ICC INTERNATIONAL COURT OF ARBITRATION

CASE No. 15908/FM

KENOZA INDUSTRIAL CONSULTING & MANAGEMENT INC

(British Virgin Islands)

vs/

GIAT INDUSTRIES SA

(France)

This document is an original of the Final Award rendered in conformity with the Rules of the ICC International Court of Arbitration.

International Court of Arbitration
of the International Chamber of Commerce

ICC Case N° 15908/FM

KENOZA INDUSTRIAL CONSULTING & MANAGEMENT INC
British Virgin Islands 6

- Claimant

vs

GIAT INDUSTRIES SA
France

- Respondent

FINAL AWARD

by the Arbitral Tribunal composed of

David Sutton
Arbitrator

Professor Ibrahim Fadlallah
Arbitrator

Michael E. Schneider
Chairman of the Arbitral Tribunal

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1. INTRODUCTION

1. The present dispute arose from a Commercial Agency Contract concluded between the Parties on 29 August 1991 (the Contract or the Agency Contract). On 6 April 1996 the Respondent concluded a contract for the supply of Leclerc combat tanks and related equipment (the Leclerc Contract, occasionally also the UAE Contract) which entitled the Claimant to commission payments in an amount of US$234'875'369.40. Of this a total amount of US$195'120'030.36 has been paid in instalments, the last being made on 22 March 2000.

2. The Claimant seeks as its principal relief payment of the outstanding balance of US$ 39'755'339.04.

3. The Respondent argues that, at the latest since 30 June 2000, when the OECD Anti-Corruption Convention of 1997 became effective in France, performance of the Contract became illegal, void or unenforceable, and the Respondent cannot be required to make any further payment. The Respondent also claims reduction of the Claimant's compensation on other grounds, in particular relying on French law, providing for the adjustment of excessive compensation. It does not seek reimbursement of payments made in the past.

2. THE PARTIES TO THE ARBITRATION

4. **The Claimant**, KENOZA INDUSTRIAL CONSULTING & MANAGEMENT INC, British Virgin Islands (hereinafter referred to as "Claimant" or "KENOZA"), is a company incorporated in the British Virgin Islands, having its principal office and place of business at:

Morgan and Morgan Trust Corporation Limited
Parea Estate
P.O. Box 3149
Road Town – Tortola
British Virgin Islands

In these proceedings, the Claimant is represented by:

Bâtonnier Yves Repiquet and Benoît Descours
Jeantet Associés
87, avenue Kléber
75784 Paris CEDEX 16
Eml: yrepquet@jeantet.fr

and

Me Nigel Hartridge
COTTY VIVANT MARCHISIO & LAUZERAL
91, rue du Faubourg Saint Honoré
F-75008 Paris
Tel, :+33 1 55 73 20 20
Fax : +33 1 55 73 20 21
Eml : n.hartridge@cvml.com

Formerly of
BRANDFORD-GRIFFITH & ASSOCIES
9, rue des Pyramides
F-75001 Paris
Eml: n.hartridge@brandfordgriffith.com

5. **The Respondent** is GIAT INDUSTRIES SA, a corporation organised and existing under the laws of France having its principal office and place of business at:

13, route Minière
F-78000 Versailles

In these proceedings the Respondent is represented by

Me Pierre-Charles Ranouil
Me Benoît Javaux
SCP AUGUST & DEBOUZY
6-8, Avenue de Messine
F-75008 Paris
Eml: odebouzy@augdeb.com
Eml: pcranouil@augdeb.com
Eml: bjavaux@augdeb.com
Until his death in April 2010, Me Olivier Debouzy also represented the Respondent in these proceedings.

3. SUMMARY OF THE FACTS

6. On 29 August 1991 the Parties concluded a Commercial Agency Contract (the Contract or the Agency Contract) whereby the Respondent, as Principal, granted to the Claimant, as Agent, "the prospection and sales agency for the territory of the United Arab Emirates (UAE)" for "contractual products, referred to as "the Contract Equipment" and listed in Appendix 1 to the Contract.

7. According to the express terms of the Contract, the Agent's obligation included the task of promoting the sales of the Contract Equipments, assisting in negotiations and providing other service. The agent was "not empowered to take commitments for the account of the Principal or to act in the latter's name". The Agent undertook not to carry out activities in support of the Principal's competitors. The Agent's remuneration was fixed in Appendix 2. Subject to clauses providing for reduction in specified circumstance, the remuneration amounted to 6.5% of the ex works sale price, before tax and duty, of the products sold in the Territory "whose sales he has initiated and negotiated". The remuneration was to be made pro rata to receipt of payment by the Principal.

8. The Contract was concluded for one year, subject to prolongations in writing or termination on specified grounds. Article 8.3 provided that in case of "termination" the Agent's right to commissions on contracts "initiated by him and having come into force before the expiry of the contact" was preserved. Article 7 provided that "no indemnity shall be due in case of termination or unrenewal of the present contract."

9. On 14 January 1994 Amendment N° 1 was concluded, by which the rate of commission as specified in Appendix 2 to the Contract was maintained, notwithstanding the provision in the Appendix that provided for reduction.

10. The Contract was prolonged from year to year, for the last time on 4 July 1995 with an expiration date of 29 August 1996.

11. On 6 April 1996 the Principal concluded a contract for the supply of Leclerc tanks to the UAE (the Leclerc Contract, also the UAE Contract). This contract has not been produced in the arbitration; but in the context of the presentation in the Terms of Reference the Respondent described the principal terms of the Leclerc contract as follows:

> It was *"for the delivery of 388 combat tanks; spare parts, ammunition and various other deliveries at a price of US$3'613'467'233. Subsequently, the price had to be reduced to US$3'258'467'223. The UAE contract was performed over a long period of time. The last phase*

was scheduled to be completed by the end of 2008; actual completion is in doubt."[1]

12. It is undisputed that, according to the terms of the Agency Contract, the Leclerc Contract initially gave rise to a right to commission payments in an amount of US$234'875'369.40.

13. During the period until 22 March 2000 the Respondent made pro rata payments to the Claimant in a total amount of US$195'120'030.36

14. On 30 June 2000 the OECD Anti-Corruption Convention of 1997 became effective in France.

15. The last payment to the Claimant was made on 22 March 2000. By that time US$39'755'339.04 remained outstanding from the commission as originally calculated.

16. The Claimant commenced arbitration by filing its Request for Arbitration on 29 October 2008.

[1] Terms of Reference, Section 5.3.

4. THE ARBITRATION AGREEMENT AND THE CONSTITUTION OF THE ARBITRAL TRIBUNAL

17. The Contract provides in Article 10, entitled "Law applicable – Arbitration", as follows:

> *"10.1 This contract is subject to French law.*
>
> *10.2 All disputes arising in connection with the present contract which cannot be solved amicably shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators in accordance with the said Rules. Arbitration will take place in Paris."*

18. The Request for Arbitration, dated 29 October 2008, was received by the International Chamber of Commerce on the same date. It nominated Mr David Sutton as arbitrator.

19. The Response to the Request for Arbitration, dated 4 December 2008, was received by the Secretariat on 10 December 2008. It nominated Professor Ibrahim Fadlallah as arbitrator.

20. On 5 February 2009 the ICC International Court of Arbitration decided that this case shall be submitted to a three-member arbitral tribunal and on 4 March 2009 the Secretary General confirmed the Party-nominated Arbitrators as follows:

> David Sutton, Esq
> 20 Essex Street, London
> and also at
> 47, avenue Georges Mandel
> F-75116 Paris
> Eml: dsutton@20essexst.com

and

> Professor Ibrahim Fadlallah
> 61, rue La Boétie,
> F-75008 Paris
> Eml: ibrahim.fadlallah@wanadoo.fr

21. The Parties having agreed that the Chairman of the Arbitral Tribunal be nominated jointly by the co-arbitrators, the Secretary General confirmed on 24 April 2009 upon joint nomination of the co-arbitrators as Chairman:

Michael E. SCHNEIDER, Esq
LALIVE Attorneys-at-law
35, rue de la Mairie
CH-1211 Geneva 6, Switzerland
E-mail: meschneider@lalive.ch

22. The Secretariat of the Court assigned the following counsel to the case:

Ms Francesca Mazza, Counsel,
Replaced by Ms Anne Secomb, Counsel
Replaced by Mr Julien Fouret, Counsel
ICC International Court of Arbitration
38, Cour Albert 1er
F-75008 Paris
E-mail: ica6@iccwbo.org

5. THE ARBITRAL PROCEEDINGS

23. The File was transmitted to the Arbitral Tribunal on 24 April 2009.

24. The Respondent had submitted its Answer to the Request for Arbitration in the French language and requested that this language be used in the arbitration. The Claimant objected to this choice of language and insisted on English as the language of the arbitration.

25. The Tribunal convened a meeting with the Parties in Paris on 16 June 2009 at which it invited the Parties to address the matter of the language of the arbitration, and to discuss the Terms of Reference and the Provisional Timetable.

26. At the 16 June 2009 meeting, the Tribunal rendered its decision on the language of the proceedings. It recorded the decision in the Summary Minutes of the meeting. In the decision the Tribunal noted that the contract and all correspondence between the Parties was in English and that, as confirmed by the Respondent at the hearing, there was no indication of French having been used by the Parties. The Tribunal therefore saw no justification for imposing on the Claimant the use of any other language during the arbitration.

27. The Tribunal did, however, note that the Respondent was a French company which had expressed the wish to allow its representatives to express themselves in French. The Tribunal therefore accepted that the representatives of the Respondent, but not its Counsel, use French when appearing before the Tribunal. Since the Parties had chosen the application of French law, the Tribunal authorised the production of texts relating to that law, such as laws, court decisions and legal writings be submitted in their original without the need for translation.

28. Having decided the language of the proceedings, the Tribunal settled the Terms of Reference on 16 June 2009 in consultation with the Parties, recording the positions of the Parties, as they shall be summarised below, and settling the issues to be decided. The Terms of Reference also contained a number of procedural rules, including the following,

> *"7.1.4 These arbitration proceedings shall be treated as confidential by all participants, save and to the extent that disclosure may be required of a party by legal or regulatory duty, to protect or pursue a legal right or to enforce or challenge an award in bona fide legal proceedings before a state court or other judicial authority."*

and

"8.3 In the present case, given the tax legislation and practice in France and Switzerland[2] both Mr Sutton and Professor Fadlallah are subject to VAT on fees paid to them. The Parties hereby agree jointly and severally to pay to the ICC the VAT which each of these two arbitrators has to pay. They shall do so in the same proportion as that of the costs of the arbitration."

