On September 16, 2019, the arbitrator declared that he was immediately withdrawing, whilst rejecting all of the accusations made against him.

Referring to the deliberations of the Arbitral Tribunal as originally constituted, which were undertaken on March 27, 2019, June 3, 2019, and August 29, 2019, and the fact that a revised draft of the arbitral award dated September 6, 2019, was before the Arbitral Tribunal, the remaining members communicated to the Court of Arbitration on September 23, 2019, that they were prepared to issue the arbitral award as a two-arbitrator tribunal. That same day, the Defendants submitted an application to repeat the entire arbitration. On September 30, 2019, the Court of Arbitration communicated to counsel for the Parties that it declined to authorise the remaining arbitrators to continue the proceedings and to issue the arbitral award and instead had appointed a replacement arbitrator.

On October 2, 2019, the Defendants again applied to repeat the proceedings. By letter that same day, the Claimants objected to that application. On October 3, 2019, the Arbitral Tribunal invited the Parties to comment on or before October 7, 2019, on the question of repeating the proceedings. Both Parties complied with this request by the deadline indicated.

Upon enquiry by the Claimants, the Arbitral Tribunal notified the Parties on December 29, 2019, that an internal meeting of the Arbitral Tribunal as newly constituted would now not take place until January 22, 2020. On January 23, 2020, an internal meeting then took place in the presence of the newly appointed arbitrator as well as the chair of the Arbitral Tribunal, although the third arbitrator was, due to illness, unable to attend the meeting either in person or by telephone. Instead, that arbitrator submitted written comments on the revised draft arbitral award to the other members of the Arbitral Tribunal on January 28, 2020.

On March 4, 2020, internal deliberations on the award took place, which were attended by all members of the Arbitral Tribunal in person.

On March 26, 2020, the Arbitral Tribunal notified the Parties that in application of Article 14 of the Swiss Rules, the Arbitral Tribunal had decided to continue the proceedings without repeating any procedural steps.

On April 21, 2020, the Arbitral Tribunal closed the arbitration.

On April 22, 2020, the Arbitral Tribunal notified the Parties with respect to a relevant grievance asserted by the Defendants that all of the relief requested and applications would be comprehensively dealt with in the arbitral award.

B.d. By its Award of May 19, 2020, the Arbitral Tribunal with its seat in Zurich, upheld the Statement of Claim and in essence found that the Framework Agreement of November 5, 1987, together with the amendments and addenda, as well as the X._____ Agreement of May 10, 1988, continued to be valid. The arbitral Award was issued as a majority award.

The majority of the members of the Arbitral Tribunal concluded that the Framework Agreement could not be terminated independently of the equity interests in the target companies. Because both the ordinary Notice of Termination and the Extraordinary Notice of Termination of the Defendants was directed toward solely terminating the Framework Agreement, the Arbitral Tribunal found that that Agreement thus continued to be in force and effect. Because the X._____ Agreement, in line with the Parties' concordant understanding, shared the fate of the Framework Agreement, that Agreement, too, continued to be in force and effect. The opinion of the arbitrator appointed by the Defendants diverged from this, and he prepared a dissenting opinion.

C.
By civil law appeal, the Defendants have requested the Federal Tribunal to set aside the arbitral award of May 19, 2020, and to remand the matter to the Arbitral Tribunal for readjudication.

The Respondents have requested dismissal of the Appeal, to the extent the matter is capable of appeal. By written submission of August 25, 2020, the Arbitral Tribunal commented on a single point in the Appeal Brief.

The Appellants have submitted a Reply and the Respondents have submitted a Rejoinder to the Federal Tribunal.

Reasons:

1.
In the field of international arbitration, a civil law appeal is admissible under the requirements of Art. 190-192 PILA[2] (SR 291) (Art. 77 (1)(a) BGG[3]).

1.1. The seat of the Arbitral Tribunal in the present case is located in Zurich. All of the Parties had their residence, habitual abode und/or registered office 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 (2) PILA).

