4A_231/2014[1]

Judgment of September 23, 2014

First Civil Law Court

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

Y._____ SA,
Represented by Mr. Maurice Harari and Mrs. Delphine Jobin,
Appellant,

v.

B._____,
Represented by Mr. Christopher Koch and Mr. Philip Landolt,
Respondent

Facts:

A.
On September 10, 2003, and March 6, 2006, Y._____ SA (hereafter: Y._____), a company under [name of country omitted] law, known at the time as Y.Y._____ Ltd., and some other companies of Group Y._____ entered into two Consultancy Agreements (hereafter, together: The Contracts; respectively: the 2003 Contract or the 2006 Contract), with the company under [name of country omitted] law B._____, governed by Swiss law, by which the former entrusted the latter to assist them in preparing tenders with a view to obtaining contracts for the construction and renovation of electrical power plants. An arbitration clause inserted into both Contracts entrusted a three-member arbitral tribunal

[1] Translator's Note: Quote as Y._____ SA *v.* B._____, 4A_231/2014.
The original of the decision is in French. The full text is available on the website of the Federal Tribunal, www.bger.ch.

constituted under the aegis of the International Chamber of Commerce (ICC) with settling the disputes that arose from the performance of the Contracts. The seat of the arbitration was in Geneva.

The 2003 Contract concluded by Y._____ and its American sister B.Y._____ Inc. concerned equipment for an electrical power plant. B._____ was to receive a commission of 3% of the unit price of the equipment delivered by Y._____.

The 2006 Contract, signed by B._____ with Y._____ and C.Y._____ AG, a German branch of the Y._____ Group, concerned equipment to be installed in another electrical power plant. The commission was 4% of the value of the equipment.

It is not disputed that B._____ furnished its contractual counterparts with all the services it had undertaken to provide. As compensation, it received commissions of USD 974'624 under the 2003 Contract, leaving a balance of USD 115'000. As to the performance of the 2006 Contract, the [name of country omitted] company received EUR 1'448'380. The balance of its commissions in this respect amounted to EUR 935'076.

B.
On November 29, 2012, B._____ sent a request for arbitration against Y._____, B.Y._____ Inc. and C.Y._____ AG severally to the ICC with a view to obtaining payment of the balance of its commissions, namely the USD 115'000 and EUR 935'076, with interest.

As a preliminary issue, the Respondents sought a stay of the arbitral proceedings until B._____'s activity could be clarified. According to them, there were various criminal investigations pending for suspicion of corruption in connection with projects in which Y._____ had participated, in particular in the United States of America through the Department of Justice (hereafter: the DOJ) and in England through the Serious Fraud Office (hereafter: the SFO). Hence, they had no other choice than to suspend payment of the commissions until full clarification of B._____'s compliance with legal provisions concerning corruption could be ascertained, as otherwise they would breach the UK Bribery Act 2010 (hereafter: the Bribery Act) and its American counterpart, the Foreign Corrupt Practices Act (hereafter: the FCPA) and incur heavy criminal sanctions, in particular high fines. To substantiate their statements, the Respondents submitted, among other documents, two written statements from private experts, the English lawyer C._____ and the American lawyer D._____.

In a Procedural Order n. 2 of September 2, 2013, the Arbitral Tribunal rejected the request for a stay of the proceedings. After establishing the facts and formally closing the proceedings by letter of January 22, 2014, it issued a decision on March 3, 2014, rejecting the Respondents' new request to stay the proceedings for 9 or even 6 months. On the same date and in the same document, it issued its final award in which, in particular, it ordered Y._____ to pay to B._____ USD 115'000 and EUR 935'076 with interest at 5% from December 6, 2012, while rejecting the claim insofar as it concerned B.Y._____ Inc. and C.Y._____ AG.

C.
On April 7, 2014, Y._____ (hereafter: the Appellant) filed a civil law appeal with a view to obtaining the annulment of the final award of March 3, 2014. It argues that the Arbitral Tribunal issued an award incompatible with substantive public policy within the meaning of Art. 190(2)(e) PILA.[2] In its answer of May 14, 2014, B._____ (hereafter: the Respondent) submits that the appeal should be rejected. In a letter of May 5, 2014, one of the arbitrators sent a letter to the Federal Tribunal that the Chairman of the Arbitral Tribunal had sent to him on May 2, 2014, and in which he spelled out, in detail, the process by which the award under appeal was adopted. Both letters were communicated to the representatives of the parties.

In a brief of June 12, 2014, the Appellant submitted some short observations as to the answer to the appeal.

A stay of enforcement was granted by the decision of the presiding judge on July 9, 2014.

D.
After filing the appeal at hand, the Appellant submitted a request for revision concerning the same award (case 4A_247/2014).