29. When settling the Terms of Reference at the 16 June 2009 procedural meeting, Counsel reserved approval by their respective Parties. In correspondence following this meeting, the Parties and the Secretariat requested changes in the Terms of Reference. Once these changes had been settled, the Tribunal circulated the Terms of Reference for execution by the Parties and by its members and submitted them to the Secretariat on 16 September 2009 and to the Court on 1 October 2009.

30. Also at the Procedural Meeting of 16 June 2009 the Tribunal settled with the Parties the Provisional Timetable and recorded it in the Summary Minutes of that meeting.

31. Further to this timetable and an extension granted by the Tribunal on 2 July 2009, the Respondent provided on 9 July 2009 information concerning pricing and payments pursuant to the Leclerc Contract.

32. On 29 September 2009 the Respondent submitted its Statement of Unenforceability and on 30 September 2009 the Claimant submitted its Statement of Claim.

33. The Parties responded to these submissions on 30 November 2009 by the Claimant's Response to the Statement of Unenforceability and the Respondent's Statement of Defence.

34. A procedural meeting was held on 17 December 2009 in Paris at which the Tribunal examined with the Parties the status of the case and further steps in the procedure. Considering that the unenforceability issue is closely related to other issues of the merits of the dispute, the Parties and the Tribunal confirmed the decision to hold a single evidentiary hearing at the scheduled dates from 17 to 19 February 2010. The Tribunal settled the further procedure concerning a request from the Claimant for accounting information and confirmations from KPMG.

35. At Procedural Meeting of 17 December 2009 various matters concerning the Evidentiary Hearing were examined and decided. The Claimant had produced witness statements of

Mr Abbas Ibrahim Yousef Al Yousef

Jumeirah 1, Dubai UAE

[2] The correct reference should be to the United Kingdom.

According to his declaration the sole beneficial owner of the entire issued share capital of the Claimant company.

and

Mr Alexander Breuer
Unterbachstrasse 13
CH Walchwil, Zug, Switzerland
Certified fiduciary expert.

The Claimant stated that it wished these persons to be heard at the evidentiary hearing. The Respondent identified the main substance matters on which it wished to address questions to the witnesses. The Parties stated that, apart from the testimony at the Evidentiary Hearing, they had no further evidence to offer in support of their respective allegations. In consultation with the Parties the Tribunal fixed the programme for the hearing. The meeting was recorded by Summary Minutes which were sent to the Parties on 23 December 2009 in a document containing also the Updated Procedural Calendar.

36. Further to the procedure adjusted at the 17 December 2009 meeting, the Claimant submitted on 23 December 2009 an Application for Audit by which it requested "a full independent audit"; the request was qualified by the words "if the Arbitral Tribunal is not minded to make its award based on the Claimant's primary claim (paragraph 26 and 27 of the Statement of Claim) or pro rata claim (paragraphs 28 to 34 of the Statement of Claim)". The Respondent replied to the application on 22 January 2010, denying the need for such an audit. At the same occasion the Respondent requested that the Claimant produce its bank statements concerning the two bank accounts on which it received payments from the Respondent and the identity of the beneficiaries of the transfers.

37. On 22 January 2010 the Claimant objected to the questions which the Respondent had announced at the procedural meeting.

38. By its Procedural Order N° 1 of 27 January 2010 the Arbitral Tribunal decided that the questions on the identified subject matters were admitted. Concerning the conditional Application for Audit, the Tribunal announced that it will consider it if and when the Claimant's conditions are met.

39. The Evidentiary Hearing was held on 17 and 18 February 2010 in Paris. The Hearing was attended by the full Tribunal and the Parties' Counsel. The Parties delivered Opening Statements.

40. Following the Opening Statements, the testimony of Mr Abbas Ibrahim Yousef AL YOUSEF of Dubai, UAE, and Mr Alexander BREUER of Zug, Switzerland, was heard. Both witnesses were reminded of their obligation to tell the truth. They confirmed the two witness statements which each of

them had signed and then were questioned by the Parties' Counsel and the Tribunal.

41. At the end of the Hearing Counsel of both Parties requested to be given the opportunity of delivering oral Closing Statements, followed by written Post-Hearing Submissions. Since the Claimant had requested an opportunity to develop in writing its response to the Statement of Defence, it was decided that the Post-Hearing Submissions should be sequential, commencing with that of the Claimant.

42. The Respondent confirmed the requests it had presented in its letter of 22 January 2010 concerning the production of documents.

43. Having heard the testimony of Mr Breuer about the use of the funds received by Kenoza, the Tribunal decided that, for the time being, it did not expect that the requested documents could provide probative evidence for the issues which it had to decide. The Tribunal decided not to order the production. It added that, if it would determine later that the documents could be useful for its decision, it would inform the Parties in time.

44. The hearing was recorded for the purpose of a verbatim transcript by Ms Yvonne Vanvi. This transcript was delivered subsequently to the Parties and the members of the Tribunal. In addition the Tribunal prepared Summary Minutes and Updated Procedural Calendar and submitted them to the Parties on 12 March 2010.

45. Further to a reference made at the Hearing the Claimant was authorised to produce immediately thereafter a document described as "excerpt from Who's Who in France" and containing information on Mr Chiquet.

46. The Claimant submitted its Post Hearing Submission on 15 March 2010. The Respondent did likewise on 2 April 2010.

47. The Tribunal had decided at the Hearing of 17 February 2010 that, apart from the submissions on cost and possible questions from the Tribunal, no further submissions in fact or in law would be admitted after the Respondent's Reply Post Hearing Submission of 2 April 2010, thereby closing the proceedings according to Article 22 (2) of the Rules.

48. Both Parties submitted their cost claims on 2 April 2010. On 16 April 2010, each Party informed the Tribunal that it had no comments on its opponent's cost claim.

49. Subsequently, the Tribunal deliberated in a personal meeting on 26 April 2010 and by correspondence. It had advised the Parties that during its deliberations it might see the need of holding a meeting with them in case

questions arose which it wished to put to them. On 26 April it informed the Parties that no such need had arisen.

50. The last date of signature on the Terms of Reference being 15 December 2009, the six month period provided by Article 24 (1) of the Arbitration Rules would have expired on 15 March 2010. At its session of 4 March the ICC Court extended the time limit to 30 June, at the session of 3 June to 30 September 2010 and at its session of 9 September 2010 to 31 October 2010.

6. THE POSITIONS OF THE PARTIES, THE CLAIMS AND THE ISSUES TO BE DECIDED

6.1. Summary of the Dispute

51. The Parties agree that they concluded a Commercial Agency Contract on 29 August 1991 and an Amendment N° 1 to it on 14 January 1993. They also agree that the Contract and its Amendment were prolonged from year to year, the last amendment being that of 4 July 1995, extending them until 29 August 1996. The Respondent concluded a Contract with the Government of the United Arab Emirates and, following the conclusion of this contract made payments to the Claimant in a total amount of US$195'120'030.36.

52. The Parties disagree about the question whether there are still any further payments due from the Respondent to the Claimant.

6.2. The Claimant's Position and Relief Sought

53. In the Terms of Reference the Claimant's position was recorded as follows:

> *"The Claimant seeks full payment of the outstanding amount of US$39'755'339, plus interest.*
>
> *The Claimant denies the defences based on illegality of the Contract and statutory limitation.*
>
> *The Claimant seeks information from the Respondent necessary for the calculation of its commission."*

54. During the course of the proceedings, the Claimant has developed this position, in particular by explaining that it had fully performed the Contract without any complaint or objection from the Respondent and that it was now entitled to the contractual payments.

55. In particular, the Claimant argued that, in the circumstances, there was no justification for reducing the contractual fee and that there were no grounds of illegality. It pointed out that the "Respondent chose not to call any witnesses and has not produced any internal documents to support its allegations or substantiate its position". The Claimant reproached the Respondent for having "sought throughout these proceedings, to turn a straightforward dispute relating to non-payment of contractual dues into a case involving very serious allegations of corruption against the Claimant without providing any evidence whatsoever in support".[3]

56. In the Statement of Claim the Claimant also affirmed that it suffered "considerable damage to its reputation as a result of the failure of the Respondent to perform the UAE Contract, the adverse press comment

[3] Post-Hearing Submission, p. 11.

surrounding progress, the frequent delays and the consequent loss of other opportunities". Having been "identified with the astounding success of the award of the UAE Contract in the minds of the French business community", so the argument continues, the Claimant's "reputation suffered from the disastrous mismanagement of the UAE Contract by the Respondent". The explanations on this subject then conclude as follows:

> *"The Claimant does not intend to make a separate claim for damages in this respect; however, if the Arbitral Tribunal considers that the remuneration of the Claimant under the Agreement is less than the Total Commission, the Claimant requests that the difference between the amount determined by the Arbitral Tribunal as due and the Total Commission (less the Paid amounts) shall be ordered to be paid to the Claimant as damages for loss of reputation".*[4]

57. As relief the Claimant seeks primarily payment of US$39'755'339.04, plus interest.

58. In the Statement of Claim, the relief sought was presented as follows:

> *"(A) an order for payment by the Respondent of USD 39'755'339.04 being the Total Commission less the Paid Amount;*
>
> *(B) in the alternative, failing an award based on (A) above, an order for payment by the Respondent of (i) an amount calculated as a percentage of the Total commission being the same percentage of the UAE Contract value that is represented by the aggregate of payments received by the Respondent under the UAE Contract as at the date of the arbitral award, less the Paid Amount together with (ii) an amount being the equivalent of the difference between the amount claimed in (A) above and the amount referred to in (i) above, being awarded to the Claimant as damages;*
>
> *(C) in the alternative, failing an award based on (A) or (B) above, an order for payment by the Respondent, after full independent audit of the sales made under the UAE Contract, of (i) an amount equivalent to 6.5% of the total amount of sales under the UAE Contract as shown by such audit, without taking into account any reimbursements effected by the Respondent in favour of the customer, less the Paid Amount together with (ii) an amount being the equivalent of the difference between the amount claimed in (A) above and the amount referred to in (i) above, being awarded to the Claimant as damages;*
>
> *(D) an order for payment by the Respondent of interest at the legal rate accruing on the amount referred to in (A), (B) or (C) above (as the case may be) from the date of due payment until the date of actual payment thereof; and*

[4] Statement of Claim, paragraph 39.

