

4A_532/2014
4A_534/2014¹

Judgment of January 29, 2015

First Civil Law Court

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

4A_532/2014

1. Y. _____ SA,
2. Z. _____ SA,

Both represented by Mr. Maurice Harari and Mrs. Delphine Jobin,
Appellants

v.

B. _____ B.V.,
Represented by Mrs. Nadine Maier Vinas,
Respondent

and

4A_534/2014

1. V. _____ Ltd, (previously V.V. _____ Ltd),
2. W. _____ SA,

Both represented by Mr. Maurice Harari and Mrs. Delphine Jobin,
Appellants

v.

B. _____ B.V.,
Represented by Mrs. Nadine Maier Vinas,
Respondent

¹ Translator's Note:

Quote as A. _____ SA v. B. _____ SA, 4A_532/2014.

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

Facts:

A.

On February 20, 2008, V._____ Ltd, a company under [name of country omitted] law, then known as V.V._____ Ltd, and W._____ SA, a company under [name of country omitted] law, entered into a Consultancy Agreement with B._____ B.V. (hereafter: B._____) in connection with the construction of a subway. An arbitration clause inserted into this contract entrusted a three-member arbitral tribunal, to be constituted under the aegis of the International Chamber of Commerce (ICC), with settling any disputes which may have arisen from the performance of the contract. The seat of the arbitration was to be in Geneva.

On May 22, 2008, Y._____ SA, a company under [name of country omitted] law, then known as Y.Y._____ and Z._____ SA, a company under [name of country omitted] law (previously known as Z.Z._____) also entered into a Consultancy Agreement with B._____ in connection with the construction of an electrical plant. The parties inserted an arbitration clause identical to that in the aforesaid contract. On February 1, 2010, the parties entered into an addendum to the contract.

B.

On June 12, 2012, B._____ initiated two arbitral proceedings in connection with the two aforesaid consultancy agreements with a view to obtaining payment of the commissions agreed upon in these contracts. As a preliminary issue, the Defendants sought a stay of the arbitral proceedings until the activity carried out by B._____ could be clarified. According to them, various criminal investigations were still pending due to suspected bribery in connection with the projects in which the companies of Group Y._____ participated, particularly in England through the Serious Fraud Office (hereafter: the SFO). Therefore, they had no other choice than to suspend payment of the commissions until light could be shed upon B._____’s compliance with the laws purporting to fight bribery, for otherwise there would be a breach of the UK Bribery Act 2010 (hereafter: the Bribery Act) with possible heavy criminal penalties, in particular, heavy fines. To substantiate their position, the Defendants submitted, among other documents, two written statements issued on June 11, 2013, by a party-appointed expert, the British lawyer, C._____.

The ICC Arbitral Tribunal refused to stay the arbitration. After investigating both matters, it issued two awards on July 17, 2014. Essentially upholding the claims of B._____, it ordered the two Defendants severally to pay various amounts to the Claimant.

C.

On September 12, 2014, Y._____ SA and Z._____ SA filed a civil law appeal with a request for a stay of enforcement with a view to obtaining the annulment of the award concerning them (case 4A_532/2014). On the same day, V._____ Ltd and W._____ SA also appealed (case 4A_534/2014). All Appellants submit that the Arbitral Tribunal issued two awards inconsistent with

substantive public policy within the meaning of Art. 190(2)(e) PILA.² By way of a letter of October 4, 2014, of its president, the Arbitral Tribunal submitted that the request for a stay of enforcement should be rejected as the two appeals did not appear to be well founded.

In its answers of October 31, 2014, B._____ submitted that the appeals should be rejected.

With their replies of November 18, 2014, the Appellants submitted two written statements issued by one of their English lawyers and by the investigation's director in Group Y._____ on November 17 and 18, 2014, respectively.

The Respondent submitted two rejoinders on December 4, 2014.

Reasons:

1.

Although the two appeals are aimed at two different awards issued by the same Arbitral Tribunal, they are nonetheless closely connected. Each was made by two companies belonging to the same group. The Respondent is the same company in both cases. The answers to be given to the issue raised by the Appellants do not change from one appeal to the other. Procedural economy calls for consolidating the two cases as submitted by the Appellants, it being noted that the Respondent left the matter to the appreciation of the Federal Tribunal in this respect. Consequently, cases 4A_532/2014 and 4A_534/2014 shall be consolidated in accordance with Art. 24 PCF,³ which is applicable by analogy pursuant to the *renvoi* at Art. 71 LTF,⁴ so that they can be dealt with in the same judgment.

2.

According to Art. 54(1) LTF, the Federal Tribunal issues its judgment in an official language,⁵ 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 they used English. In the briefs submitted to the Federal Tribunal, they used French. In accordance with its practice, the Federal Tribunal shall consequently issue its decision in French.

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 subject of the appeals, the standing to appeal, the time limit to do so, the Appellants' 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: PCF is the French abbreviation for the Swiss Code of Civil Procedure.

⁴ Translator's Note: LTF is the French abbreviation of the Federal Statute of June 17, 2005, organizing the Federal Tribunal, RS 173. 110.

⁵ Translator's Note: The official languages of Switzerland are German, French and Italian.

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

4.