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 was issued in another language (here: English), the Federal Tribunal resorts to the official language chosen by the parties. Before the Arbitral Tribunal the parties used English. In the briefs submitted to the Federal Tribunal both used French. In accordance with its practice, the Federal Tribunal will consequently issue its decision in French.

2.
The Federal Tribunal is seized of a civil law appeal and a request for revision concerning the same arbitral award. According to the general rule, from which there is no reason to derogate in this case, the civil law appeal shall be addressed as a matter of priority (see ATF 129 III 727 at 1).

3.
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 (Art. 77(1)(a) LTF). Whether as to the object of the appeal, the standing to appeal, the time limit to appeal, the appellant's submissions or the ground for

[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.
[4] Translator's Note: The official languages of Switzerland are German, French, and Italian.

appeal invoked, none of these admissibility requirements raises any problems in this case. The matter is therefore capable of appeal.

4.
4.1. The Federal Tribunal issues its judgment on the basis of the facts found in the award under appeal (see 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 manifestly inaccurate manner or in violation of the law (see Art. 77(2) LTF, ruling out the applicability of Art. 105(2) LTF). Indeed, its mission when seized of a civil law appeal against an international arbitral award is not to adjudicate with full powers as a court of appeal would do but rather only to examine whether the admissible grievances raised against the award are accurate or not. Allowing the parties to state other facts than those found by the arbitral tribunal – but for the exceptional cases reserved by case law – would no longer be compatible with this mission, even if the facts were established by evidence in the arbitration file (judgment 4A_386/2010[5] of January 3, 2011, at 3.2). However, as was already the case under the federal law organizing federal courts (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 facts on which the award was based if one of the grievances listed in Art. 190(2) PILA is raised against such factual findings or when some new facts or evidence are exceptionally taken into consideration in the framework of the civil law appeal procedure (ATF 138 III 29[6] at 2.2.1 and the cases quoted).

4.2. By way of a letter from counsel of March 3, 2014, the Appellant advised the Chairman of the Arbitral Tribunal of the indictment in the United States of America of a [name of country omitted] citizen by the name of F._____, who was under suspicion of having received bribes paid through consultants such as the Respondent, who were acting on behalf of foreign companies seeking to be awarded contracts through tender processes for various electrical power plant construction projects. The indictment issued on February 10, 2014, by the Grand Jury for the district of Maryland in case *United States of America v. F.*_____ was attached to the letter.

In an email of March 4, 2014, the Chairman of the Arbitral Tribunal advised the Appellant that he had received the March 3, 2014, letter when the final award had already been signed by all members of the Tribunal. In his aforesaid letter of May 5, 2014, a copy of which was sent to the Federal Tribunal, he confirmed this and detailed the process by which the award under appeal was adopted. The Appellant received a copy of this letter and did not challenge its contents. Indeed, it considers that the circumstance alleged in the letter of March 3, 2014, is a "new fact" and invokes it in support of its parallel request seeking the revision of the award under appeal.

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[5] 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

[6] 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

According to the Appellant, it would be justified nonetheless to exceptionally take this new fact into account *in casu* because of the critical issues, which in its view, are involved in the appeal and due to the criminal sanctions arising from foreign legal orders threatening the Appellant. It is not so. The fact mentioned in the Appellant's letter of March 3, 2014, and the evidence in support were undeniably brought to the attention of the Arbitral Tribunal after the award under appeal was issued. This is a new fact and new evidence which does not arise from the award and therefore cannot be taken into consideration by this Court according to Art. 99(1) LTF, a provision not mentioned in the list of exceptions at Art. 77(2) LTF.

Consequently, the merits of the appeal will be examined without regard to the circumstance mentioned in the Appellant's letter of March 3, 2014.

5.
The Appellant argues that the Arbitral Tribunal issued an award incompatible with public policy within the meaning of Art. 190(2)(e) PILA by ordering it to pay in a manner which could violate the FCPA and the Bribery Act and consequently lead to the criminal sanctions foreseen by these two laws. According to the Appellant, the commissions it paid to the Respondent may have been used to pay bribes to F._____.

5.1. The Swiss legal order considers promises to pay bribes as contrary to morals and consequently void due to the defect they contain. According to well-established opinion, they are also contrary to public policy (ATF 119 II 380 at 4b). For the corresponding grievance to be upheld, corruption must be established but the Arbitral Tribunal refused to take it into account in the award (judgments 4A_538/2012[7] of January 17, 2013, at 6.1; 4P.208/2004 of December 14, 2004, at 6.1 and 4P.115/1994 of December 30, 1994 at 2d; Kaufmann-Kohler and Rigozzi, *Arbitrage international*, 2nd ed., 2010, p. 536, note 666).