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

[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).

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 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 relates to the jurisdiction of the arbitral tribunal or its composition, an exception to this rule applies in that the Federal Tribunal may itself rule on the jurisdiction or lack of jurisdiction of the arbitral tribunal or on the rejection of the arbitrator in question (BGE 136 III 605 at 3.3.4 p. 616 with references). One can, likewise, not rule out the possibility that the Federal Tribunal will remand the matter to the arbitral tribunal (Judgements 4A_124/2020[4] of November 13, 2020, at 2.1; 4A_418/2019[5] of May 18, 2020, at 2.3; 4A_294/2019[6] of November 13, 2019, at 2.2).

The Appellants' application is accordingly admissible.

1.2. Only those grievances which are comprehensively set out in Art. 190(2) PILA are admissible (BGE 134 III 186[7] 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 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 at 5, p. 187, with references). Criticisms of an appellate nature are inadmissible (BGE 134 III 565[8] at 3.1 p. 567; 119 II 380 at 3b p.382).

1.3. The Federal Tribunal bases its judgement on the factual findings of the arbitral tribunal (Art. 105(1) BGG). This includes the findings as to the facts which are the basis of the dispute and those as to the course of the previous proceedings, *i.e.* the findings as to the subject matter of the case, including in particular, the applications of the parties, their factual allegations, legal arguments, procedural statements and offers of evidence, the content of a witness statement, an expert report, or the findings as to a visual inspection (BGE 140 III 16 at 1.3.1 with references).

The Federal Tribunal may not rectify or supplement the 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). However, the Federal Tribunal may review the factual findings of the arbitral award under appeal when some admissible grievances within the boundaries of Art. 190(2) PILA are raised against them, or, exceptionally, when new evidence is taken into consideration (BGE 138 III 29[9] at 2.2.1 p.34; 134 III 565 at 3.1 p.567; 133 III

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[4] Translator's Note: The English translation of this decision is available here: https://www.swissarbitrationdecisions.com/atf-4a-124-2020

[5] Translator's Note: The English translation of this decision is available here: https://www.swissarbitrationdecisions.com/atf-4a-418-2019

[6] Translator's Note: The English translation of this decision is available here: https://www.swissarbitrationdecisions.com/atf-4a-294-2019-4a-296-2019

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

[8] Translator's Note: The English translation of this decision is available here: https://www.swissarbitrationdecisions.com/extension-of-arbitration-clause-to-non-signatories-case-of-a-gua

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

139 at 5, p. 141; each with references). Whichever party wishes to claim an exception to the rule that the Federal Tribunal is bound by the factual findings of the arbitral tribunal and seeks to rectify or supplement the factual findings on that basis must show, with precise reference to the record, that the corresponding factual allegations were raised during in the arbitral proceedings, and in accordance with procedural rules (*see* BGE 115 II 484 at 2a, p. 486; 111 II 471 at 1c, p. 473; each with references; *see also* BGE 140 III 86 at 2, p. 90).

2.
The Appellants raise the grievance that the Arbitral Tribunal's composition was in violation of the Rules (Art. 190 (2)(a) PILA).

2.1. The newly constituted Arbitral Tribunal rejected the application to repeat the proceedings by the Appellants that they had made upon the departure of the arbitrator they objected to. The Arbitral Tribunal did not uphold their objection that the fact that the arbitrator had withdrawn would imply that the allegations made against him were factually correct and that, accordingly, the entire arbitration had been tainted at least since January 25, 2019 (*i.e*. the date of the first alleged telephone call between the arbitrator and counsel for the Claimants), as a result of the participation of an arbitrator who was not impartial and independent. As to the grounds of its decision to continue the proceedings, by way of application of Art. 14 of the Swiss Rules, without repeating procedural steps, the Arbitral Tribunal referred to the customary practice and the opinion of scholars regarding the need to repeat the proceedings under the *lex arbitri* and the Swiss Rules. Under those Rules, the Arbitral Tribunal should, following the replacement of a member of the tribunal, decide, on its own discretion whether it should depart from the rule requiring them to continue the proceedings without repeating any procedural steps. Furthermore, the Arbitral Tribunal held that following replacement of an arbitrator after evidentiary hearings had already been carried out, such hearings should, as a basic matter, only be repeated if no suitable record of the hearing was available or if the arbitral award was based on a decisive point which could only be properly assessed by the personal observation of an arbitrator.