(E) an order for payment by the Respondent all of the of the Claimant's arbitration costs (as defined in Article 31 of the ICC Rules of Arbitration)".[5]

59. The claim for loss of reputation as described above was not formally presented as part of the relief requested.

60. With the Statement of Claim the Claimant presented an "indicative calculation" of its interest claim, showing for the period from 2000 to 2009 an amount of US$3'445'556.[6] With the Post-Hearing Submission the Claimant presented an updated interest calculation starting from 18 June 2008, the date of the notice to pay, until 26 April 2010 and showing an amount of US$1'037'277.[7]

61. Apart from this update of the interest claim and the specification of the claim for arbitration costs (see below Section 8), the Claimant did not update the relief sought.

6.3. The Respondent's Position and Relief Sought

62. In the Terms of Reference the Respondent's position was recorded as follows:

"GIAT's Contract with the Government of the UAE was concluded on 6 April 1993 for the delivery of 388 combat tanks Leclerc, 46 tank-recovery armoured vehicles, 2 training tanks, spare parts, ammunition and various other deliveries at a price of US$3'613'467'223. Subsequently, the price had to be reduced to US$3'258'467'223. The UAE contract was performed over a long period of time. The last phase was scheduled to be completed by the end of 2008; actual completion is in doubt.

The claim is time barred since 23 October 2003.

Since the expiration of the Contract on 29 August 1996, the Claimant has lost any right to commission payments.

The Claimant fails to provide any explanation or evidence about the services provided under the Contract.

Since 30 June 2000 the OECD Anti-Corruption Convention has become applicable in France. In view of the disproportion between the amount of the commission and the service provided, the Respondent decided to

[5] Statement of Claim, paragraph 42.
[6] Statement of Claim, paragraph 38 and Exhibit K-8.
[7] Exhibit K-22.

stop making payments, fearing that payments could be considered acts of corruption.

The price payable under the UAE Contract has been substantially reduced since its conclusion. Consequently, any entitlement which the Claimant may have had by reference to the original contract price also has been substantially reduced.

In any event, the Respondent would be entitled to request that the amount of the commission be reduced."

63. This position was developed during the course of the arbitration. In particular, the Respondent insisted that the Agency Contract was unenforceable on the grounds that "Kenoza intended to commit and indeed committed corruption acts", that it had to be voided because of its illicit cause and that it "lapsed when the OECD anti-corruption convention was transposed into French law". It also argued that the amount already paid to Kenoza "has sufficiently remunerated its alleged activities" under the Agency Contract, the Arbitral Tribunal having the power to do so under French law. The Respondent denied that the Claimant's reputation was damaged.

64. The Respondent also contested the calculation of the claim for interest, arguing that interest can be due only as from the date of the notice to pay sent by Kenoza on 18 June 2008.

65. The relief sought by the Respondent was recorded in the Terms of Reference as follows:

"The Respondent requests that the Arbitral Tribunal dismiss or reduce the claim for one or more of the following alternative grounds

5.4.1 the claim has been time barred since 23 October 2003;

5.4.2 the Contract has become illegal following the transposition of the OECD 1997 Anti-Corruption Convention into French law on 30 June 2000;

5.4.3 the reduction of the Commission as a result of reductions in the price under the UAE Contract;

5.4.4 failure of the Claimant to demonstrate the provision of any services under the Contract.

Award the costs of the arbitration (Article 31.1 ICC Arbitration Rules) against the Claimant."

66. In the Statement of Unenforceability the Respondent presented the first part of the relief requested in the following terms:

" The Arbitral Tribunal is respectfully requested to:

DECLARE and RULE that the contract of August 29, 1991 is void insofar as its cause is contrary to morality as well as French and international public policy;

DISMISS Kenoza's claim for payment of its alleged commissions remaining due;

In the alternative,

DECLARE and RULE that the contract of August 29, 1991 lapsed at the date of entry into force in France of Act of June 30, 2000 (i.e., July 1, 2000);

DISMISS Kenoza's claim for payment of its alleged commissions remaining due;

In addition,

DECLARE and RULE that Kenoza's remaining claim amounts to USD 3,650,223.98;

In any event,

ORDER Kenoza to pay GIAT the costs of arbitration, including an amount of fifty thousand US dollars (USD 50,000) for legal costs incurred by GIAT./.(page 18)

67. These requests were complemented in the Statement of Defence as follows:

"If it rules that the contract of August 29, 1991 was fully enforceable despite the arguments developed by GIAT in its statement on unenforceability, the Arbitral Tribunal is respectfully requested to

DECLARE and RULE that it is empowered to reduce Kenoza's remuneration;

DECLARE and RULE that the commissions already paid to Kenoza have sufficiently remunerated its activities under the contract of August 29, 1991;

DISMISS all of Kenoza's claims;

in the alternative,

DECLARE and RULE that the commissions remaining due to Kenoza must be calculated prorate the payments effectively received by GIAT from the United Arab Emirates;

DECLARE and RULE that the interest at the French legal rate on the commissions remaining due to Kenoza shall accrue from June 18, 2008;

In addition,

DECLARE and RULE that the commissions remaining due to Kenoza must be calculated on the sale price of the products effectively sold by GIAT to the United Arab Emirates;

DECLARE and RULE that the interest at the French legal rate on the commissions remaining due to Kenoza accrue from June 18, 2008;

DISMISS Kenoza's claim for an independent audit of the sales made under the UAE Contract;

In any event,

DISMISS Kenoza's claim for damages compensating its alleged loss or reputation;

ORDER Kenoza to pay GIAT the costs of arbitration, including an amount of fifty thousand US dollars (USD 50'000) for the legal costs incurred by GIAT. (page 19)

68. With the exception of the claim for arbitration costs, which was updated in the Post-Hearing Reply Brief (see below Section 8), no formal updates of the requests for relief were presented by the Respondent.

6.4. Issues to be Decided

69. In the Terms of Reference the Tribunal and the Parties defined the issues to be decided as follows:

> *"The Arbitral Tribunal shall determine all issues necessary for the decision of the case before it, as they result from the Parties' submissions, provided that these submissions are made in accordance with the directions of the Tribunal."*

70. The issues as they arise for the Tribunal's decision are considered in further detail in the following section of this award.

7. THE TRIBUNAL'S DECISION ON THE CLAIMS

7.1. Jurisdiction

71. The jurisdiction of the Arbitral Tribunal to decide the dispute before it has not been challenged. The Parties have not contested that the present dispute is covered by their arbitration agreement contained in the Agency Contract.

72. The Parties confirmed the arbitration agreement in the Terms of Reference which added the following passage:

> *"The Parties accept that the present Terms of Reference be treated as the arbitration agreement for the purposes of enforcement of an award."*[8]

7.2. Time Bar

73. In the Response to the Request for Arbitration the Respondent argued that the claims were time barred. It relied on Article 2277 of the French Civil Code providing a five year time bar for salaries and generally all claims for payment in annual or shorter intervals.

74. On this basis the Respondent argued that claims for the payment of all sums that had fallen due prior to 28 October 2003 were time barred.

75. In the Statement of Unenforceability the Respondent argued that in the interpretation given by French courts to Article 2277 CC the remuneration of intermediaries was "compared [...] to salaries as far as the prescription period set in article 2277 C. civ. is concerned."

76. The Respondent accepted that the initiation of the arbitration proceedings on 29 October 2008 tolled the period of limitation provided by this provision and that commission payments based on payments under the Leclerc Contract made to the Respondent after 28 October 2003 were not time barred. It calculated the payments that had been made subsequent to this date or which were still expected to be received at US$56'157'292. Consequently, the Respondent accepted that the corresponding commission in an amount of US$ 3'650'224 was not time barred.[9]

77. In its Response to the Statement of Unenforceability the Claimant denied that Article 2277 CC was applicable to commission payments as

[8] Clause 9 of the Terms of Reference
[9] Statement of Unenforceability, page 17

those considered here. Relying on several French court decisions, including decisions of the Court of Cassation of 12 June 1928 and 7 July 1978, the Claimant argued that Article 2277 applied only to periodic payments in ascertainable amounts. The payments to which it was entitled under the Agency Contract were neither periodical nor in an ascertainable amount.

78. The Claimant also insisted that periods of limitation started running from the time when a claim was known or could have been known to the claimant. The Claimant stated that it was only on 9 July 2009, when the Respondent produced statements of account of payments received under the Leclerc Contract, that it became aware of the payments and the corresponding claims for commission.

79. In the view of the Arbitral Tribunal Article 2277 CC does not apply to payments for commission which fall due not in regular intervals but depend on prior payments of a third party. Moreover, once it stopped making payments to the Claimant under the Agency Contract the Respondent has failed to inform the Claimant of the amounts that had become payable according to the terms of this contract. Since it cannot be assumed that the Claimant could have known from other sources the time and amount of payments received by the Respondent under the Leclerc Contract, a period of limitation could not have started running until the Respondent provided the necessary information in July 2009. By that time the arbitration had commenced and the period of limitation had been tolled.

80. The Arbitral Tribunal concludes that the claims are not time barred.

7.3. Failure to Perform

81. The Respondent refers to the provisions of the Agency Contract and the description of the Agent's activities contained in it. The Respondent argues that the Claimant failed to demonstrate that it performed the services described there or, for that matter, any services at all.[10]

82. The Claimant denies that it failed to provide the required services. It argues that Mr Al Yousef's "involvement was essential to secure the award of the UAE Contract". It points out that the Contract was renewed and that there were no complaints by the Respondent about an alleged failure to perform the required services.[11]

83. The Arbitral Tribunal has noted the detailed description of the "Agent's obligations" at Article 4 of the Contract. Apart from the testimony of Mr Al Yousef there is no evidence that any of these activities were performed.

[10] Post-Hearing Reply Brief, section 2.1, pp. 6 et seq.
[11] E.g. Post-Hearing Submission, p. 8.

However, apart from this testimony there is also no evidence that the Respondent requested any services.

84. Moreover, there is no indication whatever that the Respondent was dissatisfied with the services of the Claimant or any insufficiency of these services. Indeed, as the Claimant rightly points out, the repeated prolongation of the Agency Contract must be taken as an indication that the Respondent was not seriously dissatisfied with the services. The conclusion is further confirmed by the observation that, after it has obtained the Leclerc Contract, the Respondent paid large sums of money to the Claimant.

85. Therefore, the Respondent has not established that it may refuse payment on the grounds of any failure by the Claimant to perform correctly the services which it was required to perform under the Contract.

86. This being said, the Tribunal does not disregard the fact that, apart from Mr Al Yousef's testimony, there is no evidence in this arbitration to show that the services described in the Contract or any other services were actually performed by the Claimant directly or through Mr Al Yousef. It does consider this fact when addressing the true purpose of the Agency Contract and the equivalence between the services provided and the remuneration claimed.

