

4A_509/2013¹

Judgment of January 27, 2014

First Civil Law Court

Federal Judge Klett (Mrs.), Presiding

Federal Judge Kolly

Federal Judge Kiss (Mrs.)

Clerk of the Court: M. Carruzzo

X._____ SA,

With a domicile for the service of documents at the offices of Mr. Philippe Schweizer,
Appellant

v.

Z._____,

Represented by Mr. Ilir Cenko,
Respondent

Factual and legal reasons:

1.

1.1.

In a final award of September 12, 2013, a three-member arbitral tribunal constituted under the aegis of the Court of Arbitration of the International Chamber of Commerce (ICC) and sitting in Geneva, ordered the Moroccan company X._____ SA (hereafter, X._____) to pay a total of EUR 7'128'143.74 to the Spanish company Z._____ with interest, mainly as the balance of the price of a mill for the manufacture of reinforcing bars that the Spanish company had delivered to the Moroccan company with assorted services.

¹ Translator's Note:

Quote as X._____ SA v. Z._____, 4A_509/2013.

The original decision is in French. The full text is available on the website of the Federal Tribunal, www.bger.ch.

1.2.

X. _____ submits a civil law appeal with a view to obtaining the annulment of this award.

Z. _____ submits that the appeal should be rejected to the extent that the matter is capable of appeal.

The Arbitral Tribunal did not submit any observations as to the appeal.

The Appellant did not submit a reply.

2.

In the field of international arbitration, a civil law appeal is admissible against the decisions of arbitral tribunals pursuant to the requirements of Art. 190 to 192 PILA² (Art. 77(1)(a) LTF)³. Concerning the object of the appeal, the standing to appeal, the time limit to appeal, the Appellant's submissions or the ground for the appeal invoked, none of these admissibility requirements raises an issue in this case. There is therefore no reason not to address the appeal.

3.

3.1.

In a single argument, the Appellant claims that the Arbitral Tribunal violated public policy within the meaning of Art. 190(2)(e) PILA by wrongly accepting that the Respondent had standing to sue as the latter had fraudulently hidden with the complicity of some witnesses that it did not enter the contract in dispute on its own behalf but as a member of a consortium of four companies. According to the Appellant, applying the case law of the Federal Tribunal concerning revision of arbitral awards for the ground stated at Art. 123(1) LTF by analogy would justify declaring procedural fraud to be a constituent part of public policy as contemplated by the aforesaid provision.

There is no need to review this suggestion any further. Indeed, it must be found that the requirements for the provision invoked by the Appellant to become applicable are manifestly not met in this case.

3.2.

3.2.1. Revision of a judgment of the Federal Tribunal may be sought when a criminal investigation establishes that the judgment was influenced by a crime to the Petitioner's detriment, even if no conviction took place (Art. 123(1), 1st sentence, LTF). It does not matter whether the crime was committed by one of the litigants or by a third party. The essential element is the existence of a causal link between the crime committed and the operative part of the award, the revision of which is sought. In other words, the crime must have directly or indirectly influenced the judgment involved to the Petitioner's detriment. Moreover, the criminal investigation must have been conducted to its end except when prosecution is not possible (Art.

² Translator's Note: PILA is the most commonly used English abbreviation for the Federal Statute on International Private Law of December 18, 1987, RS 291.

³ Translator's Note: LTF is the French abbreviation of the Federal Statute of June 17, 2005, organizing the Federal Tribunal, RS 173. 110.

123(1) LTF, 2nd sentence) (judgment 4F_15/2008 of November 20, 2013, at 2.1 and the precedents quoted; as to international arbitration, see judgment 4A_596/2008⁴ of October 6, 2009, at 4.1 and judgment 4A_234/2008⁵ of August 14, 2008, at 3).

3.2.2. None of these cumulative requirements is met in the case at hand.

First, the Appellant's claim that the Respondent and the other two members of the consortium who testified would have hidden its existence does not correspond to any finding in the award under appeal. As such, it is therefore inadmissible. It must be recalled that when it decides an appeal against an award in an international arbitration, the Federal Tribunal is bound by the factual findings contained in the award under appeal (see Art. 105(1) LTF). Therefore, this Court cannot rectify or supplement *ex officio* the factual findings of the arbitrators, even if the facts were established in a blatantly inaccurate manner or in violation of the law (see Art. 77(2) LTF, ruling out the applicability of Art. 105(2) LTF).

Moreover, no decision of a criminal court confirmed the Appellant's allegations and consequently the existence of a crime committed by the Respondent or by third parties.

Finally and above all, the causal link alleged by the Appellant between the alleged fraudulent concealment and the outcome of the dispute can be set aside immediately. It is indeed established that the Arbitral Tribunal issued its award in full awareness of the existence of the consortium, proved by Exhibits 588, 588bis and 588ter placed into the file of the arbitration by the Appellant, the admissibility of which was expressly accepted by the Arbitral Tribunal (award n. 319). Moreover, the Arbitrators had at hand a legal opinion specifically dealing with the issue of the Respondent's standing to act in view of the aforesaid exhibits (award n. 286).

Under the cloak of a grievance based on Art. 190(2)(e) PILA, the Appellant actually criticizes the answer the Arbitral Tribunal gave to this question at §§295-297 of the award. In so doing, it disregards that the manner in which arbitrators apply substantive law does not fall within the judicial review of the Federal Tribunal in an appeal against an international arbitral award.

Therefore, the appeal can only be rejected even if it is admissible.

4.

The Appellant loses and will therefore pay the costs of the federal proceedings (Art. 66(1) LTF) and compensate its opponent (Art. 68(1) and (2) LTF).

⁴ Translator's Note: The English translation of this decision is available here: <http://www.swissarbitrationdecisions.com/revision-of-award-accepted-arbitral-tribunal-misled-by-evidence->

⁵ Translator's Note: The English translation of this decision is available here: <http://www.swissarbitrationdecisions.com/renunciation-to-appeal-revision-of-award-within-time-limit-to-ap>

Therefore the Federal Tribunal pronounces:

1.

The appeal is rejected to the extent that the matter is capable of appeal.

2.

The judicial costs, set at CHF 30'000, shall be borne by the Appellant.

3.

The Appellant shall pay to the Respondent an amount of CHF 35'000 for the federal judicial proceedings.

4.

This judgment shall be notified in writing to the parties and to the ICC Arbitral Tribunal.

Lausanne, January 27, 2014

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

Presiding Judge:

Clerk:

Klett (Mrs.)

Carruzzo