The Arbitral Tribunal found that the newly appointed arbitrator was in a position to form an opinion on the points relevant to the Arbitral Tribunal's decision in a manner which was reasonable and fair. The record of the evidentiary hearings of March 25-27, 2019, to which both Parties had referred in their further written submissions, was, the Arbitral Tribunal stated, complete, and no Party had objected to it. In addition, the Arbitral Tribunal said that the witness testimony of Ms. I._____ and Mr. J._____ were not relevant to the decision on the merits in this case. The Arbitral Tribunal noted that the newly appointed arbitrator had personally reached the conclusion, after having studied the Parties' written submissions, the entirety of the files of the case as well as the hearing records, that a repetition of procedural steps was not necessary in order to form a due and proper and fair opinion in line with the duties of an arbitrator. The Arbitral Tribunal found that the Appellants' right to be heard as well as the principle of immediacy were honoured in the present proceedings even if no procedural steps were repeated.

2.2. The Appellants submit that the arbitrator who withdrew from the Arbitral Tribunal was subject to bias after having held a total of five hours telephone conversations with counsel for the Claimants in Spring 2019. Nevertheless, they argued that the arbitrator in question had not withdrawn of his own accord, but

rather continued to participate in the proceedings and exercised a substantial influence on them, *inter alia* by participating in the preparation of a complete draft of the arbitral award. It was only after the Appellants' application of September 15, 2019, they argued, that he withdrew the following day. Since the beginning of 2019, at the latest, up to the time of his withdrawal on September 15, 2019, the Appellants argue that a partisan arbitrator had thus significantly participated in the arbitration as a result of which all of the decisions which were made during this period were rendered by an improperly composed Arbitral Tribunal.

The Appellants argue that, *inter alia*, the participation of a partisan arbitrator at the arbitral hearings had meant that in the course of the oral hearings, as well, substantial decisions to the detriment of the Appellants had been taken, which had had an adverse impact on the questioning of witnesses. Despite his central and active role which the arbitrator in question had taken in the arbitration and, in particular, in the multi-day evidentiary hearings and witness questioning, the Arbitral Tribunal had refused to repeat any of the parts of the arbitration at all. As a result of this, a substantial part of the arbitration being challenged in this case was conducted with a partisan arbitrator and thus by an improperly composed Arbitral Tribunal. Therefore, the challenged award should be set aside under Art. 190(2)(a) PILA.

2.3.
2.3.1. 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. 190(2)(a) PILA. For purposes of assessing whether an arbitrator satisfies these requirements, the courts are required to rely on the constitutional principles which were developed for state courts (BGE 142 III 521[10] at 3.1.1; 136 III 605[11] at 3.2.1 p. 608; 129 III 445 at 3.3.3 p. 454).

Pursuant to Art. 30(1) BV and Art. 6(1) ECHR, any person whose legal claim is subject to an adjudication will have a right to adjudication of their dispute by a judge who is unbiased, unprejudiced, and impartial. This is intended to guarantee that no extraneous circumstances lying outside the proceedings have an improper impact on the court's judgement either in favour 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 cases and thus facilitate a just decision. This guarantee is deemed to be breached when, upon an objective review, there are facts present which could create the appearance of bias or the risk of prejudice (BGE 144 I 159 at 4.3, p. 162; 142 III 521 at 3.1.1, p. 536, 732 at 4.2.2; 140 III 221 at 4.1; Judgement 4A_243/2020 of November 5, 2020, at 4.1, publication planned).