7.4. Unenforceability of the Agency Contract

87. The Respondent denies any obligation to make further payments to the Claimant on grounds of unenforceability of the Contract. In this respect the Respondent's position takes a variety of forms which are not always clearly distinguished.

88. Relying on Articles 1131 and 1133 of the French Civil Code the Respondent argues that the Agency Contract had an illicit cause and thus is of no effect. The Respondent affirms that the Respondent's "real intention was to facilitate the conclusion of the UAE Contract by offering civil servants or other officials from the United Arab Emirates part of its commission. The contract on which Kenoza's claims are based is consequently both contrary to morality and public policy".[12] It quotes several decisions by French courts which refused to enforce claims for the payment of sums of money intended to be remitted to foreign civil servants.

89. Alternatively the Respondent argues that the Agency Contract "lapsed" when the 1997 OECD Anti-Corruption Convention was transposed into

[12] Statement of Unenforceability, p. 4.

French law by the Act of 30 June 2000, introducing Article 435-3 of the French Penal Code.[13]

90. The Respondent summarised the position under French law in this respect in its Post-Hearing Reply Brief as follows:

> *"...prior to the entry into force of Act no. 2000-595 of June 30, 2000, corruption of foreign public officials was not a criminal offence under French law, but justified the annulment of any contracts whereby one party intended to commit such acts insofar as their cause was contrary to morality and public policy. In other words, prior to July 1, 2000, corruption of foreign public officials was only punished under French civil law, but not under French criminal law."*[14]

91. The Claimant strongly denies that the purpose of the Agency Contract was to make corrupting payments to UAE civil servants or that it made such payments. Relying on the testimony of Mr Al Yousef and Mr Breuer, the Claimant affirms that "the commissions received by the Claimant were not used to pay UAE officials. They were invested in various businesses of Mr Al Yousef ..." in various parts of the world.[15]

92. The Claimant denies the application of Article 435-3 of the French Criminal Code, arguing that "neither party to the [Agency Contract] is a person holding public authority, performing a public service mission, or vested with a public electoral mandate in foreign States or in public international organisations and the Respondent has not provided any evidence that the [Contract] was a means to make any offers, promises, gifts, presents or any advantages to such persons indirectly".[16] It also argues that the payment obligations under the Contract were contracted prior to the enactment of Article 435-3 and that, because of the prohibition of retroactive effect of laws as contained in Article 2 of the Civil Code, this provision does not apply to them.[17]

93. Since the Respondent does not seek reimbursement of past payments to the Claimant it is sufficient for the Tribunal to take note of the incorporation of the 1997 OECD Convention into French law on 30 June 2000 by Article 435-3 of the French Penal Code. This provision reads as follows:

> *Est puni de dix ans d'emprisonnement et de 150'000 euros d'amende le fait, par quiconque, de proposer, sans droit, à tout moment, directement ou indirectement, à une personne dépositaire de l'autorité publique, chargée d'une mission de service public ou investie d'un mandat électif public dans un Etat étranger ou au sein d'une organisation*

[13] Statement of Unenforceability, p. 12 and Post-Hearing Submission, p. 8 et seq.
[14] Post-Hearing Reply Brief, p. 22; emphasis in the original.
[15] Post-Hearing Submission, p. 9.
[16] Claimant's Response to Statement of Unenforceability, paragraph 19.
[17] Ibid. paragraphs 21 et seq.

internationale publique, des offres, des promesses, des dons, des présents ou des avantages quelconques, pour elle-même ou pour autrui, afin d'obtenir qu'elle accomplisse ou s'abstienne d'accomplir un acte de sa fonction, de sa mission ou de son mandat, ou facilité par sa fonction, sa mission ou son mandat.

Est puni des mêmes peines le fait, par quiconque, de céder à une personne visée au premier alinéa qui sollicite, sans droit, à tout moment, directement ou indirectement, des offres, des promesses, des dons, des présents ou des avantages quelconques, pour elle-même ou pour autrui, afin d'accomplir ou de s'abstenir d'accomplir un acte visé audit alinéa.

Translation:

Any person who at any moment, either directly or indirectly, without justification makes offers, promises, or gives gifts, presents, or advantages of any kind, by himself or on behalf of another, to any public official or authority, charged with a mission of public service, or vested with an elective public mandate in a foreign state or public international organization, in order that the official act or refrain from carrying out an act of the official function, mission, or mandate or made possible by that function, mission, or mandate shall have committed an offence punishable by 10 years imprisonment and a fine of 150,000 Euros.

Any person who yields to a person guilty of the above offense, who without justification solicits, either directly or indirectly, offers, promises, gifts, presents, or advantages of any kind, for himself or on behalf of another, in order to act or refrain from carrying out an official act contemplated above shall be subject to the same penalties.

By the adoption of this article, a criminal sanction was added to the civil unenforceability of corruption contracts. From then on, a contract for the purpose of corruption was not only unenforceable but its performance was prohibited and became a criminal offence. If and to the extent to which payments made after that date are intended to be delivered to foreign civil servants, they are covered by the new sanction, even if the contract under which they are made has been concluded before the entry into force of this article.[18]

94. The Tribunal must therefore determine whether the Agency Contract had as its purpose to corrupt civil servants or other acts which rendered it unenforceable against the Respondent and, since 30 June 2000, made it illegal for the Respondent to make to the Claimant any payments under this Contract.

[18] Lamy Droit Pénal des Affaires – 2009, quoted by the Respondent in the Statement of Unenforceability, and reproduced as Exhibit R 12.

95. The Tribunal notes that Contract settles the Agent's "remuneration" by way of "commissions". It states that these commissions "correspond to the full payment of the Agent's trouble and care".[19] There is no indication in the Contract about any other purpose of the commission payments or the use to which they are to be put. On the face of it, the Agency Contract does not show an illegal purpose.

96. In the eyes of the Tribunal this does not exclude the possibility that there was an intention to use the commission payments for corruption or other illegal purposes. According to a decision of the French Court of Cassation a contract may be annulled on the grounds of its illicit or immoral cause even if one of the parties was not aware of the illegal motive which determined its conclusion.[20]

97. The Respondent relies on a number of indicia, arguing that their presence allows the presumption of the corruption purpose of the Agency Contract. Such indicia have indeed been referred to in a variety of texts,[21] including ICC arbitral awards. In this respect, the Respondent relies in particular on the ICC award of 1998 in case N° 8891.[22] In this award the arbitral tribunal explains that corruption payments often are hidden behind innocent sounding contract terms and that, therefore, arbitrators may have no other choice but to rely on indicia; it emphasises that such indicia have to be sound ("sérieux").

98. On the basis of legal writings and arbitral jurisprudence the arbitral tribunal in ICC case N° 8891 indentifies four indicia. Such an attempt to identify indicia is a risky exercise, given the great variety of agency contracts and the scarcity of published cases considered by the arbitral tribunal in that case. However, since the Respondent laid special emphasis on these four criteria and concluded that each of them supported a presumption of corruption, they are examined specifically.

99. The first of these indicia relates to the evidence for the agent's activity. The tribunal in ICC case N°8891 was of the opinion that agency work is normally documented and the failure of an agent to provide evidence for its activity is an indication of illegality; even stronger is the indication if the agent refuses to provide explanations about his services.

100. In the present case, Mr Al Yousef has provided extensive explanations on his activity under the Agency Contract; he did so both in his witness statement and at the hearing. He stated that he gave regular and detailed reports to his counterparts in the Respondent's organisation; he did so in

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[19] Article 6.

[20] Decision of 7 October 1998, Bulletin 1998 I N° 285 p. 198, produced by the Respondent as Exhibit R 8.

[21] See for instance Matthias SCHERER, Circumstantial Evidence in Corruption Cases before International Arbitral Tribunals, [2002] International Arbitration Law Review, Vol. 5 Issue 2, 29 – 40, with a table of relevant arbitration cases.

[22] [2000] Journal de Droit International, 1076 – 1085, produced by the Respondent as Exhibit R 10.

meetings in which his counterparts took notes and he had his own notes. As a precautionary measure he destroyed his notes in order "to protect GIAT's confidentiality".[24] He explained that "we have to be very careful due to the competitors [...that] there is no leakage of information".[25]

101. The Respondent accepts that "confidentiality is a crucial aspect of the negotiations of defence contracts". It then adds: "that does not mean that the preparation and negotiations of these contracts are exclusively oral and that the persons involved do not exchange written correspondence or, more generally, do not keep written documents".[26] This is a surprising statement coming from the Respondent which did not produce any evidence at all concerning the work of an agent to which it made payments in very high amounts. Indeed, the Respondent has been unable to shed any light on the negotiations and on its relations with the Claimant. According to the Respondent, the Claimant's activity has not left any traces in the Respondent's organisation that could be produced in the arbitration. [27]

102. The Tribunal concludes that, in the circumstances of this contract, the absence of documentary evidence on the side of the Claimant may well be explained by fact that the agent's activity concerned an important defence contract with its requirement of confidentiality. In any event, there is no indication whatsoever that the Respondent requested the Claimant to provide, in addition to the oral reports, written documents and reports. The Tribunal concludes that, in the circumstances of the present case, the absence of written evidence for the Claimant's activity cannot be taken as an indication of an illicit purpose of the Contract.

103. The second indication given in ICC award N° 8891 and referred to by the Respondent is the duration of the agent's activity. The only support for this consideration given in the ICC award is the reference to another ICC award which took as an indication of corruption the surprising speed ("étonnante rapidité") with which the agent succeeded in obtaining the desired contract with the Iranian Government. In the Respondent's view the fact that the Agency Contract in the present case was concluded initially for one year must be taken as such an indication of corruption.

104. Now, Mr Al Yousef explained that, before the conclusion of the Agency Contract, he had already provided substantial services, which culminated in a contract for the funding by the UAE Armed Forces of the development of the Leclerc tank. It was only once this initial success had been achieved that the Agency Contract was concluded.[28] These explanations have not been contradicted by the Respondent.

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[23] Transcript, p. 122.
[24] Transcript, p. 123.
[25] Transcript, p. 121.
[26] Post-Hearing Reply Brief, p. 12.
[27] Respondent's post-hearing reply brief, paragraph 2.2.1
[28] Al Yousef First Witness Statement, paragraphs 14 – 15.

105. In any event, it took over four and a half years from the time of the conclusion of the Agency Contract on 29 August 1991 until the Leclerc Contract was concluded on 6 April 1996. During this period the Claimant was expected to work without any claim to remuneration or compensation of costs. This can hardly be considered as surprisingly short and, in itself, does not appear as an indication of corruption. However, the duration of the time during which services were provided must be considered in the context of the equivalence between the services provided and the remuneration.

