4A_50/2017[1]

Judgment of July 11, 2017

First Civil Law Court

Federal Judge Kiss, Presiding,
Federal Judge Klett,
Federal Judge Hohl
Clerk of the Court: Carruzzo (Mr.)

X1._____ Ltd.,
X2._____ S.A., both represented by Mr. Martin Molina and Mr. Omar Abo Youssef,
Appellants,

v.

Z._____ Ltd, represented by Mr. Marco Cereghetti and Mr. Flavio Peter,
Respondent.

Facts:

A.
The Arbitral Award submitted for examination by the Federal Tribunal concerns two Consultancy Agreements, governed by Swiss law, on the basis of which X2._____ SA, a [name of country omitted] company, and X1._____ Ltd, a [name of country omitted] company (hereafter: X._____ companies), engaged Z._____ Ltd (hereafter: Z._____), a [name of country omitted] company, to assist them in the preparation and submission of tenders for the award of contracts for railway projects initiated by A._____.

An arbitration clause in each of the two contracts entrusted a three-member arbitral tribunal, constituted under the aegis of the International Chamber of Commerce (ICC), to settle disputes that resulted from the performance of these two contracts. The seat of arbitration was set in Geneva.

The first contract, concluded on September 6, 2006, related to a call for tenders for the supply to A._____ of six-axle electric locomotives intended for the transport of heavy goods (a project named V._____). B._____ Ltd, a [name of country omitted] company, which had signed it with X._____ companies, assigned it to Z._____ on July 1, 2009. X._____ companies paid the first two invoices issued by Z._____ under the consulting contract, but refrained from paying the other two, amounting to EUR 1'555'000 each. The second contract was concluded on July 10, 2009, by the parties to these proceedings in connection with a call for tenders for the supply of a second batch of

[1] Translator's Note: Quote as X._____ companies *v.* Z._____, 4A_50/2017. The original decision was issued in French. The full text is available on the website of the Federal Tribunal, www.bger.ch

self-propelled electric units to C._____ Company (a project known as W._____ 2nd Batch; hereafter: W._____ project).

The invoices issued by Z._____ for the consulting services provided under said contract, for a total of EUR 1'569'150, remained unpaid.

To justify their refusal to take action, the X._____ companies argued that various criminal investigations into suspicions of corruption in connection with projects in which they had participated were under way, notably in the United States of America, through the Department of Justice (DOJ), and in the United Kingdom, via the Serious Fraud Office (SFO).

Accordingly, they had no choice but to suspend the payment of commissions, or run the risk of incurring severe criminal sanctions, as the verifications made had demonstrated the lack of adequate proof of the services provided by the insurance company as well as the deliberately misleading or false nature of the material submitted as evidence.

By letter dated August 19, 2014, to Z._____, the X._____ companies terminated the consultancy contracts on the ground of a serious breach by that company.

B.
B.a. On December 3, 2014, Z._____ submitted a request for arbitration to the ICC for arbitration against the X._____ companies seeking payment of EUR 4'679'150, plus interest, or the balance of its fees for the project. V._____ and payment for the W._____ project. The defendants argued that the appeal should be rejected in its entirety.

B.b. After hearing the case, the ICC Arbitral Tribunal issued its final Award on December 13, 2016. The operative part, states the following (the figures introducing the various sections of the operative part were added by the Court in the place of the dashes in the original text, for the sake of clarity):

> 1. The Respondents, regarding project V._____, breached the Consultancy Agreement by failing to pay outstanding fees to the Claimant after the first two payments had been made with no reservations;
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> 2. Thus, Respondents shall pay to Claimant, as far as project V._____ is concerned, a compensation in the amount of EUR 3'110'000, plus default interest, at the rate of 5% per annum, on the amount of EUR 1'555'000 from the 31 December, 2010 and on the amount of EUR 1'555'000 from May 1, 2012 until the date of full payment;
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> 3. As to project W._____ 2nd Batch, Claimant breached the Consultancy Agreement by failing to provide adequate proofs of services; symmetrically, Respondents breached the Agreement as they failed to pay any fees to the former;
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> 4. Thus, Respondents shall pay to Claimant, as far as project W._____ 2nd Batch is concerned, a compensation in the amount of 50% of the total fees, i.e. EUR 784'575, plus default interest, at the rate of 5% per annum, on the awarded amount of EUR 784'575 from the 24 November 2010 until the date of full payment.[2]

