4A_136/2016[1]

Judgment of November 3, 2016

First Civil Law Court

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

1. A.X._____ SA,
2. B.X._____ SA,
Both represented by Mr. Martin Molina and Mr. Omar Abo Youssef,
Appellants

v.

Z._____ Ltd,
Represented by Mrs. Pierre-Yves Tschanz and/or Mr. Frank Spoorenberg and Mr. Jean-Pierre Mignard and/or Mrs. Adrien Basdevant,
Respondent

Facts:

A.
On August 26, 2004, December 22, 2004, and December 2, 2009, A.X._____ SA, a company under [name of country omitted] law and B.X._____ Ltd, a company under [name of country omitted] law on the one hand (hereafter: the X._____ Companies or the Defendants) and the company under [name of country omitted] law Z._____ Ltd (hereafter: Z._____ or the Claimant) on the other hand, entered into three Consultancy Agreements (hereafter: the Contracts; or Contract No. 1, Contract No. 2, and Contract No. 3), governed by Swiss law, by which the former entrusted the latter with assisting them in the preparation and submission of tenders with a view to the award of infrastructure (transport) projects

[1] Translator's Note: Quote as A.X_____ SA and B.X._____ Ltd *v.* Z._____ Ltd, 4A_136/2016.
The decision was issued in French. The full text is available on the website of the Federal Tribunal, www.bger.ch.

initiated by the U._____ Republic and, as the case may be, carrying out those projects. An arbitration clause was inserted into each of the three Contracts and entrusted a three-member arbitral tribunal constituted under the aegis of the International Chamber of Commerce (ICC) with settling any disputes that may arise from the performance of these Contracts. The seat of the arbitration was set in Geneva.

The three Contracts followed two other consultancy agreements concluded by the same parties which were entirely performed.

Between February 2006 and November 2008, the X._____ Companies paid invoices issued by Z._____ as the projects progressed they had been awarded through ZZZ Company. The former companies paid to the latter amounts corresponding in total to some 55% of the compensation anticipated in Contract No. 1 and 80% of the compensation anticipated in Contract No. 2. Since then, they refrained from any payment under these two contracts and paid nothing to Z._____ under Contract No. 3. According to them, the various criminal investigations relating to suspicions of corruption in connection with the projects to which X._____ participated were ongoing, particularly in the United States by the department of Justice (DoJ) and in the United Kingdom by the Serious Fraud Office (SFO). Therefore, they had no choice but to suspend payment of the commissions to avoid serious criminal penalties, as the verifications made had showed the existence of violations by Z._____ of the rules inserted into the Contracts that X._____ had established for its consultants in the framework of its Ethics & Compliance Policy with a view to preventing corruption.

B.

On December 20, 2013, Z._____ sent a request for arbitration to the ICC against the X._____ Companies with a view, in particular, to obtaining the payment of the balance of its commissions for Contracts Nos. 1 and 2, and the payment of the compensation connected to Contract No. 3. The defendants submitted that the claim should be entirely rejected.

After investigating the matter, the Arbitral Tribunal upheld the claim in part and ordered the Defendants in a final award of January 29, 2016, to pay to the Claimant the amount of EUR 932'800 in connection with Contract No. 1, and the amount of EUR 624'440 in connection with Contract No. 2, with interest. In doing so, and as to the reasons that are still important at this stage in the proceedings, it first reviewed the documents in the arbitration file but did not find the proof there – the burden was on the Defendants, in its view – of any acts of corruption traceable to the Claimant. Secondly, the Arbitral Tribunal reviewed the argument of the Defendants, according to which the Claimant did not satisfy its contractual obligation to bring proof of services, even though each of the three Contracts conditioned the payment of the agreed-upon commissions to this. In this respect, it drew a distinction between Contracts Nos. 1 and 2 on the one hand and Contract No. 3 on the other hand. As to the first two, it emphasized that if each of them did contain a specific clause concerning proof of services rendered by the consultant, the clause had to be interpreted with a view to the behavior of the parties after it was concluded. Yet, they showed by their common behavior that they did not intend to interpret the clause at issue literally. Thus, over several years, despite the wording of the clause, the Defendants satisfied themselves with the documents submitted by