106. The third indication of corruption mentioned in award N° 8891 and on which the Respondent relies concerns the type of remuneration. According to the award, commission payments based on the value of the contract obtained by the agent are a sign of corruption. In particular remuneration of consultancy services in the form of a percentage is said to be unusual. This statement in the ICC award relies on an article by Kosheri and Leboulanger,[29] where a statement to this effect is made without any supporting reference.

107. The Respondent relies on the asserted unusual nature of this form of remuneration, although according to Mr Breuer's uncontradicted witness statement the text of the Agency Contract was in the form of "the standard Giat draft Commercial Agency Contract".[30] Indeed, as the Claimant rightly points out, this form of remuneration of commercial agents is far from unusual. In the ICC Practice Manual on Fighting Corruption (of which the Respondent produced an extract of a different edition), it is indeed described as the usual form of compensation of an agent.[31] This observation is confirmed by other studies which show that in agency contracts percentage fees are the rule rather than the exception.[32]

108. The Arbitral Tribunal concludes that the form of remuneration in the Agency Contract cannot be taken as a persuasive indication for a corrupt purpose of that contract.

109. The fourth indication relied upon by the Respondent concerns the rate of the commission agreed. The ICC award considers this as the most important criterion. Relying on a commentary of Derains relating to another award, the Respondent affirms that it is rare in practice for an agent to receive more than 1 or 2% commission. Statements of this type are risky, especially if they rest on such thin evidentiary basis. The comparative table of arbitration cases published by Scherer shows that, in the sample available to him, in most cases the commission rates were above 2%.

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[29] Ahmed El Kosheri and Philippe Leboulanger, L'arbitrage face à la corruption et aux trafics d'influence, [1984] Revue de l'arbitrage, 3 – 18 at 7.
[30] Witness Statement Breuer, paragraph 6.
[31] François Vincke and Fritz Helmann, Fighting Corruption, A Corporate Practice Manual, Chapter 4, p. 59, produced by the Claimant as Exhibit K 11.
[32] Abdulhay Sayed, Corruption in International Trade and Commercial Arbitration,2004, in particular pp. 136 et seq.; Scherer, op. cit. p. 32 with further references.

110. In this context the ICC award on which the Respondent relies concludes that one must compare the amount of the fees with the services provided by the agent. This does indeed appear as the decisive criterion. The higher the rate of the commission the greater the concern that it is intended not only to remunerate the work of the agent but also provide the means for payments to those who make the decision. But, depending on the work required and the risk taken by the agent, a high rate may be justified. The issue requires careful analysis and cannot be decided simply by reference to a particular percentage.

111. The Tribunal accepts that the equivalence between the services of the agent and the risks taken by him are a particularly important indication for a possible corrupt purpose of a contract. It will consider below in greater detail this equivalence in the context of the present case.

112. In the Post-Hearing Reply Brief the Respondent presents essentially the same indicia but adds some considerations concerning the corporate status and the payment modalities. The Respondent argues that the Claimant "has its principal office and its bank accounts in tax havens". In the Respondent's view there was no justification for Mr Al Yousef to establish a company in the British Virgin Islands and to use accounts in Gibraltar and Liechtenstein. The Respondent also relies on the testimony of Mr Breuer who stated that he transferred to the holdings of Mr Al Yousef the funds that had been received by Kenoza.

113. The Respondent sees in these circumstances a further justification for the presumption "that Kenoza was set up to provide a convenient corporate vehicle to corrupt officials from the UAE according to Mr Al Yousef's instructions".

114. The Tribunal notes Mr Breuer's explanations according to which that he was requested by Mr Al Yousef to set up a company in a suitable jurisdiction and he recommended the BVI as "a stable legal environment, a proper jurisdiction as to company law, an efficient handling of the company's affairs, and to keep the company in good standing, and to avoid unnecessary costs. So to be cost effective."[33] The banking connections for the operation were chosen, according to Mr Breuer, on the basis of personal connections of Mr Al Yousef's banking adviser in Switzerland.[34]

115. Apart from using the expression "tax haven" the Respondent has not attempted to demonstrate that the jurisdiction in which Kenoza was created and those in which its bank accounts were located must be taken as indicia for intentions of corruption. It may well be that payments for such purposes can be operated through the vehicles chosen by Mr Al Yousef more easily than through others. But for an internationally operating business man, there are also perfectly justifiable reasons for choosing such a structure. Without any further demonstrations the Arbitral Tribunal is not persuaded

[33] Transcript p. 225.
[34] Transcript p. 228 – 230.

that the country of incorporation of Kenoza and the choice of the bank accounts is a particularly compelling indication for a corrupt purpose of the Agency Contract.

116. The Tribunal concludes that, in the circumstances of the present case, the equivalence between the remuneration, on the one hand, and the services of the agent and the risks taken by him, on the other hand, are a particularly important if not the principal indication for a possible corrupt purpose of a contract. The proportion between the agent's remuneration and his services and risks will be considered below in section 7.7.

7.5. The Reduction of the Commission as a result of Reductions in the price of the Leclerc Contract

117. In the Answer to the Request for Arbitration the Respondent argued that in the year 2000 the Government of the UAE suspended the performance of the Leclerc contract requiring renegotiation about its terms. Eventually, so the Respondent explained, modified terms were agreed with the UAE which upset the balance of the Leclerc Contract (described by the terms "changé l'équilibre économique" and "bouleversement des conditions financières"). In the Terms of Reference this argument was expressed as follows:

> *"The price payable under the UAE Contract has been substantially reduced since its conclusion. Consequently, any entitlement which the Claimant may have had by reference to the original contract price also has been substantially reduced."*

118. The Claimant replied in the Statement of Claim that any reductions which the Respondent may have had to concede to the UAE Government during the performance of the Leclerc Contract were due to the Respondent's own "mismanagement".[35]

119. The Claimant is of the view that subsequent reductions in the Leclerc Contract do not affect its right to commission and that, in any event, no evidence for the circumstances of the reduction were shown.

120. The Tribunal notes that any reductions in the price of the Leclerc Contract which affect future payments automatically affect the payments of the Claimant, since commission payments under the Agency Contract are made pro rata the amounts collected by the Respondent. To the extent to which reductions in the price lead to lower collection, the adjustment is automatic.

[35] Statement of Claim, paragraph 23.

121. The Respondent's objection could also be understood in the sense that the reductions it had to concede to the UAE Government had such an unbalancing effect on the economics of the Leclerc Contract that the adjustment pro rata the collections would not have been sufficient; the overall commission amount might have been affected.

122. However, if that had been the sense of the Respondent's argument, there was not a shred of evidence to support it.

123. The Tribunal concludes that there is no justification to adjust, as a result of any reduction in the price of the Leclerc Contract, the Claimant's contractual remuneration other than by virtue of the provision concerning commission payments pro rata the collections by the Respondent.

7.6. Adjustment of the Remuneration under French Law

124. In the Statement of Defence the Respondent introduced a new line of defence. Relying on consistent jurisprudence of the French courts since the XIXth century, the Respondent argued that courts and arbitrators applying French law have the power to reduce the remuneration of agents if it is "excessive in the light of all of the circumstances of the case, in particular the services effectively performed by said agent".[36]

125. In support of this position the Respondent cites a number of decisions of French courts, in particular a decision of the French Court of Cassation of 9 March 1976 which relies on the

> *"... pouvoir souverain reconnu aux juges du fond de déterminer le salaire dû à un intermédiaire en tenant compte des circonstances de la cause et des servies rendus et de réduire le cas échéant la rémunération qui avait été contractuellement prévue ."*[37]

126. The Claimant denies that an arbitral tribunal has the power to revise the terms of a contract. It affirms that the present arbitral tribunal "is not competent to adjust the amount of such remuneration". According to the Claimant it "is a principle of French law that the court is not competent to re-write an agreement made between the parties where the provisions are clear and unequivocal".[38]

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[36] Statement of Defence p. 7.

[37] Cour de Cassation, Chambre Commerciale, 9 March 1976; produced as Exhibit R22 and translated by the Respondent as ""... the discretionary power granted to courts ruling on the merits to determine the remuneration due to an intermediary given the circumstances of the case and the services rendered, and to reduce the remuneration which had been contractually provided, as necessary" (Statement of Defence, p. 7.

[38] Statement of Claim, paragraph 20.

127. According to the Claimant the jurisprudence on which the Respondent relies is inapplicable in the present case. The Claimant argues in particular that the decisions cited by the Respondent concern cases where (i) the services had not been fully performed, (ii) the services performed were of poor quality or (iii) inadequate. The Claimant also argues (iv) that "no revision of a contractual price is possible when payment has occurred after the performance of the services provided for in such contract" and (v) where the price is a "fixed sum".[39]

128. The Respondent objects first of all by insisting on the general nature of the principle, as expressed in particular in the quoted passage from the 1976 decision of the Court of Cassation. It then discusses the specific circumstances in the cited cases, arguing that they do not contain any reasons why the courts' discretionary powers do not apply in cases as the present one.[40]

129. The Tribunal notes first of all that the power of the courts to adjust the remuneration under a contract has been recognised in French law for a very long time, the first case normally cited dating from 1824.[41] Since then the rule granting such power has been applied consistently and the 1824 decision is included in what might be called the "leading cases" of French law.[42] The rule is based on the need perceived by French law to ensure a contractual balance and the equivalence of the parties' respective contributions.[43]

130. The cases to which the Claimant refers concern situations which in one or another aspect differ from the present one. An examination of the decisions shows that the decisions themselves and the notes by learned authors which accompanied their publication in general confirm the principle of the court's power to revise contractual remuneration. There are, however, two situations which need closer consideration.

131. The first of these situations concerns those where the compensation is agreed in a fixed amount. There has indeed been some argument by French legal writers to the effect that agreements for a fixed remuneration are excluded from revision. The argument refers to situations where a party commits to provide certain services at a fixed price. The client knows in advance the price it has to pay and the service provider takes the risk of the cost and effort required to perform the obligations. In such a situation some authors are of the opinion that there should not be revision of the remuneration by the courts. The view finds some support in decisions of the

[39] Post-Hearing Submission, pp 2 – 4.
[40] Post-Hearing Reply Brief, p. 24 – 26.
[41] Req. 11 March 1824, Sirey, Chr.
[42] Capitant, Terré and Lequette, Les grands arrêts de la jurisprudence civile, tome 2, Dalloz, 11th ed. (2000).
[43] Ch. Albiges, Le développement discret dela réfaction du contrat, Mélanges Cabrillac,(1999) p. 13 et seq.

courts;[44] but a recent decision of the Court of Cassation indicates the contrary.[45]

132. It must be noted, however, that a critical element in this discussion is the risk which the service provider takes. Thus one of the learned authors states that agreement of a lump sum excludes revision of the remuneration, provided the risk taken by the service provider is real.[46] In any event, as the Respondent rightly points out, the fee agreed in the Agency Contract is not a lump sum but a percentage and depends on the value of the contract which the principal eventually may conclude.

