4A_346/2020[1]

Judgment of January 6, 2021

First Civil Law Court

Federal Judge Hohl, Presiding,
Federal Judge Kiss,
Federal Judge May Canellas
Clerk of the Court: Mr. O. Carruzzo.

A._____, SA
Represented by Mr. Marc Gilliéron and Ms. Nathalie Fluri,
Appellant

v.

B._____ SA, and C._____ SA
Represented by Mr. Daniel L. Bühr, Mr. Dominik Elmiger, and Mr. Philippe Hovaguimian,
Respondent

Facts:

A.
At the beginning of the 2000s, C._____ SA (now B._____ SA since September 28, 2020, following a change of name) concluded three agency contracts with D._____.

In 2011, D._____ founded A._____ SA, a company based in Panama.

On April 30, 2011, C._____ SA, entered into three agency agreements with A._____ SA. Under the terms of these contracts, which initially had an initial term of twelve months but were renewed until April 2015, A._____ SA undertook to provide various services to its co-contractor in three different states in return for the payment of commissions.

Between June 2010 and November 2013, E._____, an employee of C._____ SA, received, without the knowledge of his employer, various amounts from D._____ totaling more than CHF 600'000. These payments were intended to reward or remunerate the person concerned for the conclusion and/or renewal of the agency contracts ("kickbacks").

[1] Translator's Note: Quote as A._____ *v.* B._____, 4A_346/2020.
The decision was issued in French. The full text is available on the website of the Federal Tribunal, www.bger.ch.

On August 28, 2016, A._____ SA sent its contracting partner a statement of commissions for services used to April 30, 2015, and requested payment of the following amounts: EUR 1'067'663, CHF 152.80, USD 121'159.70, and CHF 28'728.

In the absence of payment of the aforementioned amounts, on October 12, 2017, A._____ SA issued C._____ SA an order to pay. The objection submitted by the defendant to this order to pay was provisionally lifted by the appropriate judge on November 27, 2017.

On September 8, 2017, the Office of the Attorney General of the Confederation allowed C._____ SA access to the file of the criminal proceedings against E._____. It was then that C._____ SA discovered the existence of certain payments made by D._____ to E._____.

B.
On December 17, 2018, C._____ SA, relying on the arbitration clause inserted in each of the three agency contracts, sought an injunction for debt relief by submitting a claim for arbitration to the International Chamber of Commerce (ICC) against A._____ SA.

On February 27, 2019, C._____ SA argued that the agency agreements were invalid by reason of fraud and material error.

The Defendant argued that the Claimant's arguments should be rejected and made several counterclaims.

In a final award dated May 25, 2020, a sole Arbitrator, sitting in Geneva, applying Swiss law, and ruling under the aegis of the ICC, found that C._____ SA was not required to pay the amounts claimed by A._____ SA in the proceedings.

C.
On June 25, 2020, A._____ SA submitted a civil law appeal to the Federal Tribunal seeking the annulment of the Award.

By order of the presiding judge of August 20, 2020, the Appellant was invited, at the request of C._____ SA (hereinafter, the Respondent), to pay, by September 10, 2020, the amount of CHF 30’000 to the Office of the Federal Tribunal as security for the costs. This was done in a timely manner.

In its Answer of October 9, 2020, the Respondent submitted that the appeal should be rejected insofar as the matter was capable of appeal.

On October 12, 2020, the Arbitrator submitted comments on the appeal.

In its voluntary submissions of October 28 and November 13, 2020, the Appellant and the Respondent maintained their arguments.

Reasons:

1.
The *rubrum* of this case reflects the change of name of Respondent C._____ SA, now B._____ SA.

2.
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 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 Arbitrator, they used English, while in its brief to the Federal Tribunal, the Appellant used French, thus complying with Art. 42(1) LTF in conjunction with Art. 70(1) Cst.[4] (ATF 142 III 521[5] at.1). According to its practice, the Federal Tribunal shall consequently issue its judgment in French.

3.
In the field of international arbitration, civil appeals are admissible against the decisions of arbitral tribunals under the conditions set out in Art.190-192 of the Federal Law on Private International Law of December 18,1987, (PILA[6]; RS 291), in accordance with Art. 77(1)(a) LTF.

The seat of the arbitration is in Geneva. The Appellant was not based in Switzerland at the relevant time. The provisions of Chapter 12 of the PILA are therefore applicable (Art.176 (1) LDIP).

4.
Whether as to the object of the appeal, the time limit to do so, the Appellant's submission or the reason for appeal put forward, none of these admissibility requirements raises any problems in this case.

The admissibility of the Appellant's grievance is still to be examined.

