4A_538/2012[1]

Judgment of January 17, 2013

First Civil Law Court

Federal Judge Klett (Mrs), Presiding
Federal Judge Corboz,
Federal Judge Kolly,
Federal Judge Kiss (Mrs),
Federal Judge Niquille (Mrs.),
Clerk of the Court: Carruzzo

X._____,
Represented by Mr. Pierre-Yves Tschanz, Mrs. Perrine Duteil and Mr. Boris Vittoz
Appellant,

v.

Y._____ Ltd.,
Represented by Mr. Xavier Favre-Bulle and Mrs. Marjolaine Viret,
Respondent,

Facts:

A.
Pursuant to a contract of June 8, 2000, the French company X._____ appointed the Iraqi company Y._____ Ltd. (hereafter: Y._____) as exclusive agent for the sale in Iraq of diesel engines for electrical power plants. Initially set at 5% of the amount of the order, the compensation of the agent's services was later set at 8.5% of this amount pursuant to an addendum of March 5, 2002. A first addendum, signed on January 23, 2002, extended the scope of the agency contract to an agreement contemplated by X._____ with a Syrian company named A._____.

On March 6, 2002, X._____ entered into a contract by which it undertook to sell ten diesel engines to A._____ for the price of EUR 161'000'000. In a letter of April 6, 2002, the French company informed Y._____ that it had included EUR 6'000'000 in the total contract price as an additional commission for the agent.

[1] Translator's note: Quote as X._____ *v.* Y._____ Ltd., 4A_538/2012. The original decision is in French. The text is available on the website of the Federal Tribunal www.bger.ch

On July 8, 2002, X._____ promised a company B._____ that it would pay a commission of 3.5% on the A._____ contract. The aforesaid company consequently sent an invoice dated October 1, 2002, for EUR 4'970'000, namely 3.5% of EUR 142'000'000 minus an advance of EUR 70'000.

B.
Relying on the arbitration clause contained in the agency agreement, Y._____ filed a request for arbitration against X._____ with a view to obtaining the payment of EUR 22'894'600 as a commission.

A three-member arbitral tribunal was constituted under the aegis of the Court of Arbitration of the International Chamber of Commerce (ICC), the seat of the arbitration being in Lausanne and the proceedings governed by the ICC Rules of Arbitration with Swiss law applicable to the merits.

Respondent X._____ argued that the Arbitral Tribunal had not been regularly constituted. In the alternative, it argued that it had no jurisdiction over the claims made by Y._____ and, in the further alternative, to reject the claim.

In an award of July 9, 2012, the Arbitral Tribunal, rejecting all Respondent's procedural defenses, ordered X._____ to pay to Y._____ the amount of EUR 10'400'000 with interest at 5% from June 22, 2005. To set this amount, the Arbitral Tribunal reasoned as follows: as to the A._____ contract, the basis of the 8.5% commission minus various expenses and taxes in connection with the delivery of the goods, must be set at EUR142'000'000. The commission is consequently EUR 12'070'000, from which, as the Claimant agrees, the EUR 4'970'000 paid by the Respondent to B._____ must be deducted, leaving a balance of EUR 7'100'000. Part of the additional commission of EUR 6'000'000 mentioned in the aforesaid letter of April 6, 2002, must be added to this amount, namely EUR 3'300'000. Only the latter amount and not the entire additional commission agreed can be taken into account with a view to avoiding that the total commission of EUR 15'370'000 (*i.e.* EUR 12'070'000 + EUR 3'300'000) exceeds 10% of the price of the goods sold with an additional margin of tolerance; indeed according to the usages of trade, a commission above this percentage is such as to cause suspicion that the additional portion does not compensate the very work of the agent but is used for corruption purposes or for other payments. This being so, it must be emphasized that the evidence adduced did not establish that the Respondent would have accepted that bribes would be paid to Syrian officials as this would have caused the agreement to be void pursuant to Art. 20 CO.[2]

[2] Translator's note: CO is the French abbreviation for the Swiss Code of Obligations.

C.
On September 14, 2012, X._____ (hereafter: the Appellant) filed a civil law appeal. It seeks a finding of the Federal Tribunal that the Arbitral Tribunal that issued the award of July 9, 2012, had no jurisdiction and in any event that the award be annulled. Moreover, the Appellant applied for a stay of enforcement issued *ex parte* – that was granted by Presidential Order on September 20, 2012 – and also on a definitive basis, the latter being still undecided as of this writing.