133. The second situation which needs closer consideration arises when the services have been performed and payment has occurred in compliance with the contract. The Claimant argues that in such a situation the remuneration may not be revised.[47] One may indeed question the good faith of a party which accepted the services of an agent and, once the principal contract was concluded and the full amount of the remuneration was known, made the contractual payments on account of that amount, but then seeks reduction of the remuneration and reimbursement. However, as the decision of the Paris Court of Appeal of 30 September 2009 shows, revision of the remuneration in such a situation is not excluded by French law; the court even ordered reimbursement of the overpayment.[48]

134. In light of these considerations, the Arbitral Tribunal concludes that, as a matter of principle, remuneration as that provided by the Agency Contract may in French law be revised by the courts. This all the more in a situation where the principal claims reduction not of past payments but only of those which are still outstanding.

135. The question remains whether an arbitral tribunal proceeding under the ICC Rules has the same power.

136. It has not been contested in this arbitration that the powers of adjusting the contractual compensation which French law confers on the courts are equally conferred on arbitrators applying French law.

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[44] Paris Court of Appeal, 15th Ch., sect. B, 30 January 2004, n°2002/15444, X. and SA Emballage 48 v. SA ING Barings, Bulletin Joly Bourse, produced as Exhibit K 18: the case concerns the services of a bank for a lump sum; the court finds that the bank correctly performed the agreed services and no reduction of the lump sum was justified on grounds of a shorter duration of the services. When concluding that there was no justification for a reduction of the lump sum fee, the court adds: "étant du reste rappelé que le caractère forfaitaire de la commission convenue s'y oppose".

[45] Court of Cassation, 1st civ., 5 May 1998, Bull. Civ. 1, n° 168; deciding that the request for reduction of the remuneration of a genealogist in a heritage search could not be rejected on the sole grounds that a fixed amount had been agreed.

[46] See Rontchevsky in Bulletin Joly Bourse, May, June 2004, p. 300 fn 14, commenting the ING Baring decision of the Paris Court of Appeal and referring to Bénabent, Les contrats spéciaux civils et commerciaux, 2001, 5th ed. N° 568

[47] Post-Hearing Submision, p. 3.

[48] Decision produced as Exhibit R44.

137. When considering whether it should make use of these powers, the Arbitral Tribunal notes that it has its mandate from the Parties. The Contract which contains the arbitration clause also sets the rate for the calculation of the remuneration of one Party by the other. It might appear contradictory with the mandate which the Parties have conferred on the Tribunal if the Tribunal failed to apply the Contract as the Parties had agreed. This all the more as the Arbitration Rules which the Parties chose in the present case expressly require in Article 17 (2) that "in all cases the Arbitral Tribunal shall take account of the provisions of the contract ...".

138. Such doubts may have some justification in cases where the parties have chosen a law with which they were not familiar, for instance because that law was "neutral". The law so chosen may contain rules which might appear surprising to the parties, especially if they render ineffective the agreement of the parties or essential elements of it.

139. This is not the situation in the present case. Irrespective of the question whether both or only one of the Parties was familiar with the chosen law, it is important to note here that the provision of French law considered in the present case is not one that renders the parties' contract ineffective; it merely adapts it to the circumstances as they emerge during its performance. This possibility of adapting important terms of the contract responds to a concern with the contractual balance and the equivalence of the parties' contributions[49] which is perhaps more advanced in French law than in some others.

140. The rules and powers concerning the adjustment of the compensation thus must be considered as an essential feature of French law. Depending on the perspective, this feature of French law may be attractive, leading parties to chose it for their contract. Such features are supportive of the contract and should not be seen as creating a conflict with the Tribunal's duty to take account of the Contract. In the absence of clear indications to the contrary, there would seem to be no justification to assume that the parties did not wish this and similar provisions applied to their contract.

141. The Arbitral Tribunal concludes that it has the power to reduce the Claimant's compensation resulting from the rate agreed in the Contract, if this appears appropriate in the circumstances of the case and in light of the services rendered by the Claimant.

7.7. The Claimant's Services in Proportion to its Remuneration

142. The Claimant has received commission payments in an amount of US$195'120'030.36; it claims in this arbitration an additional amount of

[49] Albiges, Le développement discret de la réfaction du contrat, op. cit., p. 13 et seq.

US$39'755'339.04. The total remuneration to which the Claimant sees itself contractually entitled is therefore US$234'875'369.40. For the Respondent such remuneration is totally out of proportion with any services which the Claimant may have provided. Therefore the remuneration it must be taken as proof for the illicit purpose of the Agency Contract and, in any event, it must be reduced to an amount of at most that which has already been paid.

143. It is undisputed by the Parties that any services that were provided under the Contract were those of Mr Al Yousef. No mention was made of contractual services by any other person or entity. The Tribunal therefore limits its examination of the contractual services to those of Mr Al Yousef.

144. As explained above, no records were produced in this arbitration about the activities deployed by Mr Al Yousef or by anybody else. The only information which was provided to the Tribunal in this respect are the Claimant's accounts in its submissions and those of Mr Al Yousef in his witness statements and at the Hearing on 17 February 2010. The Respondent has not provided any evidence nor even information about the services of Mr Al Yousef.

145. As the Respondent pointed out, Mr Al Yousef, as the economic owner of the Claimant company, has a very direct interest in the outcome of the case. The Tribunal has taken this into account when assessing the evidence provided by him. However, since the Respondent failed to provide any evidence concerning the Claimant's services or at all, the Tribunal was deprived of any other source of information against which it could test the veracity of Mr Al Yousef's testimony.

146. The first account which Mr Al Yousef gave of his activity was in his witness statement. There, he described his activity and the contribution which he made to the transaction of the Leclerc tank. He started with the observation that, when around 1989 the UAE armed forces were seeking to renew and reinforce their armaments and, in particular, their fleet of battle tanks, the competition was between Germany, Brazil and the United States; France and the Respondent initially played no role.[50]

147. Mr Al Yousef explained that by that time the Leclerc tank was a new concept, "effectively a paper project".[51] Selling something that existed only on paper was a challenge for him which, after some consideration and an assessment of the possibilities, he was prepared to accept.[52] Mr Al Yousef went on to explain:

> "*My discussion with the UAE armed forces led me to believe that if GIAT was willing to cooperate with them and change and adapt the Leclerc tank with respect to its engine, its electronics and its air conditioning*

[50] WS, paragraphs 6 and 7.
[51] Ibid, paragraph 6.
[52] Paragraph 8.

system, they would have a good chance as against the competition. The idea was to choose the best parts of the competitive products and pull them together to make the best tank in the world. ..."[53]

148. In this context Mr Al Yousef explained in his witness statement that a particularly critical factor was the engine for the tank; he advised to use "an engine manufactured by the German company MTU"; but that raised a political obstacle due to German legislation on arms exports to the Middle East. Mr Al Yousef provided the solution:

> *"I undertook the lobbying of the German authorities and was instrumental in ensuring that the necessary approval or waiver was obtained, a process which involved decision-makers at the highest levels in both France and Germany."*[54]

149. As the next step in Mr Al Yousef's account, he intervened to provide funding for the development of the Leclerc tank to be sold to the UAE. Drawing on his experience with a joint development of the Exocet missiles, Mr Al Yousef, according to his written account,

> *"... negotiated with the UAE armed forces for them to provide a commitment of 60 million French francs to finance the development of the Leclerc tank with the MTU engine and the capacity to carry a 140mm turret gun, as against the 120mm gun proposed at the time. The counterpart to this funding commitment was that the UAE would benefit from a royalty payment on future global sales of the Leclerc tank. I was sure that with this commitment and royalty package, the UAE would be almost bound to enter into the principal contract for the purchase of the Leclerc tanks, on successful completion of the development."*[55]

150. Once this *"funding commitment had been obtained"*, the Respondent signed the Contract with Mr Al Yousef, "through [his] company Kenoza". The cooperation that followed is described by Mr Al Yousef as follows:

> *"I developed a good working relationship with the GIAT team and spent a considerable amount of time with them advising on the best way to present their products from the point of view of UAE culture, psychology and the business and governmental environment. I relayed to them at each stage, what the UAE authorities were thinking, what they wanted to know, how to build their confidence and what were the priority technical issues. ..."*

151. This development was successfully completed and the Respondent was awarded the contract by the UAE Armed Forces. Mr Al Yousef describes the importance of this contract for the Respondent, preserving it from "in all likelihood" becoming "technically bankrupt". This contract, to which he refers by a description in the French press as "the contact of the century",

[53] Paragraph 11.
[54] WS paragraph 13.
[55] WS paragraph 14.

"was also of major importance for the French armed forces, which were not able to buy the Leclerc tank unless an export client was secured..."[56]

152. The activity thus described in Mr Al Yousef's witness statement is very important. Services of this nature and importance exceed what one normally expects of an agent and what one might expect when simply reading the Contract. Indeed, Mr Al Yousef claimed in his witness statement to have not only assisted in the sale of a product; he described himself as having made a major contribution to the development of this product, making it responsive and attractive to the potential client. One had to conclude from the witness statement that, without the services of Mr Al Yousef and his development of the project in the UAE, the Leclerc tank would not have had much of a chance to be implemented.

153. It would not be surprising that a company such as the Respondent pays a substantial amount as remuneration for services of such importance and value.

154. Against the background of this description in his witness statement, Mr Al Yousef's testimony at the hearing came as somewhat of a surprise.

155. Mr Al Yousef continued to insist on the frequency of his meetings, stating that since 1989 he flew three or four times a week to France discussing with personnel of the Respondent.[57] However, as it turned out when he was questioned at the Hearing, Mr Al Yousef's entire discussions with the Claimant and its personnel passed through two persons, Mr Pierre Chiquet, Chairman of GIAT Industries, and Mr Philippe Léthier; they were the only persons with whom Mr Al Yousef had direct contact. One of the members of the Tribunal summarised the answers received from Mr Al Yousef:

> *"... Mr Chiquet and Mr Léthier took technical information from you and gave them to their people?*
>
> *THE WITNESS: Yes ...."*[58]

156. At the end of the discussion about this subject, the position was summarised in the following exchange:

> *"THE CHAIRMAN: Let's try this again. You had technical information to convey to GIAT?*
> *THE WITNESS: Correct.*
> *THE CHAIRMAN: This technical information was conveyed to Chiquet and Léthier?*
> *THE WITNESS: Precise.*
> *THE CHAIRMAN: Nobody else?*

[56] WS paragraph 17.
[57] Transcript, p. 128.
[58] Transcript, p. 140.