the Claimant to pay on the commissions in installments stipulated in the Contracts, without reservations. Moreover, still according to the Arbitral Tribunal, even assuming that the conduct adopted by the parties as to the proof of services were no longer covered by the text of the topical clause of Contracts Nos. 1 and 2, one would have to admit that the common conduct resulted in changing the Claimant's contractual obligations concerning that proof. The Arbitral Tribunal then sought to demonstrate why the same conclusion could not be drawn in connection with Contract No. 3. Besides a much more strict and detailed text of the comparable clause in the latter, it also emphasized the fact that the Defendants paid nothing to the Claimant pursuant to the latter contract and the various commitments undertaken by the Claimant as to compliance with the Ethics & Compliance policy adopted by X._____ before the last contract was executed.

C.
On March 2, 2016, the Defendants (hereafter: the Appellants) filed a civil law appeal with a motion to stay the enforcement, with a view to ultimately obtaining the annulment of the Award of January 29, 2016. They argued that the Arbitral Tribunal issued an award incompatible with public policy and violated their right to be heard.

In its answer of April 12, 2016, the Claimant (hereafter: the Respondent) mainly submitted that the matter is not capable of appeal and in the alternative, that it should be rejected to the extent that it is capable of appeal. In a Reply of May 26, 2016, and a Rebuttal of June 10, 2016, the Appellants and the Respondent reiterated their submissions whilst the Respondent pointed out that it would leave the admissibility of the appeal to the Court's discretion.

A stay of enforcement was issued by the presiding judge on June 28, 2016.

Reasons:

1.
According to Art. 54(1) LTF[2] the Federal Tribunal issues its judgment in an official language,[3] 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. In the Arbitral Tribunal, they used English, whilst in its appeal brief submitted to the Federal Tribunal, they used French, thus complying with Art. 42(1) LTF in connection with Art. 70(1) CSE[4] (Judgment 4A_386/2015[5] of September 7, 2016, meant

[2] Translator's Note: LTF is the French abbreviation of the Federal Statute of June 17, 2005, organizing the Federal Tribunal, RS 173. 110.
[3] Translator's Note: The official languages of Switzerland are German, French and Italian.
[4] Translator's Note: CSE is the French abbreviation for the Swiss Federal Constitution.
[5] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/federal-tribunal-upholds-independence-members-cms-network

for publication,[6] at 1). In accordance with its practice, the Federal Tribunal shall therfore issue its judgment in French.

2.
A civil law appeal is admissible against international arbitral awards pursuant to the requirements of Art. 190-192 PILA[7] (Art. 77(1)(a) LTF). Whether as to the object of the appeal, the standing to appeal, the time limit to appeal to appeal, the Appellants' submissions, or the grievances raised in the appeal briefs, none of these admissibility requirements raises any problem in the case at hand. The matter is therefore capable of appeal.

3.
3.1. 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 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 application of Art. 105(2) LTF). Indeed, the Court's mission, when seized of a civil law appeal concerning an international arbitral award, is not to decide with full power of review as a court of appeal would, but only to examine whether the admissible grievances raised against the award are established or not. Allowing the parties to state facts other than those found by the arbitral tribunal, beyond 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[8] of January 3, 2011, at 3.2). However, as was already the case under the aegis of the federal law organizing the courts (see ATF 129 III 727 at 5.2.2; 128 III 50 at 2a, and the cases quoted), the Federal Tribunal retains power to review the facts on which the award is based if one of the grievances mentioned at Art. 190(2) PILA is raised against the factual findings or if some new facts or evidence are exceptionally taken into consideration in the framework of the civil law appeal (ATF 138 III 29[9] at 2.2.1 and the cases quoted).