5.
5.1. Appeals in international arbitration can only be submitted for one of the reasons exhaustively listed in Art. 190(2) PILA (Art. 77(1) LTF). The substantive examination of an international arbitral award by the Federal Tribunal is limited to the question of the award's compatibility with public policy (ATF 121 III 331 at 3a).

An appeal brief for an arbitration award must satisfy the requirement of reasoning as it follows from Art. 77 LTF in connection with Art. 42(2) LTF and the case-law relating to this latter provision (ATF 140 III 86 at 2 and references). The appellant must discuss the reasons for appealing the award and indicate

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[2] Translator's Note: LTF is the French abbreviation for 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: CST is the French abbreviation for the Swiss Federal Constitution
[5] Translator's Note: The English translation of this decision can be found here: http://www.swissarbitrationdecisions.com/federal-tribunal-upholds-independence-members-cms-network
[6] Translator's Note: PILA is the most frequently used abbreviation for the Swiss Private International Law Act of December 18, 1987

precisely why it considers that the author of the award has infringed the law (Judgment 4A_522/2016[7] of December 2, 2016, 3.1) It can only do so within the limits of the admissible grievances against that award, namely with regard to the only grievances listed in Art. 190 PILA where the arbitration is international in nature. Moreover, 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. In addition, the Appellant may not rely on arguments of fact or of law that were not submitted in a timely manner – that is, before the expiry of the non-extendible time-limit for bringing an action (Art. 100(1) LTF in conjunction with Art. 47(1) LTF) to supplement, beyond the deadline, insufficiently reasoned submission (Judgment 4A_157/2016 of April 25, 2017 at 2.2).

5.2. The Federal Tribunal 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 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). The findings of the arbitrator 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 (Judgement 4A_322/2015[8] of June 27, 2016, at 3 and the case-law cited).

As such, when a civil law appeal against an international arbitral award is submitted, its mission does not consist of deciding with full power of review, like an appellate jurisdiction; rather it may only 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 not be compatible with such a mission, even where these facts may be established by evidence contained in the arbitration file (Judgment 4A_386/2010[9] of January 3, 2011 at 3.2).

5.3. In a section of its Brief to the Federal Tribunal (pp. 3-6), entitled "Brief review of the facts" (pp. 3-5), the Appellant presents its own version of the circumstances of the case at issue, referring in particular to certain documents in the case file. It makes assertions, some of which deviate from the findings of the Arbitral Tribunal. This is inconsistent with the nature of a civil appeal against an international arbitral award and the limited power of review enjoyed by the Federal Tribunal in this area. It is therefore appropriate to disregard this pseudo-'reminder' of the decisive facts.

6.
In a single argument, divided into two branches, the Appellant argues that the award under appeal is contrary to substantive public policy (Art. 190(2)(e) PILA).

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[7] Translator's Note: The English translation of this decision can be found here: https://www.swissarbitrationdecisions.com/atf-4a-522-2016

[8] Translator's Note: The English translation of this decision can be found here: https://www.swissarbitrationdecisions.com/alleged-unpredictability-reasons-rejected

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

6.1. An award is incompatible with public policy if it disregards the essential and broadly acknowledged values which, according to prevailing views in Switzerland, should constitute the basis of any legal order (ATF 144 III 120[10] at 5.1; 132 III 389 at 2.2.3). Such is the case when it violates some fundamental principles of the law to such an extent as it is no longer consistent with the notions of justice and system of determining values (ATF 144 III 120 at 5.1) For there to be incompatibility with public policy, it is not sufficient to show that the evidence was wrongly assessed, a factual finding manifestly wrong, or a rule of law clearly violated (Judgment 4A_116/2016[11] of December 13, 2016, at 4.1; 4A_304/2013[12] of March 3, 2014 at 5.1.1; 4A_458/2009[13] of June 10, 2010 at 4.1).

In determining whether the award is compatible with public policy, the Federal Tribunal does not freely review the legal assessment of the arbitral tribunal issued on the basis of the facts found in its award. The only thing that matters, regarding the decision to be made in terms of Art. 190(2)(e) PILA, is the question of whether the outcome of this legal assessment made completely independently by the arbitrators is or is not compatible with the jurisprudential definition of substantive public policy (Judgment 4A_157/2017[14] of 14 December 2017 at 3.3.3).

6.2. In the first branch of the argument under consideration, the Appellant argues that the Arbitrator breached the principle of the sanctity of contracts and thus issued an award that was incompatible with substantive public policy within the meaning of Art. 190(2)(e) PILA).