THE WITNESS: Yes, absolutely.
THE CHAIRMAN: Only to Léthier and Chiquet?
WITNESS: Precisely."[59]

157. The technical issues which were thus conveyed to the technicians in GIAT through its Chairman and Mr Léthier concerned the need for providing "*air conditioning, climatisation*" for the Leclerc tank, [60] the related issue of the power of the tank engine and the recommendation to increase the size of the gun from 120mm to 140mm.[61]

158. However, the information which Mr Al Yousef thus conveyed to the Respondent was not gathered at the source. It was not the result of discussions with the persons in charge of the subject in the UAE. His testimony was clear:

"*THE CHAIRMAN .....*
You told us, on the French side, you had only two people you talked to, and that was Chiquet and Léthier. That was on the French side.

On the UAE side, did you have people with whom you discussed the Leclerc project?

THE WITNESS: Look, I don't need, in fact

THE CHAIRMAN: Whether you need –

THE WITNESS: Answer, no.

THE CHAIRMAN: You didn't have any?

THE WITNESS: No.

THE CHAIRMAN: So all your contribution to the development of the Leclerc for the sale, so that GIAT could sell it in the Emirates, was what you, on your own, thought was necessary in the Leclerc?

THE WITNESS: Absolutely.[62]

159. Even more surprisingly it emerged from Mr Al Yousef's testimony, that neither the Minister of Defence nor anyone else in the Ministry nor anyone in the UAE knew, during the contract negotiations and until the Leclerc Contract was concluded, that Mr Al Yousef was associated with the Leclerc project:

"*THE WITNESS: ...*

[59] Transcript p. 141 to 142.
[60] Transcript p. 142.
[61] Transcript p. 207.
[62] Transcript, ppé 147 to 148.

I mean, I was secret. I am working for GIAT consultant and I am not supposed to be exposed, because, for the simple reason – excuse me, you see, because for simple reasons, I never wanted to be close to the UAE officer at all, because I don't want them any accusation of corruption, in fact.

THE CHAIRMAN: Mr. Al Yousef, there is nothing wrong. I am just trying to understand. So General Sultan [the Minister of Defence], he knew you, but he didn't know that you were pushing Leclerc?

THE WITNESS: Absolutely not.

THE CHAIRMAN: Did anybody else in the Ministry know that you were pushing or supporting Leclerc?

THE WITNESS: Absolutely not.

THE CHAIRMAN: Who else in the Emirates knew that you were promoting Leclerc?

THE WITNESS: Absolutely not.

THE CHAIRMAN: Nobody?

THE WITNESS: Nobody."[63]

160. The manner in which Mr Al Yousef understood his role in the UAE was summarised in the following exchange, shortly thereafter at the Februray Hearing:

"THE CHAIRMAN: You are saying, on the Emirates' side, you kept behind the scene, you were not associated with Leclerc?

THE WITNESS: At all.

THE CHAIRMAN: But once the deal would have become known, it would have been found out that you were the mastermind behind it?

THE WITNESS: Absolutely."[64]

161. Eventually it emerged from the oral testimony that Mr Al Yousef's role consisted in informing Mr Chiquet and Mr Léthier about "*the UAE environment of business*", providing his "*local know-how being a UAE citizen*".[65] Specifically with respect to the needs of the Ministry of Defence, Mr Al Yousef's role consisted in helping Mr Chiquet and Mr Léthier understand what they themselves had heard in the Ministry.

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[63] Transcript, pp. 152 to 153.
[64] Transcript p. 154.
[65] Transcript p. 160.

"THE CHAIRMAN: [....] In your statement, you say, I relay to them at each stage what the UAE authorities were thinking. How did you find out what the UAE authorities were thinking?
[...]

THE WITNESS: Because each time the GIAT people go officially and they have the meeting with official people of the UAE Armed Forces, and therefore they come and brief me. So when they brief me of their meeting, in fact, and then they have questions what UAE think they want from us.

THE CHAIRMAN: So they told you – Mr Chiquet told you what General Sultan and the others told him, and you explained to Mr Chiquet what they were really thinking?

THE WITNESS: Precisely. So I was interpreting.

THE CHAIRMAN: And you know that because you are from the region?

THE WITNESS: Precisely.

THE CHAIRMAN: There was no other source of information?

THE WITNESS: No, absolutely no.

THE CHAIRMAN: You had no contact – sorry, you told us before you were not wearing the label of GIAT or Leclerc, but you had no other contact with the Ministry of Defence.

THE WITNESS: Not at all.

THE CHAIRMAN: So it was your capacity of interpreting what they told you they had heard?

THE WITNESS: Exactly.

THE CHAIRMAN: That is how you –

THE WITNESS: Absolutely."[66]

162. In his witness statement Mr Al Yousef also had highlighted as one of the major obstacles for the development of the project legislation in Germany prohibiting the export of arms to the Middle East. In the witness statement he explained:

> *"I undertook the lobbying of the German authorities and was instrumental in ensuring that the necessary approval or waiver was obtained a process which involved decision-makers at the highest levels both in France and Germany."*[67]

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[66] Transcript, pp. 165 to 166.
[67] First Witness Statement, paragraph 13.

163. When questioned about this lobbying involving such decision makers, adjustments were made by Mr Al Yousef to his written account, similar to those about his other activities. He could not remember any names, and when asked about the functions of the persons with whom he was in contact, it turned out that they were lobbyists. The conclusion was clear:

> *"THE CHAIRMAN: So when you say 'undertook the lobbying of German authorities', you are saying this was not directly the authorities, that was through German lobbyists?*
>
> *THE WITNESS: Precisely."*[68]

164. Mr Al Yousef did testify, however, that in the context of the issue concerning the use of the German MTU motor in the tank for the UAE, he met a very highly placed person in France. He explained that in the context of the project, he met General Christian Quesnot at the Elysée, whom he described as *"the military adviser to President Mitterand"*.[69] But this was the only concrete example of a contact of a highly placed person in the context of his work for the promotion of the Leclerc project. The follow-up exchange made this clear:

> *"THE CHAIRMAN: [...] On the German side, whom did you meet on the German side, apart from the lobbyist?*
>
> *THE WITNESS: Nobody."*[70]

165. The Tribunal has reproduced these exchanges with Mr Al Yousef at the hearing because they portray a level of activity which is very different from that described in Mr Al Yousef's witness statement. The role of Mr Al Yousef that emerged from his testimony at the Hearing was far less important than what one could read in the witness statement and his contribution to the project now appeared much more limited.

166. Mr Al Yousef's testimony at the Hearing has led the Tribunal to the conclusion that the role which Mr Al Yousef really played in the development of the Leclerc project and the promotion of the contract between the Respondent and the UAE did not differ substantially from that of other agents in similar situations. In some respects it even seems to have been less than what one would normally expect from an agent.

167. In particular, the Tribunal is not persuaded that in the conception of the Leclerc project and in its technical and commercial development Mr Al Yousef played the important role which he described in his witness statement.

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[68] Transcript, p. 177.
[69] Transcript, p. 179.
[70] Transcript, P. 182.

168. Mr Al Yousef himself has given a reference for assessing the value of the services. At the hearing he stated:

> *"If I was on a retainer, I probably would ask GIAT to pay me a million dollars a month as a consultant".*[71]

169. In his witness statement he explained that "between 1989 and 1993, I was working practically full time on this project, with meetings three or four times a week to review progress, brainstorm and strategise".[72]

170. If both statements were correct, Mr Al Yousef would have earned one million US dollars during the five years of this active period, providing him with a total of US$ 60 million.

171. The Respondent relies on these explanations. Taking into account only the period between 1989 and 1993[73] and, calculating 51 months at US$1 million, the Respondent concludes that, according to Mr Al Yousef's own assessment, Kenoza's activities for the 51 months were worth US$51 million.

172. In both ways of calculating the amount of what Mr Al Yousef's would have earned, i.e. US$ 51 or 60 million, is a substantial amount. The Parties have not produced any evidence about the level of compensation in agency contracts concerning transactions as that which the Parties hoped to see concluded by the Respondent. Therefore, the Tribunal makes no finding on the question whether the amount of a "retainer" which Mr Al Yousef considered as appropriate would be excessive. However, the Tribunal notes that the difference between this "retainer" and the amount of the total fee as claimed in this arbitration is enormous. Even if one accepts the amount of the "retainer" presented by Mr Al Yousef as not excessive, this difference is exorbitant and out of proportion with the activities of an ordinary agent or, rather an advisor, as they were described by Mr Al Yousef at the Hearing.

173. Mr Al Yousef insisted that under the fee arrangement agreed with the Respondent he bore the full risk of the success of the project. Had it failed and the Respondent not obtained the Leclerc Contract, Mr Al Yousef would not have received any remuneration and he would have had to bear his costs. This is indeed an important risk which deserves to be remunerated adequately. However, a risk premium at more than double the high "base salary" (if one could so describe the assumed remuneration of one million per month) can hardly be justified by the importance of the risk.

174. In the light of these considerations, the Tribunal concludes that the compensation of the Claimant, as claimed in this arbitration on the basis of the contractual commission rates is far above anything that could be justified in light of Mr Al Yousef's explanations about the Claimant's activities under the Agency Contract. The remuneration is excessive by the

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[71] Transcript, p. 196.
[72] WS Paragraph 10.
[73] The Respondent refers to 1991 ; but judging from the result of its calculation, the correct reference seems to be 1993.

standard which Mr Al Yousef himself set and by any standard which was raised in this arbitration.

7.8. The consequences of the excessive amount of the Compensation

175. Having found that, under French law as it is applicable to the present case, the Tribunal has the power to reduce the compensation of a commercial agent, and having found that the compensation claimed by the Claimant is excessive, the Tribunal now must decide the amount of the reduction.

176. The Claimant argues that under French law the compensation may not be revised when payment has occurred after the services have been performed.[74] As pointed out above, this is not correct under French law. Nevertheless, one may doubt the good faith of a party which contests the agreed remuneration as excessive once the services have been successfully completed and after it has made over several years payments on account of this remuneration, as and when such payments became due under the Contract. In the circumstances, the Claimant may well have been entitled to assume that, once the Respondent knew the exact amount due under the Contract, it accepted the level of compensation or at least would not be challenged it.