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

B.c. The Arbitral Tribunal first considered the defendants' argument that the plaintiff had failed to meet its contractual obligation to provide proof of services, as the two consulting contracts made this proof a necessary condition for the payment of the stipulated fees. With respect to the Project V._____ contract, it took into account the fact that the defendants had paid – without reservation or raising any dispute – the first two invoices that the plaintiff had sent them, with a certain amount of documentary evidence, thus implicitly accepting the proof of services that had been provided to them. Therefore, in its view, the plaintiff was no longer required to produce further evidence in relation to the two subsequent invoices totaling EUR 3'110'000 and the defendants had to pay this amount and interest related thereto. As to the contract relating to Project W._____, which had not given rise to any payment by the defendants, the Arbitral Tribunal found that, as the plaintiff had not provided sufficient proof of its services in connection with this project, the subjective condition its entitlement to payment depended upon had not been fulfilled. However, on the basis of the evidence adduced, it found that the conclusion of the contract between the defendants and A._____ had been achieved through the plaintiff and that the defendants had failed to complain in a timely manner about the insufficient proof of services provided by the plaintiff, which had undoubtedly assured their co-contracting party it had not needed to do more. On the basis of these findings, the Arbitral Tribunal, relying on opinion expressed by commentators (JOSEF HOFSTETTER, Der Mäklervertrag, in Schweizerisches Privatrecht VII/2, 1979, pp. 127 ff.) and published case law (ATF 114 II 357), held, in law, that under the rules of good faith the defendant's conduct had had the effect of nullifying, at least in part, the condition precedent to which the consultancy firm's right to the payment of the agreed upon fees was subject. On the basis of this, it found that there was scope for reducing these by 50%, since the intermediary's activity had only been partially successful. That is why it ordered the defendants to pay the plaintiff half of the EUR 1'569'150 it had claimed, or EUR 784'575, plus interest.

Second, the Arbitral Tribunal held that the conditions for the application of Section 7 of the UK Bribery Act 2010 (hereafter: the Bribery Act) were not met in the present case. Consequently, it denied the defendants the right to refuse to honor their debt to the plaintiff because, in the defendants' opinion, this English law would expose them to the risk of criminal sanctions.

C.
On January 31, 2017, the defendants (hereafter, the Appellants) submitted a civil law appeal together with a request for a stay of enforcement, in order to obtain the annulment of the Award of December 13, 2016. They argue that the Arbitral Tribunal decided beyond what was sought by the parties (Art. 190(2)(c) PILA) and issued an award incompatible with public policy (Art 190(2)(e) PILA).

In its answer of February 24, 2017, the plaintiff (hereafter: the Respondent) submitted that the appeal should be rejected insofar as the matter is capable of appeal.

The Arbitral Tribunal, which submitted its file, waived the right to comment on the appeal.

A stay of enforcement was granted for the appeal by order of the Presiding Judge on March 1, 2017. The Appellants, in their Reply dated March 15, 2017, and the Respondent, in its rejoinder of March 30, 2017, maintained their respective submissions.

Reasons:

1.
According to Art. 54(1) LTF[3] the Federal Tribunal issues its judgment in an official language,[4] as a rule, in the language of the award under appeal. When the decision was issued in another language (here, English), the Federal Tribunal uses the official language chosen by the parties. Before the Arbitral Tribunal they used English, while, in the appeal brief sent to the Federal Tribunal, the Appellants used French, pursuant to the requirements of Art. 42(1) LTF in connection with Art. 70(1) Cst.[5] (ATF 142 III 521[6] at 1). According to its practice the Federal Tribunal shall resort to the language of the appeal and thus issue its judgment in French.