2.3.2. Pursuant to the jurisprudence of the Federal Tribunal, an arbitral tribunal within the meaning of Art. 190(2)(a) PILA may only be the tribunal which actually rendered the challenged decision (BGE 118 II 359 at 3a, p. 360). Where, in the course of the arbitration, an arbitrator is replaced, then an appeal may only

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

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

be directed to challenging the newly composed arbitral tribunal that has issued an arbitral award (Stefanie Pfisterer, in: *Basler Kommentar, Internationales Privatrecht*, 4th Ed. 2020, N. 37 with respect to Art. 190 PILA; Christian Oetiker, in: *Zürcher Kommentar zum IPRG*, Vol. II, 3rd Ed. 2018, N. 37 with respect to Art. 190 PILA; Bernhard Berger/Franz Kellerhals, *International and Domestic Arbitration in Switzerland*, 3rd Ed. 2015, margin no. 1710).

The Appellants fail to grasp the true scope of application of the grounds of appeal in Art. 190(2)(a) PILA where they assert before the Federal Tribunal that the arbitrator who withdrew was biased. They are not asserting any bias of the arbitrators adjudicating in the newly composed Arbitral Tribunal; they do not claim bias either on the part of the Party-appointed arbitrators or on the part of the chair. They thus also fail to submit any challenge applications, but rather apply to the Federal Tribunal to remand the matter to the same arbitral tribunal. The fact that they newly composed Arbitral Tribunal declined to repeat the proceedings (in whole or in part) would likewise not suffice on its own, upon an objective view, to raise the appearance of bias on the part of the arbitrators who rendered the arbitral award under challenge here (*see e.g.* BGE 118 II 359 at 3c, p. 362).

Contrary to what the Appellants appear to assume, the grievance that the newly composed Arbitral Tribunal should have repeated one or the other procedural action due to the alleged bias of the arbitrator who withdrew is accordingly not covered by Art. 190(2)(a) PILA.

2.3.3. One does not find any rule in the PILA on the question of which principles should govern a decision on potential repetition of procedural acts in international arbitration where an arbitrator has withdrawn (Pierre-Yves Tschanz, in: *Commentaire romand, Loi sur le droit international privé* - Convention de Lugano, 2011, N. 30 with regard to Art. 179 PILA; Peter/Legler/Rusch, in: *Basler Kommentar, Internationales Privatrecht*, 4th Ed. 2020, N. 35 with regard to Art. 179 PILA; Berger/Kellerhals, *op. cit.* margin no. 957). In the case under adjudication here, the Parties provided a rule on this procedural question in accordance with Art. 182(1) PILA by referring to rules of arbitration: where a member of an arbitral tribunal is replaced, Art. 14 of the Swiss Rules provides that the arbitration should, as a rule, continue at the point at which the replaced arbitrator withdrew; however, the foregoing remains subject to the arbitral tribunal's right to decide otherwise.

Along these lines, as well, Art. 371(3) Swiss CCP expressly provides in domestic arbitration that – if the parties are unable to reach agreement – the newly constituted arbitral tribunal should rule on the question of repetition of which procedural acts in which the member who was replaced participated. This CCP provision comports with the intentions of the legislature no longer to accord decision-making authority with regard to the further validity of procedural acts to the State court, as under previous law (*juge d'appui*), but rather to vest this decision-making authority in the newly appointed arbitral tribunal. The CCP clause takes account of the notion that the State court is not able to sufficiently delve into the substance of the case to render a decision which is accurate in light of the circumstances (Federal Council Dispatch of June 28, 2006, in respect of the Swiss Civil Code of Procedure [German acronym: ZPO], BBl 2006 7398, No. 5.25.5 with regard to Art. 369(3) E-ZPO). Accordingly, discretion is accorded to the newly constituted arbitral tribunal to render a decision on potential repetition of procedural acts, which takes account of the material circumstances of the individual case, including, in particular, the procedural