3.2. At ns. 42 to 44 of their brief, the Appellants allege various circumstances concerning on the one hand the risk of criminal prosecution by the DoJ and/or the SFO to which they would be exposed by fulfilling their remaining monetary obligations towards the Respondent and, on the other hand, the fact that the latter, among other things, signed two "declarations of compliance *(sic)* of X._____" at the time it sent its last invoices concerning Contracts Nos. 1 and 2. Yet, in order to substantiate their submissions, they refer merely to the documents in the arbitration file and not to any specific findings in the award under appeal,

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[6] Translator's Note: The decision of the Federal Tribunal referred to here – and the English translation of which is linked to in footnote no. 5 – was published in ATF 142 III 521 and 35 ASA Bull 129 (2017).

[7] 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.

[8] 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

[9] 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

going so far as to blame the Arbitrators for not taking into account the second fact they advanced. Therefore, this Court shall not take these submissions into consideration as they are incompatible with the aforesaid jurisprudential principles.

4. In a first submission, the Appellants argue that the Arbitral Tribunal issued an award contrary to substantive public policy within the meaning of 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 determining legal order and system of values; 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 at 2.2.1).

According to Swiss legal concepts, a promise to pay a bribe is contrary to morals and any such obligations are consequently void due to the flaw in their subject matter. According to established case law, they also breach public policy (ATF 119 II 380). In order to uphold the corresponding argument, corruption must be established but the arbitral tribunal refused to take it into account in its award (Judgments 4A_532/2014 and 534/2014[10] of January 29, 2015, at 5.1; Judgment 4A_231/2014[11] of September 23, 2014, at 5.1, and the references).

4.2.
4.2.1. In the case at hand, the Arbitral Tribunal analyzed the evidence submitted by the Appellants to establish their implicit contention of corruption against the Respondent and considered that the allegation was not proved (Award, nn. 277-280). Such a conclusion derives from the assessment of the evidence that this Court may not review (see 3.1, above); its soundness is moreover confirmed by the Appellants, which point out at n. 26 of their reply that they "do not claim to have proof of acts of corruption committed in connection with the contracts in dispute." In such circumstances it is therefore not possible to submit that the Arbitral Tribunal disregarded public policy by ordering the payment of commissions concerning some consultancy agreement that would have been void due to corruption.

4.2.2. According to the Appellants, the incompatibility of the award under appeal with substantive public policy would rather be found in the fact that the Arbitral Tribunal ordered them to make payments to the Respondent, which would not be consistent with the "rules of compliance *(sic)"* of X._____ and which therefore would expose them to the risk of severe criminal sanctions (Reply, n. 27). These rules, they add, are the concretization – at the level of the company and its co-contracting parties – of the internationally

[10] 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

[11] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/suspicion-bribery-does-not-justify-stay-arbitration-indefinite-time

recognized anticorruption norms of major public interest and therefore have a public policy purpose within the meaning of Art. 190(2)(e) PILA (Reply, n. 33).

As the Respondent rightly points out (Rejoinder, nn. 16-21), 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).

As to the provision concerning proof of services, which the parties inserted into each of the three Contracts in dispute and which constitutes one of the rules in question, the Arbitral Tribunal, interpreting the behavior of the parties after Contracts Nos. 1 and 2 were entered into, inferred from there from the concordant will of the parties to alleviate the burden of proof imposed upon the Respondent by this provision. In doing so, it engaged in to subjective interpretation of the will of the parties, from which it drew the conclusion that they agreed – by way of a narrower interpretation of the provision at issue, or even by way of a consensual modification of its contents – to limit the formalities imposed upon the Respondent as to the proof of the services it furnished (Award, nn. 300-306). Then, it found that the Respondent met the burden of proof thus reduced (Award, n. 307). Yet, subjective interpretation, based on the behavior of the parties after the contract was concluded, is based on the assessment of the evidence and falls within the realm of facts, so it binds the Federal Tribunal (ATF 142 III 239[12] at 5.2.1). Moreover, even if it were within the realm of the law, the Federal Tribunal could not review it in the framework of a grievance based on Art. 190(2)(e) PILA.

Therefore, the argument based on the violation of substantive public policy falls.

5.