2.
2.1. In the field of international arbitration, a civil law appeal is admissible against the decisions of arbitral tribunals pursuant to the requirements of Art. 190-192 PILA[7] (Art. 77(1) LTF).

Whether as to the object of the appeal, the standing to appeal, the time limit to do so, the Appellant's submission or the grievance for appeal raised in the appeal brief, none of these admissibility requirements raises any problems in this case. The matter is therefore capable of appeal.

2.2 An appeal brief for an arbitration award must satisfy the requirement of reasoning that arises from Art. 77(3) LTF in conjunction with Art. 42(2) LTF and the case-law relating to the latter provision (ATF 140 III 86 at 2 and references). This presupposes that the Appellant considers the reasons for the award and precisely indicates why it considers that the author of the award has infringed the law (Judgment 4A_522/2016[8] of December 2, 2016, at 3.1). It goes without saying that it may only do so within the limits of the admissible grievances against the award, namely with regard only to those grievances listed in Art.190(2) PILA, where the arbitration is international in nature. Therefore, as this reason must be contained in the appeal, the Appellant cannot use the procedure to ask the Federal Tribunal to refer to the allegations, evidence, or offers of evidence contained in documents from the arbitration file. Moreover, the Appellant may not rely on arguments that were not submitted in a timely manner, that is, before the expiry of the time-limit for bringing an action (Art. 100(1) LTF, in conjunction with Art. 47(1) LTF) nor may it supplement insufficiently reasoned submissions after the deadline (Judgment 4A_704/2016 of February 16, 2017, at 2.2).

The Federal Tribunal, it should be recalled, adjudicates on the basis of the facts found in the award under appeal (see Art. 105(1) LTF). It may not rectify or supplement of its own motion the findings of the

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[3] Translator's Note: LTF is the French abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173.110.
[4] Translator's Note: The official languages of Switzerland are German, French, and Italian.
[5] Translator's Note: Cst is the French abbreviation for the Swiss Federal Constitution.
[6] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/federal-tribunal-upholds-independence-members-cms-network
[7] Translator's Note: PILA is the most frequently used abbreviation for the Swiss Private International Law Act of December 18, 1987
[8] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/atf-4a-522-2016

arbitrators, even if the facts have been established in a manifestly inaccurate manner or in violation of the law (see Art. 77(2) LTF, ruling out the applicability of Art. 105(2) LTF). Additionally, when seized of a civil law appeal against an international arbitral award, its mission does not consist of deciding with full power of review like an appellate jurisdiction, rather, its mission is only to consider whether the admissible grievances raised against the award are justified or not. Allowing the parties to state facts other than those found by the arbitral tribunal, apart from the exceptional cases reserved by case law, would no longer be compatible with such a mission, even though these facts may be established by evidence contained in the arbitration file (judgment 4A_386/2010[9] of January 3, 2011 at 3.2). However, as was already the case under the federal law of judicial organization (see ATF 129 III 727[10] at 5.2.2; 128 III 50 at 2a and the judgments cited), the Federal Tribunal has the power to review the facts underlying the award under appeal if one of the grievances mentioned in Art. 190(2) PILA is raised against this fact or new facts or evidence are exceptionally taken into account in the civil appeal procedure (ATF 138 III 29[11] at 2.2.1 and the awards cited). The findings of the arbitral tribunal as to the course of the proceedings also bind the Federal Tribunal, subject to the same reservations, whether they relate to the parties' submissions, the alleged facts or the legal explanations given by the parties, the statements made in the course of the proceedings, as well as to the content of testimony or an expert opinion or the information gathered during an on-site visit (Judgment 4A_322/2015[12] of June 27, 2016, at 3, and the precedent cited therein).

It is on the basis of those principles that it is at this point necessary to examine the various aspects of the Appellant's arguments.