The Arbitral Tribunal stated in a letter of its chairman of October 4, 2012, that it had nothing to add to the award, which was self-explanatory.

In its answer of November 2, 2012, Y._____ (hereafter: the Respondent) submits that the appeal should be rejected to the extent that the matter is capable of appeal.

On November 22 and December 10, 2012, the Appellant and the Respondent filed a reply and a rejoinder in which they maintained their previous submissions.

Reasons:

1.
According to Art. 54 (1) LTF[3] the Federal Tribunal issues its decision in an official language,[4] as a rule in the language of the decision under appeal. When the decision is in another language (here English), the Federal Tribunal resorts to the official language chosen by the parties. They both used French. Consequently this judgment shall be issued in that language.

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 PILA[5] (Art. 77 (1) LTF). The object of the appeal, the standing to appeal, the time limit to do so, the appellant's submissions, or the grounds for appeal invoked do not raise any problems of admissibility in this case. Consequently there is no reason not to address the appeal.

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

3.
3.1
Pursuant to Art. 77 (3) LTF the Federal Tribunal reviews only the arguments invoked and reasoned by the appellant. In this case, the Appellant raises only some of the various arguments it had raised before the Arbitrators, who rejected them. Consequently, according to the provision quoted, only the arguments set forth in the appeal brief will be reviewed hereunder.

3.2 The Federal Tribunal issues its decision on the basis of the facts established by the arbitral tribunal (Art. 105 (1) LTF). This Court may not 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). However, as was already the case under the aegis of the (previous) law organizing the federal Courts (see ATF 129 III 727 at 5.2.2; 128 III 50 at 2a and the cases quoted) the Federal Tribunal retains the competence to review the factual findings on which the award under appeal is based if one of the grievances mentioned at Art. 190 (2) PILA is raised against such factual findings or when some new facts or evidence are exceptionally taken into account in the framework of the civil law appeal (see Art. 99 (1) LTF).

3.3
In support of its request for a stay of enforcement, the Appellant filed a number of new exhibits to demonstrate in particular that its opponent does not exist. This method violates the principles just recalled and is inadmissible. Particularly because the Arbitral Tribunal rejected the defense raised by the Appellant in this respect (award nr 30 to 35, particularly nr 34) and the Appellant did not raise this issue in its appeal brief. Moreover, the decision issued today renders the Appellant's request for a stay of enforcement moot, so the discussion as to the Respondent's existence, initiated only in the framework of this request, must be considered closed.

4.
4.1
In a first argument based on Art. 190 (2) (b) PILA, the Appellant claims that the Arbitral Tribunal wrongly assumed jurisdiction as to the claim. According to the Appellant, the request for arbitration was initiated on the Respondent's behalf by representatives lacking the proper authority, whose actions would never have been sanctioned.

The Respondent challenges the admissibility of this first argument because it should have been raised on the basis of Art. 190 (2) (a) PILA. In its view, as the issue of the authority of the representatives is connected with the initiation of the claim within the meaning of Art. 181 PILA, it consequently affects the regularity of the constitution of

the Arbitral Tribunal. Be this as it may, it considers that the Appellant's criticism based Art. 190 (2) (b) PILA is groundless, if not inadmissible.

4.2
Seized of a jurisdictional defense, the Federal Tribunal freely reviews the legal issues determining the jurisdiction of the arbitral tribunal or the lack thereof, including preliminary issues. As the case may be, the Court may also review the application of pertinent foreign law; it will do so with full authority but deferring to the majority view on the issue involved and to the opinion of the Supreme Court of the country stating the applicable rule of law in case of disagreement between case law and legal writing (aforesaid judgment 4A_50/2012,[6] *ibid.*). Yet the Federal Tribunal is not a court of appeal. Thus in the award under appeal, it is not incumbent upon the Court to research which legal arguments could justify upholding the grievance based on Art. 190 (2) (b) PILA. Instead, the Appellant should draw the Court's attention to them in order to comply with the requirements of Art. 77 (3) LTF (ATF 134 III 565 at 3.1 and the cases quoted).

However, the Federal Tribunal reviews the factual findings only within the aforesaid limits (see above 3.2) even when reviewing the argument based on the lack of jurisdiction of the arbitral tribunal (judgment 4A_488/2011[7] of June 18, 2012, at. 4.3).

4.3
The parties disagree as to whether the argument falls within letter (a) (Respondent's view) or letter (b) (Appellant's view) of Art. 190 (2) PILA.