In this case, the Arbitral Tribunal analyzed the evidence submitted by the Appellant to substantiate its implicit allegation of bribery against the Respondent and found that the allegation had not been proved (award n. 124 *i.f.*). Such a conclusion, based on an assessment of the evidence that this Court may not review (see 4.1, above), immediately rules out a finding that the Arbitral Tribunal disregarded public policy by ordering the payment of commissions connected with brokerage contracts that were void for corruption.

5.2. What the Appellant actually argues, from the point of view of public policy, is not so much the corruption allegedly impacting the contracts it concluded with the Respondent – it did not argue that they were void as a consequence of this in the Arbitral Tribunal – but instead the risk which compliance with the award under appeal would carry, namely heavy penalties on the basis of the criminal law provisions adopted by the United States of America and England.

5.2.1. The Arbitral Tribunal carefully factually and legally examined the issues connected with the investigations conducted by the SFO and the DOJ against several companies belonging to Group

[7] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/alleged-lack-authority-representatives-creates-jurisdictional-issue

Y._____ on the basis of the testimony of the party-appointed experts C._____ and D._____ (award n. 126 to 173). As to the first investigation, it deduced from the testimony of Mr. C._____ none of the defendants in the arbitration could risk criminal sanctions pursuant to the Bribery Act, as the only company that may fall within this regulation was the mother company of Group Y._____, based in [name of country omitted], which was not a party to the arbitration. Moreover, it pointed out the reasons for which, in its view and contrary to what the Appellant sought, it was not justified to postpone the final award until a judgment would be issued in the criminal case pending in England, recalling in this respect that the principle expressed in the adage *le pénal tient le civil en l'état* ("the criminal case stays the civil case") is not considered by the Federal Tribunal as sufficiently important to be part of procedural public policy according to Art. 190(2)(e) PILA (ATF 119 II 386 at 1c; judgment 4A_604/2010[8] of April 11, 2011, at 2.2.2). As to the second investigation, the Arbitral Tribunal pointed out that Mr. D._____ had not been able to give a serious assessment as to the foreseeable duration and the probable outcome of the investigation conducted by the DOJ pursuant to the FCPA. Thus it concluded that, in this case as well, the Respondent's interest in obtaining a decision in the arbitral proceedings it initiated within a reasonable time outweighed the Appellant's interest in postponing the performance of its (albeit undisputed) contractual obligations towards the other party until a time when the hypothetical final decision may be issued by the American criminal authorities as to the pending investigation, a time which was impossible to precisely fix.

5.2.2. As its sole argument, the Appellant refers without any further explanations in its brief to "Mr. D._____'s and Mr. C._____'s analysis" which would be valid without regard to whether the payment of the commissions in dispute took place on a voluntary basis, pursuant to the injunction of an arbitral tribunal, or in the framework of enforcement proceedings. It adds that the risk of committing a criminal offence punishable by the American and/or English courts exists no matter which entity of Group Y._____ would make such a payment because the Bribery Act and the FCPA would institute liability of the mother company – here, Y._____ SA – for the deeds of its subsidiaries (appeal n. 44). In other words, according to the Appellant, the Arbitral Tribunal disregarded transnational public policy "of which these two laws are obviously part" by ordering it to take the risk to violate them (appeal n. 47 to 49; reply p.1).

Thus set forth, the reasoning in support of the appeal appears manifestly insufficient. Indeed, the Appellant merely refers the Federal Tribunal to reading the statements of its two party-appointed experts as though it were arguing in a court of appeal. It does not demonstrate which provisions of the Bribery Act or of the FCPA would be applicable in this case, what would be the criminal sanction which could be issued pursuant to these two laws, or what its own risk would be on this basis, although it is a company under [name of country omitted] law. Neither does the Appellant explain why the mere fact that it may allegedly cause the mother company of the group to which it belongs to run similar risks, even though it was not a party to the arbitral proceedings concluded by the award under appeal, would be pertinent from the point of view of a violation of public policy. Finally, it does not present criticism worthy of the name as to the careful

[8] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/form-of-the-appeal-to-federal-tribunal-legal-interest-to-appeal-

scrutiny by which the Arbitrators reached the conclusion that, under the circumstances, it was not justified to stay the arbitral proceedings in order to wait for the outcome of the criminal investigations opened in England and in the United States of America. Under such conditions, the appeal can but only be rejected insofar as the matter is capable of appeal.

6.
The Appellant loses and it shall pay the costs of the federal judicial 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 insofar as the matter is capable of appeal.

2.
The judicial costs set at CHF 12'000 shall be borne by the Appellant.

3.
The Appellant shall pay to the Respondent an amount of CHF 14'000 for the federal judicial proceedings.

4.
This judgment shall be notified to the representatives of the parties and to Mrs. [name omitted], attorney in Geneva for the ICC Arbitral Tribunal.

Lausanne, September 23, 2014

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

Presiding Judge:	Clerk:
Klett (Mrs.)	Carruzzo