posture of the case, the quality of the case files as well as the grounds for removal of the arbitrator (Simon Gabriel/Axel Buhr, in: *Berner Kommentar, Schweizerische Zivilprozessordnung*, Vol. III, 2014, N. 34 with regard to Art. 371 CCP; Philipp Habegger, in: *Basler Kommentar, Schweizerische Zivilprozessordnung*, 3rd Ed. 2017, N. 28 with regard to Art. 371 CCP; *see also* Christian Oetiker, *Eintritt und Wirkungen der Rechtshängigkeit in der internationalen Schiedsgerichtsbarkeit*, 2003, margin nos. 297 *et seq*.)

Irrespective of the procedure chosen by the parties, the arbitral tribunal must in all cases ensure equal treatment of the parties and safeguard their right to be heard in adversarial proceedings, pursuant to the express statutory rule in Art. 182 (3) PILA. The decision on potential repetition of procedural steps must comport with this mandatory requirement (*see* Harold Frey/Martin Aebi, in: Zuberbühler [Ed.], *Swiss Rules of International Arbitration*, 2nd Ed. 2013, N. 9 with regard to Art. 14 Swiss Rules; Lucy Gordon-Vrba/Dominik Vock, in: Arroyo [Ed.], *Arbitration in Switzerland*, Vol. I, 2nd Ed. 2018, N. 6 with regard to Art. 14 Swiss Rules).

2.3.4. It follows from this that, in a case in which an arbitrator has been removed or withdrawn, it is not possible to assert a grievance regarding the arbitral award issued by the newly constituted arbitral tribunal that the arbitrator who was replaced was biased and that the newly constituted arbitral tribunal, by refusing to repeat certain procedural stages, has violated a party's claim to an arbitral tribunal composed in accordance with law pursuant to Art. 190 (2)(a) PILA. In adjudicating an appeal from an arbitral award, the Federal Tribunal is not free in its review of the procedural issue of whether procedural steps should be repeated. The grievance asserted by the Appellants thus fails. Rather, the objections raised in connection with the course of the proceedings should be examined under the aspect of the Parties' right to be heard (Art. 190 (2)(d) PILA) and of procedural public policy (Art. 190(2)(e) PILA).

3.
The Appellants allege that, by its refusal to repeat the proceedings in whole or in part after the arbitrator in question withdrew from the proceedings, the Arbitral Tribunal has violated their right to be heard (Art. 190 (2)(d) PILA).

3.1. Art. 190(2)(d) PILA permits a challenge only where the mandatory procedural rules of Art. 182(3) PILA are violated. According to that latter provision, the arbitral tribunal must, in particular, guarantee the right of the parties to be heard. This essentially corresponds (with the exception of the right to have reasons given) 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 submit their legal arguments, to prove their factual allegations material to the judgement by sufficient evidence submitted in a timely manner and in the proper format, to participate in the hearings and to access the record (BGE 142 III 360[12] at 4.1.1; 130 III 35 at 5, pp. 37-38.; 127 III 576 at 2c; each with references).

The principle of equal treatment requires that parties be treated in the same manner throughout all phases of an arbitration (including any oral hearings, but excluding any deliberations on the award; *see*

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

Judgement 4A_360/2011[13] of January 31, 2012 at 4.1; BGE 133 III 139 at 6.1, p. 143) and that the arbitral tribunal not grant one party something that it denies the other (Judgements 4A_74/2019[14] of July 31, 2019 at 3.1; 4A_80/2017[15] of July 25, 2017 at 3.1.2; 4A_636/2014[16] of March 16, 2015 at 4.2). Both parties must be afforded the same opportunity to argue their positions in the proceedings (BGE 142 III 360 at 4.1.1, p. 361)