4.3.1 According to the Appellant, the dispute would be vain. Indeed, as the argument was raised with all the necessary precision, the Federal Tribunal should review it, regardless of which letter of Art. 190 (2) PILA it should be connected with.

This view disregards the true nature of a civil law appeal against an international arbitral award and is moreover incompatible with the wording of Art. 77 (3) LTF.

4.3.2 According to the Respondent's argument in its answer (nr 33) and its rejoinder (p. 7) the lack of authority of a representative in the arbitral proceedings would not affect jurisdiction but the regularity of the constitution of the arbitral tribunal, so that the corresponding argument would fall within Art. 190 (2) (a) PILA. Thus, if an arbitral proceeding had been conducted by a *falsus procurator* unbeknownst to and without the authority of the allegedly represented party, the arbitral tribunal issuing the award

[6] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/portuguese-partial-reversal-of-vivendi-on-capacity-to-be-a-party/

[7] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/the-federal-tribunal-leaves-undecided-the-issue-as-to-whether-an/

under appeal would never have been validly constituted for this purpose as it would not have been seized of an arbitration request by any properly authorized representatives.

The argument is quite artificial. Applying it generally, one would treat as cases of irregular constitution of the arbitral tribunal a number of occurrences which case law and legal writing agree should be related to the jurisdictional defense contained at Art. 190 (2) (b) PILA. Treated in this manner, it would be possible, for instance, to claim that an award issued on the basis of an invalid arbitration agreement or not binding the party that submitted the request for arbitration came from an irregularly constituted arbitral tribunal because, as to the former, the arbitrators could not draw their authority from a legal act deprived of any legal effect and, as to the latter, because they were called upon by a party unable to derive any right from the arbitration agreement. Briefly stated, with some exaggeration, almost all issues as to the objective and subjective jurisdiction of the arbitral tribunal could also be considered as issues concerning the regularity of the constitution of the arbitral tribunal and as such fall within Art. 190 (2) (a) PILA.

In reality, nothing justifies extending the scope of this provision beyond the limits previously assigned or to consequently to limit that of the jurisdictional defense (Art. 190 (2) (b) PILA) as this would affect the certainty of the law. Thus, as a matter of principle and on the basis of the side note of section IV of chapter 12 PILA ("arbitral tribunal"), the regularity of the constitution of the arbitral tribunal means only the manner in which the arbitrators were appointed or substituted (Art. 179 PILA) and the issues concerning their independence (Art. 180 PILA). Other issues fall either within the jurisdictional defense (Art. 190 (2) (b) PILA or within one of the other specific grounds of appeal set forth at Art. 190 (2) PILA (letters (c) to (e)), such as the incompatibility with procedural public policy (Art. 190 (2) (e) PILA).

4.3.3 The issue at hand concerns the authority of the individuals acting in the arbitral proceedings on the Respondent's behalf. It does not concern the modalities pursuant to which the Arbitral Tribunal was appointed or the independence and the impartiality of its members but rather the issue as to whether the Arbitral Tribunal – regularly constituted – was seized by people entitled to do so or by a *falsus procurator*. The issue concerns the jurisdiction *ratione personae* broadly understood. It must be consequently reviewed in the light of Art. 190 (2) (b) PILA, as the Arbitral Tribunal did, treating it as a jurisdictional defense (award p. 23 nr VI).

4.4
The Arbitral Tribunal stated the following as to the issue in dispute (award nr 41):

> *The delegation of power granted by Mr. C._____ to Mr. D._____ to initiate these proceedings should be valid according to Iraqi and Swiss Law,*

which do not request any special form to the contrary of Spanish Law. This having been said, whether or not Spanish law shall govern the issue of the authority granted to Mr. D._____ as contended by the Respondent [i.e. the Appellant] is a question that does not need to be solved because the lawyers in charge of representing the Claimant [i.e. the Respondent] in these proceedings were not the law firm E._____ selected by Mr. D._____ but Messrs F._____ and G._____. It is true that these attorneys were appointed at a time, i.e. on December 23, 2009 (...) when Mr. C._____ was no longer the general manager of the Claimant . According to the Respondent, such appointment should have been made by Mr. H._____ who during the period starting from November 7, 2009 replaced Mr C._____ as general manager of the company. However, this contention should not affect Messrs F._____ and G._____'s authority to represent the Claimant before the Arbitral Tribunal, and this for the reason that the alleged lack of power of Messrs F._____ and G._____ could be cured by a ratification of their appointment by the actual manager of the company, i.e. Mr C._____ who reacquired his position of general manager of Y._____ after November 19, 2011. In this respect, it should be noted that when asked by Messrs F._____ and G._____ to confirm or infirm the threat he allegedly made to prevent Mr. I._____ from testifying, Mr C._____ reacted to this request by addressing a letter to these lawyers which was read at the end of the hearing. Therefore, Mr. C._____'s positive reaction as to the request of these two lawyers should be interpreted as a confirmation or ratification of their power to represent the Claimant in this case.[8]