6.2.1. The principle of the sanctity of contracts as expressed 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 if the Arbitral Tribunal refuses to apply a contractual clause while admitting that it binds the parties or, conversely, if it imposes compliance with a clause that it considers does not bind them. In other words, the arbitrator 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. Yet the interpretation process itself and the legal consequences logically drawn therefrom are not governed by the principle of the sanctity of contracts so, they cannot be challenged on the basis of an alleged breach of public policy. The Federal Tribunal has repeatedly emphasized that almost all disputes arising from breach of contract are excluded from the scope of protection of the principle of *pacta sunt servanda* (Judgments 4A_70/2020 of June 18, 2020, at 7.3.1; 4A_318/2017 of August 28, 2019 at 4.2).

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[10] Translator's Note: The English translation of this decision can be found here: https://www.swissarbitrationdecisions.com/atf-4a-260-2017

[11] Translator's Note: The English translation of this decision can be found here: https://www.swissarbitrationdecisions.com/atf-4a-116-2016

[12] Translator's Note: The English translation of this decision can be found here: https://www.swissarbitrationdecisions.com/definition-public-policy-reaffirmed

[13] Translator's Note: The English translation of this decision can be found here: https://www.swissarbitrationdecisions.com/challenge-of-arbitrators-sitting-on-cas-panel-rejected-claim-of-

[14] Translator's Note: The English translation of this decision can be found here: https://www.swissarbitrationdecisions.com/atf-4a-157-2017

6.2.2. In the present case, the Arbitrator found that the Appellant had acted fraudulently (Art. 28 CO) vis-à-vis the Respondent, by not disclosing the fact that E._____ had received various sums of money ("kickbacks") when the agency contracts were concluded and/or renewed. According to the Arbitrator, the Respondent would not have entered into these contracts if it had been aware of this fact. The Arbitrator then examined whether the Respondent had invalidated the contract within one year of the discovery of the fraud, in accordance with Art. 31 CO. The Arbitrator found that this had not been the case. Indeed, the victim of the fraud had acted belatedly in declaring the contracts invalid on February 28, 2019, insofar as it had sufficient knowledge of the deception when it had access, on September 8, 2017, to the file of the criminal proceedings opened against E._____. In the absence of invalidation within the peremptory period of one year after the discovery of the fraud, the agency contracts were thus considered ratified. On the other hand, the Appellant did not allege that ratification had taken place expressly or by implied contracts before the expiry of the said period. The Arbitrator went on to find that the Respondent could raise the defense provided by Art. 60(3) CO[15] to counter the Appellant's claims based on contracts tainted by fraud, even after the time limit in Art. 31 CO had expired, as the fraud constituted an unlawful act.

6.2.3. In its brief, the Appellant first argues that the Arbitrator acknowledged the existence of agency contracts but refused to enforce them on the basis of irrelevant considerations. According to it, Art. 60(3) CO is, on the face of it, neither applicable nor determinative in this case for the following three reasons:

- the provision does not apply to time-based contracts whose services cannot be returned;
- the Respondent never alleged, much less proved, the existence of any harm, a necessary condition for the application of Art. 60(3) CO;
- the Respondent ratified the agency contracts as implied contracts when it argued that a contractual breach had been committed by the Appellant, thereby depriving it of its right to raise the defense provided for in Art. 60(3) CO.

6.2.4. The Appellant's argument, summarized in this way, is of a markedly appellate nature and is based in part on allegations that deviate from the facts as determined by the Arbitrator, and thus requires a preliminary comment by this Court. It is important to remember that the argument of incompatibility with substantive public policy, within the meaning of Art. 190(2)(e) PILA and the related case-law, is not admissible insofar as it seeks only to establish the conflict between the award under appeal and a norm of Swiss law, regardless of the degree of this conflict, assuming it is established (Judgments 4A_248/2019 of August 25, 2020 at 9.8.1 not intended for publication; 4A_32/2016 of December 20, 2016 at. 4.3). It should be borne in mind that even when the Federal Tribunal is called upon to rule on an appeal against an award made by an arbitral tribunal having its seat in Switzerland and applying Swiss law, it is bound to observe, regarding the manner in which that law has been implemented, the same distance as that which it would impose on itself *vis-à-vis* the application of any other law and that it must not give in to the temptation of examining with full competence whether the specific rules of Swiss law have been correctly interpreted and/or applied, as it would do if it were asked to decide a Civil appeal against a cantonal judgment (Judgment 4A_318/2018 of March 4, 2019, at 4.5.1; 4A_312/2017[16] of

[15] Translator's Note: CO is the French abbreviation for Swiss Code of Obligations.
[16] Translator's Note: The English translation of this decision can be found here: https://www.swissarbitrationdecisions.com/atf-4a-312-2017

November 27, 2017 at 3.3.4.2; 4A_32/2016 cited above, at 4.3). Therefore, all considerations relating to the conditions of the application of Art. 60(3) CO issued in the parties' submissions will be purposely disregarded below to leave room for the only question to be resolved, which is whether or not the result reached by the Arbitrator renders the award under appeal incompatible with substantive public policy.