3.2. With their allegations and assertions, the Appellants do not make out a breach of their right to be heard. They themselves initially admit that, upon the departure of an arbitrator, a repetition of the proceedings is not necessary in every case if the arbitrator who joins the proceedings at a later point in time is able to form an opinion on the points which are relevant to the decision in a manner which is reasonable and fair. In addition, they recognise that the fact that a verbatim record of a hearing exists may be an argument against repeating a procedural phase (*see* Daniel Girsberger/Nathalie Voser, *International Arbitration*, 3rd Ed. 2016, margin no. 798; Frey/Aebi, *op. cit.* N. 23 with regard to Art. 14 Swiss Rules; Oetiker, *op. cit.* margin no. 301). They likewise do not deny that the arbitral tribunal may refrain from examining witnesses again if, based on the case files, it may be assumed that the witness testimony may not be relevant to their decision. However, they then go on subsequently and incorrectly to assert that after confirmation of the replacement arbitrator, no meeting of all three arbitrators took place at which the arbitral award could have been discussed; the findings of fact and the challenged award do in fact clearly indicate that on March 4, 2020, an internal meeting to deliberate the award took place in which all of the members of the newly composed arbitral tribunal personally participated. The mere fact that the replacement arbitrator was not involved in the procedural orders and was not present at the oral hearings of March 25-27, 2019, does not represent any violation of the Appellants' right to be heard.

By asserting in the proceedings before the Federal Tribunal that the case documentation which was before the replacement arbitrator contained an inadmissible legal opinion and the new testimony of a witness who should no longer have been examined, the Appellants are expressing inadmissible criticism of the challenged award. Similarly, with their assertion that the examination of all of the witnesses which is documented in the record of the hearings was substantially influenced by the arbitrator who subsequently withdrew, they are not demonstrating any violation of their right to be heard which would require a repetition of the oral hearings. They do not show why the fact that the arbitrator who was replaced was able to direct questions to witnesses at the oral hearing (as noted in the record of those hearings) would have prevented the replacement arbitrator who was appointed from forming an opinion in a fair manner based on a record of the hearings. The replacement arbitrator reviewed all of the case files and, with knowledge of the allegations asserted against the arbitrator who withdrew, reached the

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[13] Translator's Note: The English translation of this decision is available here: https://www.swissarbitrationdecisions.com/icc-award-annulled-for-breach-of-the-right-to-be-heard-post-hear

[14] Translator's Note: The English translation of this decision is available here: https://www.swissarbitrationdecisions.com/atf-4a-74-2019

[15] Translator's Note: The English translation of this decision is available here: https://www.swissarbitrationdecisions.com/atf-4a-80-2017

[16] Translator's Note: The English translation of this decision is available here: https://www.swissarbitrationdecisions.com/no-review-assessment-evidence-arbitral-tribunal-under-cloak-right-be-heard

conclusion (in conformity with the other arbitrators) that there was no cause to go back over the procedural phases in question.

In addition, the Appellants do not assert any grievance which is admissible under Art. 190(2) PILA by asserting, contrary to the findings in the challenged award, that "the witness testimony of Witness I._____ was [had been] most definitely relevant to the arbitral award". Rather, what they are doing there is to impermissibly criticise the Arbitral Tribunal's application of the law. The Arbitral Tribunal had considered the witness testimony in question to be of no consequence to their Award, based on the justification that the Award adjudicating the Parties' legal dispute was based on an objective interpretation of the agreements in dispute. Contrary to the view asserted in the Appeal Brief, there is accordingly no case present in which – such as in respect of assessing the credibility of a witness – determinative weight would be placed on the direct observations of the newly appointed arbitrator, which in certain cases might require the witness examination to be repeated (Gary B. Born, *International Commercial Arbitration*, Vol. II, 2nd Ed. 2014, Sec. 12.06[J] p. 1955; Frey/Aebi, *op. cit.* N. 23 with regard to Art. 14 Swiss Rules; Gordon Vrba/Vock, N. 12 with regard to Art. 14 Swiss Rules).