3.
In a first argument, the Appellants argue that the Arbitral Tribunal decided *ultra petita.*

3.1 Art. 190(2)(c) PILA allows an appeal against an award, in particular, when the arbitral tribunal has decided beyond the claims for which it was seized. Awards that grant more than, or something other than that which was claimed (*ultra* or *extra petita*), fall within this provision. According to case law, however, the arbitral tribunal is not considered to have gone beyond the claims if it ultimately does not award more than the total amount sought by the claimant, but also assesses some of the elements of the claim differently from that party's submissions or when, having been asked to find that a certain legal relationship does not exist, and having decided that the claim is without foundation, it finds that the legal relationship at issue exists and does so in the operative part of the award instead of merely rejecting the action. Nor does the arbitral tribunal breach the rule *ne eat iudex ultra petita partium* when it qualifies the claim in different legal terms than the claimant had done. The principle *jura novit curia*, which certainly applies in arbitral proceedings, requires the arbitrators apply the law *ex officio* without

[9] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/award-allegedly-issued-by-a-truncated-tribunal-claim-that-cas-de

[10] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/extension-arbitration-clause-non-signatory

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

[12] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/alleged-unpredictability-reasons-rejected

being limited to the arguments raised by the parties. Arbitrators are accordingly entitled to resort to arguments that were not raised because that is not considered a new or different claim but merely a new qualification of the facts of the case. The arbitral tribunal is however bound by the subject and the number of the submissions before it, in particular when a party qualifies or limits its claims in the submissions themselves (judgments 4A_678/2016 of March 22, 2016, at 3.2.1 and 4A_440/2010[13] of January 7, 2011, at 3.1, unpublished, of ATF 137 III 85).

3.2 The Respondent requested the Arbitral Tribunal order the Appellants to pay it the sum of EUR 4'679'150, with default interest calculated on the three components of this sum (EUR 3'110'000, EUR 1'098'405 and EUR 470'745). It was partly successful; the Arbitral Tribunal ordered the Appellants to pay the sums of EUR 3'110'000 (part 2 of the operative part of the Award) and EUR 784'575 (part 4 of the operative part of the Award), plus interest, for a total of EUR 3'894'575, which was less than it claimed.

The Appellants, however, argue that the Arbitral Tribunal inappropriately arrogated to itself the right to make the findings it made under sections 1 and 3 of the operative part of its Award. According to them, the Arbitrators have gone beyond the scope of the claim submitted to them by noting, in addition to the financial penalties, that with regard to project V._____, the Appellants had breached the consultancy contract relating thereto by failing to pay the Respondent the overdue fees after having paid the first two invoices unreservedly (part 1 of the operative part of the Award) and, in relation to the W._____ project, that they had breached the consultancy contract by not paying any fees at all to the Respondent, the latter being also held responsible by the Arbitral Tribunal for a breach of the said contract for not having provided adequate proof of the services provided by it (section 3 of the operative part of the Award). According to the Appellants, there were no reasons for incorporating such findings into the operative part of the Award, especially as the Respondent had never alleged a breach of the consultancy contracts but had only relied on its right to payment of the remuneration stipulated in them. The Appellants add that they have difficulty in discerning the Respondent's interest in the findings at issue, as it had been awarded a large part of the amounts claimed by it and that these findings have no significance of their own. According to them, therefore, there was no need to attach financial penalties to a declaration “as superfluous as it is inadequate.”

Consequently, they argue that the Award under appeal should be annulled, on the basis of Art. 190(2)(c) PILA, if not in its entirety, at least with respect to the two findings subject to complaint.

3.3 According to Art. 76(1)(b) LTF, the Appellant in particular must have an interest worthy of protection in the annulment of the award under appeal. The interest worthy of protection is the practical utility that the Appellant would derive from its appeal being admitted, preventing it from economic, moral, material, or other injury that the decision under appeal would cause (ATF 137 II 40 at 2.3 p. 43). The interest must be present, *i.e.*, it must exist not only at the time the appeal is submitted, but also at the time the judgment is issued (ATF 137 I 296 at 4.2 p299; 137 II 40 at 2.1 p. 41).