4.4.1 The Appellant first argues that the Arbitrators did not examine the contents of Iraqi law concerning the representation of legal entities, applicable to the case pursuant to Art. 187 (1) PILA in connection with Art. 154 (1) and 155 (i) PILA. It refers in this respect to an excerpt of a brief submitted in the arbitral proceedings attached to its appeal brief.

Of doubtful admissibility due to its meager reasoning, the argument also appears unfounded. It is true that the Arbitral Tribunal did not review the rules of Iraqi company law and, in particular, the provisions of this law as to the authority of individuals acting on behalf of the company. However, the Arbitral Tribunal could leave this point aside because of the legal reasoning developed in the excerpt of the award quoted above. Indeed, it found that a corporate officer empowered to commit the Respondent (C._____) had conclusively ratified the procedural steps previously taken on its behalf by representatives without authority (lawyers F._____ and G._____). Yet, the Appellant does not argue that this violates Iraqi law and neither

[8] Translator's note: In English in the original text.

does it demonstrate which provisions of this law were breached. The issue thus does not need to be reviewed (see above at 4.2).

4.4.2 In its second argument, the Appellant highlights a part of the excerpt quoted above in which the Arbitral Tribunal emphasizes that C._____ – no longer an officer of the company as of September 7, 2009 – was reinstated as general manager of the company on November 19, 2011. It also points out that the ratifying act admitted by the Arbitrators – *i.e.* a letter he sent to attorneys F._____ and G._____ – took place before the hearing in Paris on September 26 to 29 because it was brought to their attention during the hearing. From this twofold basis the Appellant draws the conclusion that the steps taken by the two attorneys were not validly ratified because the pertinent act in this respect took place at a time when C._____ had not yet been reinstated as an officer of the Respondent.

A date is a fact. Strictly speaking it is therefore not possible to modify it in the framework of a civil law appeal concerning international arbitration, whether the factual finding is arbitrary or due to manifest oversight (see above at 3.2). However there is a general principle pursuant to which any participant in the proceedings must comply with the rules of good faith (see Art. 52 of the Civil Code of Procedure [CPC]; RS 272). Such rules require in particular that no contradictory behavior should be adopted (ATF 135 III 162 at 3.3.1 p. 169 and the cases quoted). Yet the Appellant behaves in this way when basing its demonstration on the aforesaid date of November 19, 2011, which was doubtlessly mentioned in the excerpt quoted due to a *lapsus calami* according to the detailed explanations of the Respondent as to this issue (answer p. 17 nr 35 and note 31). Indeed at nr 32 (p. 19) of the award the Arbitral Tribunal states that according to the Appellant the temporary substitution of C._____ as general manager of the Respondent, starting on November 7, 2009, ended on July 8, 2011, ("Respondent in particular focuses on the false representation by Claimant that Mr. C._____ was at the material time general manager of the company whereas from November 7, 2009, to 8 July 2011, it was Mr. H._____").[9] Hence the Appellant cannot in good faith argue today that C._____ was reinstated as the Respondent's general manager on November 19, 2011, only, as inadvertently stated in the award under appeal (nr 41 p. 24) when it stated itself in the arbitral proceedings that the pertinent date was July 8, 2011. Consequently its criticism of the Arbitrators is groundless because at the latter date or on the next day at the latest, the aforesaid individual had already been reestablished as an officer of the company and consequently was capable of ratifying, as held by the Arbitral Tribunal.

Be this as it may, the procedural history contained in the award (nr 6 p. 7 to 11) shows that after November 19, 2011, a number of steps were taken on behalf of the

[9] Translator's note: In English in the original text.

Respondent by attorneys F._____ and G._____, in particular the filing of a Post-Hearing Brief[10] on March 30, 2012. The Appellant does not argue that this would have been done unbeknownst to or against the will of C._____. Yet to the extent that this was done when he had already been reinstated as the Respondent's general manager his lack of reaction could not be interpreted from a legal point of view as anything else than tacit ratification of the authority that, by hypothesis, the two attorneys arrogated to themselves. Thus the Appellant's argument should be rejected even if the date of November 19, 2011, were to be considered.