Furthermore, the Appellants do not deny that they had been granted the opportunity during the oral hearing to put questions to the witnesses. It is not clear to us to what extent the presence of the arbitrator who withdrew at the examination of witnesses is supposed to have impaired their ability to enforce their rights as Parties and to contribute their views to the proceedings. In addition, there is no dispute that the newly composed Arbitral Tribunal itself, prior to issuing its Award on October 3, 2019, invited the Parties to comment on the question of repeating the arbitration.

The allegation of a violation of their right to be heard is unfounded.

4.
The Appellants accuse the Arbitral Tribunal of having disregarded procedural public policy (Art. 190(2)(e) PILA).

4.1. Public policy, within the meaning of Art. 190(2)(e) PILA, contains two elements: substantive public policy and procedural public policy. Procedural public policy is violated when fundamental and generally recognised principles have been violated, leading to an unbearable conflict with the sense of justice, such that the decision appears incompatible with the values recognised in a state governed by the rule of law (BGE 141 III 229 at 3.2.1, p. 234; 140 III 278 at 3.1, p. 279; 136 III 345 at 2.1). However, an erroneous or even arbitrary application of procedural provisions does not in itself constitute a violation of procedural public policy. Rather, one can only consider such a violation present if there has been a violation of a rule which is indispensable for safeguarding the fairness of the proceedings (BGE 129 III 445 at 4.2.1; Judgement 4A_416/2020 of November 4, 2020, at 3.1; 4A_232/2013[17] of September 30, 2013, at 5.1.1).

[17] Translator's Note: The English translation of this decision is available here: https://www.swissarbitrationdecisions.com/resorting-auxiliary-performance-contract-does-not-affect-arbitration-clause

4.2. Referring to Art. 38 BGG and Art. 51 CCP, the Appellants argue that it is fundamental principle of Swiss law that official actions in which a court official who is subject to a duty to recuse himself has participated must be set aside and repeated. In saying this, they do not demonstrate any procedural principle which is attributable to public policy. Quite apart from the fact that as a justification for their assertions, they rely solely on individual provisions of Swiss law, which is too slender a reed in light of public policy under Art. 190(2)(e) PILA, they also fail with their assertions to take account of the fact that the rule they have put forward in support of their position, which applies to proceedings before State courts, cannot readily be applied to arbitration. Rather, in the realm of arbitration, the legislature has refrained from undertaking a formal solution and instead has granted the arbitral tribunal the authority, pursuant to Art. 371(3) CCP, to rule in its discretion on a potential repetition of procedural steps (on this point, *see* Section 2.3.3.). It is likewise not possible to identify any generally applicable rule in the realm of international arbitration pursuant to which, in the event that an arbitrator recuses himself or is removed, all of the procedural steps would need to be repeated in which the arbitrator in question participated (*see e.g.* Born, *op. cit.* pp. 1952 *et seq*.; Jean-François Poudret/Sébastien Besson, *Comparative Law of International Arbitration*, 2nd Ed. 2007, margin nos. 435-436).

The grievance asserted that the Arbitral Tribunal has disregarded procedural public policy is unfounded.

5.
The Appeal is rejected, to the extent the matter is capable of appeal. In accordance with the outcome of this case, the Appellants shall, jointly and severally, be liable for the judicial costs and for payment of party compensation (Art. 66(1) and (5) BGG as well as Art. 68(2) and (4) BGG).

Therefore, the Federal Tribunal pronounces:

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

2.
The judicial costs of CHF 80,000 shall be paid by the Appellants (jointly and severally and at one third each *inter se*).

3.
The Appellants shall pay party compensation to the Respondents in the total amount of CHF 100’000 for the proceedings before the Federal Tribunal (jointly and severally and at one third each *inter se*).

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

Lausanne, April 1, 2021

In the name of the First Civil Law Court

of the Swiss Federal Tribunal

Presiding judge:	Clerk of the Court:
Hohl (Ms.)	Mr. Leeman