[13] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/claim-of-award-ultra-petita-rejected-claim-of-violation-of-publi

On the basis of this case law, the Respondent is right to deny the Appellants any interest in admitting the grievance in question being upheld. Indeed, to conclude that an Award should be annulled – even in part – solely for the reason that its operative part contains unnecessary findings with no independent significance does not satisfy any interest worthy of protection. The explanations raised and reasoned by the Appellants in their Rejoinder, in order to justify a process that borders on recklessness, are not admissible either, as was pointed out above (see Section 2.2, *in fine*).

Even if one assumes it is admissible, the grievance in question could only be rejected. In fact, far from deciding beyond the requests submitted to it, the Arbitral Tribunal ordered monetary awards for a total that remains below the amount claimed by the Respondent. Admittedly, it included in the operative part of the Award – probably incorrectly – the finding as to the reason for each of the two penalties ordered. There is, however, no reason to justify the intervention of the Federal Tribunal in respect of an alleged breach of Art. 190(2)(c) PILA. Additionally, such a finding, which is already in the reasons for the Award, is not specifically prejudicial to the Appellants, not to mention that, in part, it also applies to the Respondent. In this respect, it is different, to cite only one example, from the finding of guilt made with respect to a person exempted from any penalty (ATF 119 IV 44 at 1a and the judgments cited therein). As for the subtle distinction that the Appellants try to make between the non-performance and the breach of the consultancy contracts, it has no place in this context, as it is true that one does not see what would be incorrect in qualifying the unjustified refusal of the principal to pay the broker's fees as a breach of contract.

4.
In a second argument divided into two branches, the Appellants argue that the award under appeal may be incompatible with substantive public policy (Art. 190(2)(e) PILA).

4.1. An award is contrary to substantive public policy when it violates some fundamental principles of the law applicable to the merits to such an extent that it is no longer consistent with the notions of justice and the dominant value system; among such principles are, in particular, the sanctity of contracts, compliance with the rules of good faith, the prohibition of abuse of rights, the prohibition of discriminatory and confiscatory measures, as well as the protection of incapable persons (ATF 132 III 389[14] at 2.2.1).

4.2 First, the Appellants argue that the Arbitral Tribunal breached the principle of the sanctity of contracts.

4.2.1 The principle in question, also known by the adage *pacta sunt servanda*, in the restrictive sense given to it by the case law relating to Art. 190(2)(e) PILA, is breached only where an arbitral tribunal declines to apply a contractual clause while stating that it binds the parties or, conversely, if it imposes performance of a contractual clause that it has found does not bind the parties. In other words, the arbitral tribunal must have applied or refused to apply a contractual provision in a manner contradictory with the result of its interpretation as to the existence or the content of the legal instrument in dispute.

[14] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/violation-of-public-policy-notion-of-public-policy-exclusion-of-

Yet the interpretation process itself and the legal consequences logically drawn therefrom are not governed by the principle of the sanctity of contracts so those cannot be challenged on the basis of an alleged breach of public policy. The Federal Tribunal pointed out repeatedly that almost the entire realm of contractual disputes is outside the scope of the rule of *pacta sunt servanda* (Judgment 4A_532/2016 of May 30, 2017 at 3.2.2 and the cases quoted).

4.2.2 Referring to the reasons for the award concerning Project W._____, as summarized in paragraph B.c. of this Judgment, the Appellants argue that the Arbitral Tribunal may have departed from its own conclusion as to the non-fulfillment of the condition precedent binding the parties by deciding, pursuant to a reasoning more *ex aequo et bono* than from a legal perspective, to award the Respondent half of the fees claimed by it. According to them, this conclusion of the Arbitral Tribunal was inconsistent with the prior finding that the condition precedent – that the Respondent produce proof relating to the services provided and upon which its right to the fees stipulated in the consultancy contract for Project W._____ depended – was not carried out in the present case. By ignoring this preliminary finding, it may not have been aware that a condition precedent cannot be partially annulled or partially fulfilled, nor may it have shown how the conduct of one of the parties to the contract would be likely to affect such a condition. Nothing of the sort, in any event, could be inferred from the commentary of Josef Hofsteter in the above-mentioned legal writing, nor from the judgment mentioned in the award.