5.
In a second group of arguments, the Appellant claims that its right to be heard within the meaning of Art. 190 (2) (d) PILA was violated on two counts.

5.1
It is first argued that in order to admit ratification by the Respondent of the steps taken by attorneys F._____ and G._____ the Arbitral Tribunal resorted to a piece of evidence totally alien to the issue, namely the letter from C._____ to the two attorneys already mentioned above (see above at 4.4.2).

According to the Appellant, this evidence had indeed been adduced only to establish the reality of the threats allegedly made to one of its witnesses by C._____. Yet despite the assurances they had given, the Arbitrators, against any expectation, diverted this evidence from its exclusive goal, deducing from it the existence of the ratification in dispute.

In raising such an argument the Appellant appears to want to claim surprise. According to the case law to which it obviously alludes, the arbitrators may exceptionally be under a duty to advise the parties when they consider basing their decision on a provision or a legal consideration that was not raised during the proceedings and the pertinence of which the parties could not guess (judgment 4A_46/2011[11] of May 16, 2011, at 5.1.1 and the cases quoted). This jurisprudence, which the Federal Tribunal applies restrictively, does not concern the establishment of facts. As to that, the right to be heard does empower each party to express its views on the facts essential for the award to be issued, to propose evidence on pertinent facts, and to participate in the hearings of the arbitral tribunal (judgment 4A_110/2012[12] of October 9, 2012, at 3.1 and references). However it does not require the arbitrators to elicit a view from the parties as to the bearing of each exhibit produced and it does not empower one of the parties to limit the autonomy of the arbitral tribunal in assessing a specific exhibit only

[10] Translator's note: In English in the original text.
[11] Translator's note: Full English translation at http://www.praetor.ch/arbitrage/no-breach-of-pre-arbitral-procedures-failure-to-deal-with-an-arg/
[12] Translator's note: Soon to be published at www.praetor.ch

as a function of the purpose for which it produced the evidence. Indeed, as the Respondent rightly emphasizes, if each party could decide in advance what would be the evidentiary conclusion that the arbitral tribunal would be authorized to draw from each exhibit produced, the principle of free assessment of the evidence – one of the pillars of international arbitration (BERGER/KELLERHALS, International and Domestic Arbitration in Switzerland, 2nd ed. 2010, nr 1238) – would be undermined.

In this case, the Appellant could have attempted to oppose the production of the exhibit in dispute if it considered to have good reasons to do so. Yet once the production was admitted it could not limit the review of the arbitrators as to this evidence by itself setting its scope. Moreover and no matter what it says, reading the excerpt of the minutes of the hearing produced as exhibit 16 does not show that it received firm assurance from the Chairman of the Arbitral Tribunal that the Arbitrators would refuse to draw any legal consequences from the very existence of the document and limit themselves to its contents exclusively. Moreover, it is established that the parties had the opportunity to state their views as to this evidence in their post-hearing briefs submitted after the hearing. In such circumstances the argument that the right to be heard was violated is unfounded.

In any event, for the reason mentioned above (see above 4.4.2 last §) even if the argument were founded, this would not necessarily result in the appeal being admitted as to jurisdiction, because the steps taken by attorneys F._____ and G._____ were tacitly ratified by the Respondent's general manager after the filing of the exhibit in dispute.

5.2
The right to be heard in contradictory proceedings within the meaning of Art. 190 (2) (d) PILA does not require an international arbitral award to be reasoned (ATF 134 III 186 at 6.1 and references). However it imposes upon the Arbitrators a minimal duty to review and handle the pertinent issues (ATF 133 III 235 at 5.2 p. 248 and the cases quoted). This duty is breached when inadvertently or due to oversight, the arbitral tribunal does not taken into consideration some statements, arguments, evidence and offers of evidence submitted by one of the parties and important to the decision to be issued. If the award totally overlooks some items apparently important to decide the dispute, it behooves the arbitrators or the respondent to justify the omission in their observations as to the appeal. It is advisable for them to demonstrate that contrary to the appellant's arguments, the elements omitted were not pertinent to decide the case at hand or, if they were, that they were rejected by the arbitral tribunal implicitly. However the arbitrators do not have the obligation to discuss all arguments raised by the parties, so that they could not be found in breach of the right to be heard in contradictory proceedings for failing to reject, even implicitly, an argument objectively deprived of any pertinence (ATF 133 III 235 at 5.2 and the cases quoted).