177. In the present case, however, the Respondent does not claim reimbursement of payments made in the past. It only refuses to make any further payments. This is a legitimate position to take: irrespective of the question whether the payments made in the past were justified, the Respondent takes the position that any payments beyond the amount paid already would be excessive. Given the excessive nature of the compensation the Claimant had no justified interest in relying on the Respondent continuing with the payment despite their exorbitant amounts.

178. The Respondent explains that there is no need for the Tribunal to fix the exact amount of the remuneration that would be justified for the Claimant's services. Since the Claimant has received already some US$195 million and since the Respondent does not claim any refund, it is sufficient for the Arbitral Tribunal to be satisfied that the amount of the fees to which the Claimant is entitled, and which otherwise would have to be fixed by the Tribunal, is below US$195 million.

179. The amount of US$195 million is still more than three times the remuneration which Mr Al Yousef would have received had the Parties agreed the monthly sum which he said he would have requested if he were

[74] Post-Hearing Submission, p. 3.

on a retainer. Based on Mr Al Yousef's testimony of the services he provided and the risk he took, the Tribunal is of the opinion that the reasonable remuneration earned by the Claimant is well below this amount.

180. Consequently, the Tribunal decides that the Claimant's compensation must be reduced to an undetermined amount below US$195 million. The Claimant's claim for further payments must be dismissed in all its variants.

181. The Respondent also argued that the excessively high compensation was a strong indication that the Agency Contract had an illegal purpose; in particular that this excessive amount was an indication of corruption. Mr Al Yousef firmly denied that he even had the intention of making such payments. In his witness statement, he emphasises how offensive the Respondent's allegation is for his reputation:

> *"I would emphasise again that I have acted as agent for substantial French and European companies for many years and have enjoyed an excellent and untarnished reputation attested to on numerous occasions by the various parties I have worked with. ..."*[75]

182. Mr Al Yousef continued his witness statement by declaring firmly:

> *"At the outset, I state unequivocally that I and the Claimant never intended, in entering into the Agreement, to offer money to any public servant or other official in the UAE in order to facilitate the award of the UAE Contract to the Respondent. In addition, neither I nor the Claimant in fact offered any money to such public servants and officials or make any promise to do so, in connection with the Agreement or the award of the UAE Contract."*[76]

183. When considering the discrepancy between the Claimant's services and the agreed compensation one must observe that this discrepancy is readily apparent. Anyone having seen the terms of the Agency Contract and having observed the services provided by Mr Al Yousef must have noted it. This must include those persons in the Respondent's organisation who agreed to the level of compensation for the Claimant and who were involved in the payments made to Kenoza.

184. In other words, if the excessive nature of the compensation for the Claimant's services must be taken as evidence of a corrupt purpose of the Agency Agreement, this purpose must have been known and intended by both Parties to the agreement.

185. Consequently, finding that the Agency Agreement has as its purpose the corruption of civil servants in the UAE and therefore is illegal, as the Respondent wishes the Tribunal to conclude, has far reaching implications. It affects not just the resolution of the present case but the reputation of both Parties. The Tribunal, which has no powers of making its own enquiries

[75] Second Witness Statement, paragraph 4.
[76] Ibid. paragraph 5.

both Parties. The Tribunal, which has no powers of making its own enquiries and depends on the evidence produced to it by the Parties, is reluctant to make such far reaching conclusions merely on the basis of the size of the agreed remuneration.

186. If the circumstances of the case would have been such that it could be resolved only by drawing such conclusions, the Tribunal may have had no choice but to express its view on the question of illegality of the Agency Agreement. However, in the present case, the Tribunal has found that the Claimant's compensation must be reduced to an amount below that which the Claimant has received already and that, consequently, the claim must be dismissed. In these circumstances, the claim can be decided without ruling on the allegation of illegality. The Tribunal therefore leaves the issue of illegality undecided.

187. In view of this conclusion, there is no need for the Tribunal to consider the Claimant's application for an Audit (see above paragraph 36).

7.9. The Claim for Loss of Reputation

188. The Claimant also affirmed that it suffered "*considerable damage to its reputation as result of the failure of the Respondent to perform the UAE Contract, the adverse press comment surrounding progress, the frequent delays and the consequent loss of other opportunities*". The Claimant did not make a principal claim in this respect but sought relief only in the alternative that "*the Arbitral Tribunal considers that the remuneration of the Claimant under the Agreement is less than the Total Commission*". Since this is indeed what the Tribunal concluded, the alternative claim must be considered.

189. The Respondent (i) denied that there was any failure on its side to perform the Leclerc Contract. It also pointed out that, (ii) according to his testimony, Mr Al Yousef did not appear as agent of the Respondent so that his reputation could not be affected by any such non performance, had occurred and (iii) Mr Al Yousef and the Claimant Kenoza are separate persons.

190. The Tribunal has considered the factual allegations surrounding this alternative claim. It is sufficient to note that the Claimant Kenoza did not in any way appear in the performance of the Agency Contract nor in relation to the Leclerc Contract. While the testimony of Mr Al Yousef is not quite clear about the question whether his name was associated with the Leclerc project and if so as from what time onward, it is clear that the Claimant Kenoza was not in any way perceived as being related to the Leclerc project in the UAE.

191. The matter was addressed at the Hearing and the testimony of Mr Al Yousef was clear:

> *"THE CHAIRMAN: Does anybody know that you use Kenoza as a vehicle, a commercial vehicle for your activities?*
>
> *THE WITNESS: It's known to GIAT.*
>
> *THE CHAIRMAN: Only GIAT?*
>
> *THE WITNESS: Just GIAT, because they have an agreement with me.*
> *THE CHAIRMAN: And you used Kenoza only for the relationship with GIAT?*
> *THE WITNESS: I can't remember, but Kenoza mainly was used for GIAT.*
>
> *THE CHAIRMAN: You are saying, you said before, for different transactions, you had different legal vehicles?*
> *[...]*
>
> *THE CHAIRMAN: That meant, in your dealings with your clients, it was you who was the one who was dealing and you used a company as vehicle?*
> *THE WITNESS: Absolutely."*[77]

192. In other words, assuming that Kenoza had any reputation at all (which does not seem to have been the case) any failure to perform on the side of the Respondent that may have occurred, would not have affected the Claimant Kenoza in its reputation since no one other than the Respondent knew that the Claimant was associated with this project.

193. Consequently, there cannot have been any damage to the reputation of the Claimant Kenoza. Since in this arbitration Kenoza does not claim on behalf of Mr Al Yousef, there is no need for the Tribunal to examine whether Mr Al Yousef suffered damage to his reputation.

194. The alternative claim for loss of reputation of the Claimant must be rejected.

[77] Transcript, p. 193 – 194.

8. THE COSTS OF THE ARBITRATION

195. Both Parties claim that the costs of the arbitration be borne by their opponent. They also seek reimbursement of the costs they have incurred themselves.

196. In its session of 5 February 2009 the Court fixed the advance on cost at US$550'000 subject to readjustment. The Parties have paid this advance in equal shares of US$275'000.

197. The amount in dispute is US$39'755'339.

198. The costs of the arbitration have been fixed by the Court at its session of 16 September in the amount of US$550'000.

199. In its Cost Submission of 2 April 2010 the Claimant declared that it spent €329'221 and US$2'039 on costs and fees of its lawyers, CHF 61'482 on fees and expenses of Quadris, the company of Mr Breuer and €5'761 as disbursements for hearing room hire and stenographer's fees.

200. In Exhibit R45, produced with the Respondent's Post-Hearing Reply Brief of 2 April 2010, the Respondent specified its costs as €213'907 and US$290'250. It provided no indication about the composition of these amounts. However, noting that the Respondent had paid US$275'000 as advance fixed by the Court, the Tribunal takes it that US$15'250 form part of what is described as "legal and other costs incurred" by the Respondent together with the aforementioned amount in Euro.

201. Both Parties informed the Tribunal on 19 April 2010 that they had no comments on their opponents costs claim.

202. In this arbitration the Claimant's claims have been dismissed and the Respondent prevailed. If the outcome of the arbitration were the only criterion for the Tribunal's decision on cost, the costs of the arbitration would have to be awarded against the Claimant.

203. However, Article 31 (3) of the ICC Arbitration Rules, which requires the Arbitral Tribunal to fix the costs of the arbitration and decide on how these costs shall be borne, does not prescribe any specific criteria for the allocation of these costs between the Parties. While the outcome of the arbitration is an important criterion it is not the only criterion which the Tribunal must or may consider. Other possible criteria include the conduct of the Parties. In this context, the origin of the dispute and the manner in which it developed may also be taken into consideration.

204. This dispute arose out of a contract which the Parties performed for many years. The remuneration was agreed by the Parties and its excessive nature must have been apparent to both Parties. Even though it had full

knowledge of the scope of the services which the Claimant had provided, the Respondent made payments over several years in very high amounts, apparently without any complaint. From this perspective, both Parties bear an equal share in the origin of the dispute.

205. When in 2000 the Respondent decided to stop payment, it may not have been forthcoming with the true reasons for so doing; at least this is what Mr Breuer wrote in his witness statement. However, as the Tribunal decided in this Award, the Respondent was entitled to take this position and it was wrong for the Claimant to insist on receiving payment far above its reasonable remuneration. Therefore, the Claimant bears the principal responsibility for the dispute ending up in an arbitration.

206. On the basis of these considerations, the Tribunal finds that the Claimant must bear the costs of the arbitration except for the Respondent's legal and other costs. With respect to these latter costs, the Tribunal finds that the Claimant must bear only part of them. The Tribunal considers approximately one half of the costs claimed by the Respondent to be adequate and, in exercising its discretion, fixes the amount payable to the Respondent on account of the Respondent's legal and other costs at €115'000.

207. The Respondent has paid half of the deposit requested by the Court, viz. US$275'000. The Claimant must therefore reimburse this amount to the Respondent.

9.1 The claim for additional payments under the Agency Contract of 09

9. DECISION

On the grounds set out above, the Arbitral Tribunal makes the following decision:

9.1 The claim for additional payments under the Agency Contract of 29 August 1991 is denied in all its variants;

9.2 The claim for Loss of Reputation is denied;

9.3 The Claimant shall bear the costs of the arbitration fixed by the Court at US$ 550'000. It shall pay to the Respondent US$275'000 and €115'000 on account of these costs and of the Respondent legal and other costs incurred in the arbitration.

9.4 All other claims of the Parties are denied.

Paris, France, 30 September 2010

For the Arbitral Tribunal

Mr David Sutton
Arbitrator

Professor Ibrahim Fadlallah
Arbitrator

Michael E. Schneider
Chairman of the Arbitral Tribunal