By arguing in this way, the Appellants are trying in vain to challenge the legal considerations on which the Arbitral Tribunal relied to order them to pay the Respondent the sum of EUR 784'575, plus interest, representing half of the fees charged for the performance of the consultancy contract relating to the W._____ project, under the guise of the incompatibility of the award with substantive public policy. The restrictive meaning of the jurisprudential notion of the sanctity of contracts, which constitutes one of the elements of the substantive public policy referred to in Art. 190(2)(e) LDIP, seems to have escaped them completely. In fact, it does not matter whether the Arbitral Tribunal may have disregarded, where appropriate, the legal consequences that should be attached to a condition precedent or that it relied, by false hypothesis, on the legal commentary and the case-law cited by it in support of its argument on this point. What is decisive, on the other hand, is that it drew from the application, correct or not, of the rules of law considered relevant by it to the facts that it had conclusively noted, specific findings that it repeated in its award. In short, the Arbitral Tribunal, through legal reasoning using its discretion and not for reasons of mere fairness, stated why it considered that the Respondent was entitled to one half of the fees it claimed, after which it ordered the Appellants to pay their co-contractor 50% of them. In other words, the Arbitrators did not order the Appellants *ex aequo et bono* to pay a debt that they may have deemed non-existent, but rather, they acknowledged that the Appellants owed some of the Respondent's fees because they had adopted a behavior that had the effect, from the point of view of the rules of good faith, of partially mitigating the effects of the non-fulfillment of the condition precedent attached to the Respondent's right to remuneration for consultancy services provided to the interested parties as part of the W._____ project.

It follows that the argument of breach of the *pacta sunt servanda* principle is manifestly devoid of foundation.

4.3 Second, the Appellants submit that the award under appeal is incompatible with substantive public policy because it orders them to make payments to the Respondent that do not comply with their "compliance rules" [*sic*] in the fight against corruption and which may expose them to severe criminal sanctions.

4.3.1 It should be noted from the outset that such arguments have been repeatedly raised and reasoned by one or other of the companies in Group X._____, for some years now, before the Federal Tribunal, to justify their refusal to honor all or part of their debts with regard to various consulting firms through which they were able to obtain lucrative contracts abroad (see 4A_69/2009[15] of April 8, 2009, 4A_213/2014 of September 23, 2014, 4A_247/2014[16] of September 23, 2014, 4A_532,534/2014[17] of January 29, 2015, and 4A_136/2016[18] of November 3, 2016). This was, in particular, the case of the Appellants, represented by the same lawyers as those who assist them in the present appeal proceedings, in the case which gave rise to the order in the last judgment cited. This insistence on systematically repeating arguments that have been rejected by the First Civil Law Court each time is somewhat surprising and one can reasonably ask whether it is still compatible with the rules of good faith. There is, however, no need to go into further detail since the arguments submitted to this Court today do not appear to be any more substantiated than those which it had already rejected in the judgments cited above.

4.3.2 Promises to pay bribes, according to the Swiss legal order, are contrary to good morals and, therefore, null and void due to a defect affecting their content. According to past case law, they also contravene public policy (ATF 119 II 380 at 4b). However, in order for the corresponding grievance to be admissible, corruption must have been established but the arbitral tribunal must have refused to take it into account in its award (Judgment 4A_136/2016[19] and the precedents cited).