Invoking these principles of case law, the Appellant argues that the Arbitral Tribunal failed to take into account the exhibits it had produced in a timely manner and in the prescribed format to demonstrate the existence of a connection between C._____ and the Al-Qaida group, a circumstance that according to the Appellant would make it impossible to uphold the Respondent's claim. The Appellant is wrong. Indeed the Arbitral Tribunal specifically refers in the award to the thesis of the financing of terrorism – pursued by the Appellant in its post-hearing briefs as a complement to its previous briefs – which relies on the accusations made against C._____ by the Iraqi Government (nr 80). Then it finds that the Appellant, which had the burden of proof, failed to prove the accusations it made against this individual, so that its thesis could only be rejected (nr. 81). This opinion appears to have been quite emphatically stated. It undeniably shows that the issue raised by the Appellant did not escape the Arbitrators and that they did not see in the evidence in the file anything that would substantiate such accusations. It is not decisive that they did not state in detail the reasons of their conviction in this respect, unless one would wish to surreptitiously introduce a duty to reason international arbitral awards. In any event the Appellant does not provide any indication that some decisive documents, emanating from reliable sources other than people, organizations or states implicated in the Iraqi crisis, would have escaped the attention of the Arbitral Tribunal. Its argument is therefore mere inadmissible criticism of the assessment of the evidence by the Arbitrators.

In conclusion the argument based on the violation of the right to be heard proves to be unfounded in both respects.

6.
In a final argument the Appellant claims that the Arbitral Tribunal issued an award incompatible with public policy within the meaning of Art. 190 (2) (e) PILA by upholding the validity of a contract affected by corruption.

6.1
According to Swiss legal concepts, promising to pay bribes is contrary to accepted standards and such promises are therefore void due to the defect impacting their contents. According to a confirmed view, they also breach public policy (ATF 119 II 380 at 4b). Yet in order for the argument to be upheld, corruption must be established and the Arbitral Tribunal must have refused to take it into account in the award (judgment 4P.208/2004 of December 14, 2004, at 6.1; judgment 4P.115/1994 of December 30, 1994, at 2d; KAUFMANN-KOHLER/RIGOZZI, Arbitrage international, 2nd ed. 2010, p. 536, note 666).

6.2

In this case, contrary to what the Appellant argues, the Arbitral Tribunal did not hold that part of the commission paid to the Respondent was for bribes to be paid to Syrian officials (award nr 84), as the Arbitral Tribunal itself stated, it would not have been in a position to order a payment in favor of the Iraqi company if it had been so, because the agency agreement would then have been void (award nr 83). Referring to the usages of trade and availing itself of its own professional experience, the Arbitral Tribunal resorted to a kind of legal fiction to consider that a commission exceeding 10% of the price of the goods sold – with a margin of tolerance added – could raise the suspicion that the additional portion would not compensate the work of the agent as such but would be used for corruption purposes or for other payments. In order to comply with this trade usage, it consequently reduced the additional commission of EUR 6'000'000, so that the total compensation of the Respondent's services would not go above the 10% threshold with a margin of tolerance (award nr 86). Then at the end of its analysis, it stated that the total commission awarded to the Respondent was not such as to elicit a suspicion of corruption, emphasizing that such a possibility, raised by the Appellant in its last brief, had been totally excluded by one of that Party's witnesses (award nr 93 in connection with nr 6 p. 10).

Whatever the pertinence of this legal reasoning, which is beyond the review of the Federal Tribunal, one cannot conclude that the Arbitrators considered the constitutive elements of corruption established. The Appellant is not entitled to claim the opposite because, according to another finding of the Arbitrators, it considered as unproved the allegations made by two of the Respondent's witnesses at the hearing, according to whom the latter would have intended to make or would have made payment to third parties, in particular to some Syrian officials (award nr 82 in connection with nr 6 p. 10).

This being so, the last argument must be rejected like the previous one.

7.
The Appellant fails and shall pay the costs of the federal proceedings (Art. 66 (1) LTF) and compensate its opponent (Art. 68 (1) and (2) LTF).

Therefore the Federal Tribunal pronounces:

1.
The appeal is rejected.

2.
The judicial costs set at CHF 40'000 shall be borne by the Appellant.

3.

The Appellant shall pay an amount of CHF 50'000 to the Respondent for the federal proceedings.

4.
This judgment shall be notified to the Representatives of the Parties and to the Chairman of the ICC Tribunal.

Lausanne January 17, 2013.

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

The Presiding Judge: The Clerk:

Klett (Mrs.) Carruzzo