In a second argument, the Appellants invoke Art. 190(2)(d) PILA and submit that the Arbitral Tribunal violated their right to be heard. According to them, the parties could not have anticipated that the Arbitral Tribunal would reduce the requirements imposed upon the Respondent as to the proof of services furnished by way of subjective interpretation of their will, which led it to restrict the scope of the clause at issue in Contracts Nos. 1 and 2 or even to modify their contents. They were even less able to do so, according to them, because in its Procedural Order No. 18 of May 28, 2015, the Arbitral Tribunal sought their views as to two specific questions of Swiss law totally unconnected with the "theories" it ultimately applied. Still according to the Appellants, the effect of the surprise was amplified in the case at hand because the parties, all foreign to Switzerland, were not represented by Swiss counsel in the arbitration proceedings.

[12] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/unsigned-arbitration-clause-upheld

5.1. In Switzerland, the right to be heard relates mainly to the finding of facts. The right of the parties to be asked for their views on legal issues is recognized only in a limited manner. As a rule, according to the adage *jura novit curia*, the state courts or arbitral tribunals freely assess the legal bearing of the facts and they may also decide on the basis of rules of law other than those invoked by the parties. Consequently, as long as the arbitration agreement does not limit the task of the arbitral tribunal to the legal arguments raised by the parties, they do not have to be heard specifically as to the scope to be given to applicable rules of law. As an exception, they must be asked for their views when the judge or the arbitral tribunal considers basing the decision on a norm or a legal consideration that was not invoked in the proceedings and the pertinence of which the parties could not anticipate (ATF 130 III 35 at 5, and references). Moreover, knowing what is unforeseeable is a matter of appreciation. Therefore, the Federal Tribunal applies the aforesaid rule restrictively for this reason and because one must take into account the specificities of this type of proceedings in order to avoid a situation where the argument of surprise could be used for the purpose of obtaining substantive review of the arbitral award by the appeal body (Judgment 4A_202/2016 of August 31, 2016, at 3.1 and the cases quoted).

5.2. In the light of these principles, the argument appears baseless. Subjective interpretation is one of the two pillars on which the interpretation of contracts rests in Swiss law (see Art. 18(1) CO[13]), the second being objective interpretation (ATF 142 III 239 at 5.2.1 and the cases quoted). Furthermore, it has been long-held that the concordant behavior adopted by the contracting parties after the conclusion of the contract helps in determining their real and common intent because it constitutes authentic subsequent interpretation of the contract by its very signatories, but that, depending on the circumstances, it may also be likened to a subsequent amendment of the contract or, as the case may be, to its cancellation (see among others, Ernest K Kramer, *Commentaire Bernois*, Das Obligationenrecht, VI/1, 1986, n. 28 ad Art. 18 CO and the references, and the writer quoted in footnotes nn. 250-253 of the Award under appeal). Therefore, the Appellants are not convincing when they argue surprise, when one of the main elements of the dispute was to determine the scope of the contracts concerning proof of services furnished by the Respondent as a consultant. It does not matter in this respect that the Arbitral Tribunal invited the parties to answer two specific questions of Swiss law unconnected with this issue. Furthermore, the argument based on the foreign citizenship of counsel for the Appellants is not admissible: on the one hand and generally speaking, the application of the principle summed up by the adage *jura novit curia* and the exceptions to this principle may not depend on the citizenship of counsel for the parties; on the other hand and moreover, the parties submitted the contracts at issue to Swiss law and choosing to waive the assistance of Swiss counsel, if that was the case indeed, could carry some risks under the circumstances.

That being so, the appeal may only be rejected insofar as the matter is capable of appeal.

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

6.
The Appellants lose and shall pay the costs of the federal proceedings (Art. 66(1) LTF) and compensate the Respondent (Art. 68(1) and (2) LTF).

Therefore the Federal Tribunal pronounces:

1.
The appeal is rejected to the extent that the matter is capable of appeal.

2.
The judicial costs set at CHF 17'500 shall be borne by the Appellants severally.

3.
The Appellants shall severally pay to the Respondent an amount of CHF 19'500 for the federal judicial proceedings.

4.
This judgment shall be notified in writing to the parties and to Mr. [name omitted], attorney in Zürich for the ICC Tribunal.

Lausanne, November 3, 2016

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

Presiding Judge:	Clerk:
Kiss (Mrs.)	Carruzzo