Final award in case no. 5622 of 1988

Facts

The defendant submitted an offer to the Algerian authorities in reply to an invitation to bids for certain works. It also concluded a Protocol of Agreement with the claimant, under which claimant was to give legal and fiscal advice to defendant and coordinate its subcontractors, thereby helping defendant obtain the contract with the Algerian authorities. Defendant was to pay claimant a percentage of the price of the construction contract to be concluded between defendant and the Algerian authorities. The Protocol contained an ICC arbitration clause.

Defendant obtained the contract with the Algerian authorities. It paid claimant 50% of the agreed fee but refused to pay the remaining 50%, alleging that claimant's performance under the Protocol had been deficient.

Claimant initiated arbitration proceedings before the ICC. For its part, defendant requested compensation for the procedural costs (indemnité de procédure).

The Sole Arbitrator denied both claimant's claim and defendant's request for compensation.

Note General Editor [of the YCA]. This award has been annulled in Switzerland and a second award has reportedly granted the claim.

Excerpt

[...]

II. MAIN QUESTIONS

[...]
E. Do Claimant’s Activities Violate Swiss Public Policy?

[...]

2. The payment of bribes

"All enterprises seek new outlets allowing them to increase their growth rate or at least to maintain a satisfactory competition level. In order to attain this goal, enterprises endeavour to hire qualified personnel and to have an effective production instrument at their disposal, so that they can offer products which can compete with those offered by their competitors. Now it happens that nowadays, especially in certain fields (armaments, sale of know-how, aviation, etc.), the products or services offered do not differ significantly in quality, or are equivalent. Hence, the manager of an enterprise or the board of a company is tempted to use various means, and particularly bribes, that is, 'any offer (or request) concerning the granting of a hidden and not-owed material advantage to the employee of a third party with the aim of influencing this third party in favour of the donor' (see A: Héritier, Les pots-de-vin, thesis (Geneva 1981) p. 19). Many enterprises, in fact, establish reserves for bribes, either by creating a 'bribery fund' or by including this practice in the budget. For instance, bribes may be deducted from taxes in the Federal Republic of Germany.

"Now, we may ask ourselves whether the conclusion of the contract between defendant and the Algerian authorities depended on bribes paid by claimant. It is important to give an answer to this question, because if this were the case the contract would be null and void. The Supreme Court has affirmed this principle on several occasions."

"The issue of bribery has been discussed at the hearings; ... one of claimant's witnesses, B, maintained that the Algerian authorities were not bribed. On the other hand, at the same hearing, B also said that when [the representatives of Algeria] were in France, 'they were taken care of'. Also, the correspondence between the former General Manager of defendant and claimant ambiguously mentions payments 'which would have been made by defendant directly to local representatives', payments which were to be deducted from claimant's fee. Further, the high commission fee could indicate that there has been bribery (see the US jurisprudence cited below).

"In the present case, bribery has not been proved beyond doubt. It is true that it is possible to prove something through indirect evidence and that Art. 8 of the Swiss CC does not exclude indirect evidence. However, it is necessary that a sufficient ensemble of indirect evidence be collected to allow the judge to base his decision on something more than likely facts, i.e., facts which have not been proven (see H. Deschenaux, 'Le Titre préliminaire du Code civil', Traité de droit civil suisse, Vol. II/I (Fribourg 1969) p. 219 et seq.). Thus, evidence of bribery has not been given and the indirect evidence is not sufficiently relevant."

[...]

Referring Principles:

IV.7.2 - Invalidity of contract due to bribery