4.1. The Federal Tribunal issues its decision 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 blatantly inaccurate manner or in violation of the law (see Art. 77(2) LTF, ruling out the applicability of Art. 105(2) LTF). Indeed, when it is seized of a civil law appeal against an international arbitral award, the mission of this Court is not to exercise full judicial review as a court of appeal would do but merely to examine whether or not the admissible grievances raised against the award are well founded. It would not be compatible with the foregoing to allow the parties to state facts other than those found by the arbitral tribunal other than in the exceptional cases reserved by case law, even though such facts may be established by the evidence included in the arbitration file (judgment 4A_386/2010⁶ of January 3, 2011, at 3.2). As was already provided under the aegis of the federal statute organizing the courts (see ATF 129 III 727 at 5.2.2; 128 III 50 at 2a and the cases quoted), the Federal Tribunal nonetheless 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 (ATF 138 III 297 at 2.2.1 and the cases quoted).

4.2. To substantiate their argument the Appellants submitted, along with their appeal briefs and their replies, an article published in [name of paper omitted] on July 24, 2014, an official press release of the SFO on the same day, and the aforesaid written statements dated 17 and 18 November, 2014.

However, these four exhibits are all subsequent to July 17, 2014, the date at which the two awards under appeal were issued. Therefore, they may not be taken into consideration by this Court pursuant to Art. 99(1) LTF, a provision not included in the exclusion list at Art. 77(2) LTF. Consequently, the merits of the appeal shall be examined without reference to the content of these exhibits.

5.

The Appellants argue that the Arbitral Tribunal issued two awards incompatible with public policy within the meaning of Art. 190(2)(e) PILA by ordering them to pay an amount which could put them in breach of the Bribery Act and expose them to the criminal sanctions contained in that law. According to them, the commissions paid to the Respondent may have been used to pay bribes. The Federal Tribunal already addressed this issue in a recent case concerning Y. _____ SA and an Egyptian company (judgment of

⁶ 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>

⁷ 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>

September 23, 2014, in case 4A_231/2014). At paragraph 38 of their briefs, the Appellants quote this precedent in connection with the stay of enforcement and emphasize that it deals with a “*very similar context*.” This Court may consequently limit itself to recall the legal principles just defined in that case and apply them to the facts found in the awards under appeal.

5.1. According to Swiss legal concepts, a promise to pay a bribe is contrary to morals and therefore void because its content is vitiated. According to a well-established view, such a promise would also violate public policy (ATF 119 II 380 at 4b). However, bribery must be established and the arbitral tribunal must have refused to take it into account in its award in order for the corresponding grievance to be upheld (judgment 4A_538/2012 of January 17, 2013, at 6.1, 4P.208/2004 of December 2004 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 the case at hand, the Arbitral Tribunal analyzed the evidence submitted by the Appellants to substantiate their implicit claim of bribery by the Respondent and held that it had not been proved. Based on an assessment of the evidence that the Court cannot review (see 4.1, above) such a conclusion immediately excludes the argument that the Arbitral Tribunal disregarded public policy by ordering the payment of commissions concerning the Consultancy Agreement that would be void as a consequence of bribery.

5.2. What the Appellants really submit from the point of view of a violation of public policy is not so much the bribery allegedly impacting the contracts they entered into with the Respondent, but the risk of heavy penalties on the basis of the criminal law provisions adopted by England to which they would be exposed by complying with the awards.

On the basis of the evidence adduced, including the explanations given by party-appointed expert, C._____, the Arbitral Tribunal carefully reviewed factually and legally the issues related to the investigations conducted by the SFO against several companies belonging to the Y._____ Group. It held, in its discretion, that there was no evidence of criminal conduct by the Respondent and in particular that the Appellants did not show or even claim the existence of one single illegal payment made by the Respondent or on its behalf. The Arbitrators also explained why, according to them, there was no reason to postpone the final awards until a final decision in the criminal proceedings pending in England, contrary to what the Appellants sought, pointing out in this respect that the Federal Tribunal does not consider the principle that criminal law has precedence over civil law of such importance that it would be considered an integral part of public policy within the meaning of Art. 190(2)(e) PILA (ATF 119 II 386 at 1c; judgment 4A_604/2010⁸ of April 11, 2011, at 2.2.2).

The Appellants submit no argument which could invalidate the solidly-reasoned conclusions reached by the Arbitral Tribunal. In reality, they challenge the factual assumptions on which the reasoning of the Arbitrators

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->

is based and seek to challenge them by way of an inadmissible criticism of the assessment of the evidence from which the factual findings of the Arbitral Tribunal arose whilst also substantiating such criticism by reference to new evidence which is inadmissible (see 4.2, above).

The two appeals may therefore only be rejected insofar as the matters are capable of appeal. The petitions for a stay of enforcement submitted by the Appellants thus become moot.

6.

The Appellants lose and shall pay the costs (Art. 66(1) LTF) and compensate their opponent for the federal judicial proceedings (Art. 68(1) and (2) LTF).

Therefore the Federal Tribunal pronounces:

1.

Cases 4A_532/2014 and 4A_534/2014 are consolidated.

2.

The appeals are rejected insofar as the matters are capable of appeal.

3.

The judicial costs in case 4A_532/2014 set at CHF 12'000 shall be paid by Y._____ SA and Z._____ SA, severally.

4.

Y._____ SA and Z._____ SA severally shall pay an amount of CHF 14'000 to B._____ B.V. for the federal judicial proceedings.

5.

The judicial costs in 4A_534/2014 set at CHF 6'500 shall be borne by V._____ Ltd and W._____ SA, severally.

6. V._____ Ltd and W._____ SA severally shall pay an amount of CHF 7'500 to B._____ B.V. for the federal judicial proceedings.

7.

This judgment shall be notified to the representatives of the parties and to the chairman of the ICC tribunal.

Lausanne, January 29, 2015

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

Presiding Judge:

Clerk:

Kiss (Mrs.)

Carruzzo