It should be noted, in passing, that where the Appellant alleges that the Arbitrator had not given sufficient consideration to whether Art. 60(3) CO is applicable in this case, it seems, in fact, to be arguing that there was a breach of its right to be heard (Art. 190(2)(d) PILA), a grievance that it does not, however, raise or give reasons for. There is therefore no need to dwell on this point.

In the present case, the Appellant, relying on a case law that is no longer relevant, totally disregards the restrictive jurisprudential concept of the sanctity of contracts in arbitration matters, when it states that the breach of Art. 60(3) CO constitutes insufficient grounds for the *pacta sunt servanda* principle. Indeed, the Arbitral Tribunal did not refuse to apply a contractual provision by contradicting the result of its interpretation. It considered that the contracts tainted by fraud were legally valid, as the Respondent had not acted to invalidate them within the strict one-year period provided for. The Respondent could, however, counter the Appellant's claims by raising a defense based on Art. 60(3) CO. Thus, the Appellant's demonstration does not seek to establish a breach of the principle of the sanctity of contracts, but only to call into question, in a way that is inadmissible, the application of a principle of law deemed relevant by the Arbitrator.

In any event, the possible breach by the Arbitrator of Art. 60(3) CO, cannot be held to be incompatible *per se* with public policy. In the Award, the Arbitrator found that the Respondent, a victim of intentional deception at the time of the conclusion and/or renewal of the agency contracts, could validly refuse to pay the amounts claimed from it by arguing deceit in accordance with Art. 60(3) CO. Such an outcome does not appear, on the basis of the Arbitrator's findings, to be contrary to substantive public policy.

Assuming it to be admissible, the argument of a breach of the *pacta sunt servanda* principle is therefore unfounded.

6.3. In the second branch of the argument in question, the Appellant claims that the Award would sanction an abuse of right. In this respect, it refers to the exception of an improperly acquired right, and stresses that the corrective function provided for in Art. 2(2) CC[17] can only be exercised, in this field, in cases where the right has been acquired in a manner contrary to law, or to contractual commitments, or to morals. According to it, the Respondent could not invoke the exception based on Art. 60(3) CO because its right was improperly acquired, since it had not met its own contractual obligations for several years. If the Respondent had paid the commissions owed as it was required to do, it could not have raised such an exception. The solution adopted by the Arbitrator would therefore be to condone an abuse of the Respondent's rights by placing the Respondent "in a situation more favorable to that in which would have been if it had respected its contractual commitments."

[17] Translator's Note: CC is the French abbreviation for Code Civil, the Federal Statute of 10 December 1907 on the civil law, RS 210

On reading the argumentation that is supposed to support the argument in question, it is obvious that the Appellant is confusing the Federal Tribunal with a court of appeal. The interested party merely presents its legal assessment of the Respondent's conduct and its own interpretation of Art. 60(3) CO and of the intent behind said provision. In any event, its submission, which is difficult to understand, is not convincing and does not in any way support the existence of an abuse of right. Following the Appellant's reasoning, it should be considered, as the Respondent rightly points out, that the prohibition of abuse of right would likewise preclude any defense of limitation as, if it were allowed by the Court, it would have the effect of placing the debtor party in a legal situation more favorable to that in which it would have been if it had honored its contractual commitments. Thus, the Respondent did not engage in conduct constituting an abuse of right by failing to fulfill its financial obligations to the Appellant before subsequently raising the exception provided for in Art. 60(3) CO. Contrary to the Appellant's assertion, the solution adopted by the Arbitrator does not amount to endorsing or even encouraging the non-compliance of a party with its contractual obligations. It simply consists in acknowledging that the Respondent, a victim of fraudulent behavior, could validly refuse performance under Art. 60(3) CO, even if it had not invalidated the agency contracts within the time limit provided for that purpose. In view of all the circumstances, and in particular the deception committed by the Appellant, the result reached by the Arbitrator is clearly not contrary to substantive public policy, which is sufficient to seal the fate of the argument in question.

7. Under these circumstances, the appeal, in so far as it is admissible, must be rejected.

The Appellant, who is unsuccessful, must pay the costs of the federal proceedings (Art. 66(1) LTF) and shall pay the Respondent's costs (Art. 68(1) and (2) LTF). The compensation granted to the latter will be taken from the security for costs provided by the Appellant.

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 25'000, shall be borne by the Appellant.

3.
The Appellant shall pay the Respondent compensation of CHF 30'000 as costs. This amount shall be taken from the security for costs deposited with the Office of the Federal Tribunal.

4.
This decision shall be communicated to the parties' counsel and to the Arbitrator located in Geneva.

Lausanne, January 6, 2021

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

The Presiding Judge:	The Clerk of the Court:
Hohl	O. Carruzzo