The Appellants admit that the two consultancy contracts contain no promise of bribery payments. However, according to them, there are concrete indications that the Respondent could have used the sums paid to it to bribe [name of country omitted] officials. Nevertheless, the Arbitral Tribunal, after having analyzed the evidentiary weight of the information provided to it by the Appellants in support of the latter hypothesis, decided that there was no evidence of corruption or other unlawful conduct attributable to the Respondent (Award, paragraph 183). Such a conclusion follows from an assessment of the evidence that the Federal Tribunal cannot review. Accordingly, the Appellants' attempt to rebut the conclusion of the Arbitral Tribunal by going through the pieces of evidence which, in their view, establish the existence of criminal acts of which the Respondent and natural persons around it were

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[15] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/claim-of-incorrect-factual-findings-in-the-award-rejected

[16] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/alleged-new-facts-must-be-pertinent-justify-revision

[17] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/bribery-must-be-proved-annul-arbitral-award-upholding-contract-suspected-bribery

[18] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/atf-4a-136-2016

[19] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/atf-4a-136-2016

guilty, is in vain – all the more so because such a demonstration is of a purely appellatory nature and has been inadmissibly introduced again in the Reply.

4.3.3. As for the argument based on the conflict between the payments that the Appellants may be required to make to the Respondent and their own "compliance rules"[*sic*], the Federal Tribunal has already disposed of it in these terms in judgment 4A_136/2016 at 2, cited above:

> "... by arguing in this manner, the Appellants seek to raise some rules adopted by a subject of private law to the normative level – in other words, to the level of substantive public policy that the case law of the Federal Tribunal drew from the quoted legal provision –and thus to give to a group of commercial companies the ability to define the latter notion.
>
> Indeed, to repeat the definition of public policy under Art. 190(2)(e) PILA, it is not imaginable to leave to a subject of private law – moreover, one not based in Switzerland – the right to determine the essential and broadly acknowledged values of Art. 190(2)(e) PILA which, according to prevailing views in Switzerland, should constitute the basis of any legal order (ATF 132 III 389 at 2.2.3)."

There is nothing further to add.

4.3.4. Finally, the Appellants' lengthy explanations of the risk that they may face severe criminal sanctions on the basis of Section 7 of the Bribery Act, in the event that they pay the fees to the Respondent, are already in conflict with the sovereign finding of the Arbitral Tribunal that the existence of a wrongful act (corruption or otherwise) committed by the Respondent is not proven, despite the fact that it constitutes a prerequisite for the application of this English criminal law. In this regard, the Arbitral Tribunal notes, moreover, that no investigation or prosecution has yet been initiated regarding the project at issue or, more generally, with regard to the activity in A._____ [name of country omitted] – the Respondent's country, the activity of its predecessors, or entities or persons close to it (Award, paragraph 214, last indent).

In these circumstances, it is not clear how the Arbitral Tribunal breached substantive public policy within the meaning of Art. 190(2)(e) PILA, in the restrictive sense given to this concept by federal case law, by having ordered the Appellants to pay their fees, in accordance with the W._____ project consultancy contract, without regard to a distant and hypothetical criminal sanction that could perhaps be imposed upon the debtors who knows when.

4.3.5. With regard to the foregoing, this argument proves to be devoid of foundation in either of its two branches.

5.
It thus follows that the present appeal must be rejected insofar as the matter is capable of appeal.

The Appellants, who are unsuccessful, will therefore be ordered jointly and severally to pay the costs of the federal proceedings (Art. 66(1) and (5) LTF) and to pay costs to the Respondent (Art. 68(1), (2) and (4) LTF).

For these reasons, the Federal Tribunal pronounces:

1.
The appeal is rejected insofar as the matter is capable of appeal.

2.
The judicial costs, set at CHF 23'000, shall be borne by the Appellants, jointly and severally.

3.
The Appellants are jointly and severally ordered to pay CHF 25'000 for costs to the Respondent.

4.
This judgment shall be notified to the parties' representatives and to Mr._____, a Zurich lawyer, for the Arbitral Tribunal.

Lausanne, July 11, 2017

On behalf of the First Civil Law Court of the Swiss Federal Tribunal

The Presiding Judge:	The Clerk of the Court:
Kiss	Carruzzo (Mr.)