Final award in case no. 6248 of 1990

Facts

Defendant, a firm of building contractors, acting on behalf of the "Joint Venture" contracted with the "Group" for the construction of a Project "the Project". The Group also concluded a Supervision Contract with an architectural firm as its engineering consultant on the Project to supervise defendant's performance of the works. In the context of the Project, claimant and defendant executed several agreements whereby claimant, acting as consultant for defendant, would assist defendant in trying to secure saving on costs of the Project and in acquiring extensions of the total value of the Project in the form of additional works such as variations and change orders. In the last agreement (Last Agreement), which superseded all previous Agreements, claimant's compensation was fixed at a certain sum, being the "gross maximum compensation". The Last Agreement contained a governing law and arbitration clause which provided, inter alia:

"This ... Agreement shall be governed by and construed in accordance with the Swiss Federal Code of Obligations. The complete or partial invalidity or unenforceability of any part or parts of this Agreement shall in no way affect the validity and enforceability of the whole...."

This clause provided further for ICC arbitration in Zurich.

A dispute arose between the Parties which was submitted to arbitration. Claimant claimed the amount of the gross maximum compensation from defendant. It also claimed payment of additional sums which were to be paid to it by defendant, simultaneously to defendant receiving payment from the Group for work done by the defendant. Three such payments had been made by the Group to the defendant.
Defendant argued that claimant was nothing other than a post office box address providing cover for the improper activities of Mr. Z, the principal of the architectural firm. It was defendant's contention that Mr. Z, under cover of claimant, abused his position as consultant to the Group to extort payments from defendant for his private gain instead of acting exclusively in the interest of the Group, and accordingly that the Agreements were null and void as being contrary to "bonos mores".

The arbitral tribunal held that the Agreements were an offensive secret commission agreement which represented a particularly offensive violation of the Group's rights and rejected the claimant's claim in its entirety.

Excerpt

I. Preliminary Remarks

A. Jurisdiction

1 "No objections to the Arbitral Tribunal's jurisdiction have been raised by the Parties. However - since defendant alleges the violation of good morals and public policy by the Agreements and since arbitrability has been denied in a widely discussed ICC Award of 1963 (ICC case no. 1110) on the ground of the illicit nature of the agreements at issue - the Arbitral Tribunal must still analyze its jurisdiction.

2 "The answer is to be based on Art. 8(3) of the ICC Rules and on Art. 178(3) of the PIL Act which both state that the validity of an arbitration agreement cannot be contested on the ground that the main contract may not be valid. This principle of severability has long been recognized not only generally, but also specifically with respect to main contracts which were found void on the ground of a violation of good morals and public policy (cf. K.-H. Böckstiegel, 'Public Policy and Arbitrability' in ICCA Congress Series no. 3 (1987) p. 177 et seq., pp. 201-202). It follows from the now dominating doctrine of severability that this Arbitral Tribunal has jurisdiction in the present matter."

B. Applicable Substantive Law

3 "Pursuant to the Parties' explicit choice of law ... the Swiss Federal Code of Obligations (CO) is applicable as substantive law in the present matter. However, as there is no indication for the Parties' intention to separate or to limit the applicable law, this choice of law clause has to be interpreted in a more comprehensive sense comprising the entirety of the Swiss substantive law. This extended interpretation also corresponds with the Terms of Reference on which this Arbitration is based where the Parties, more generally, agreed that 'Swiss Law is applicable to their dispute'.

4 "Furthermore, the Parties in their submissions never insisted on a limited application of the Swiss substantive law, or opposed its application as a whole. On the contrary, they constantly refer either to the 'governing Swiss law' ... or, more specifically, to various articles of the Introductory Provisions of the Swiss Civil Code (Art. 1-10 CC)....

5 "Even if the clause was based on the intention to limit the applicable law, the reference to the CO automatically comprises the Introductory Provisions of the Swiss Civil Code (Art. 1-10 CC) not only because the CO is the fifth part of the Civil Code but also because the Introductory Provisions include certain general rules like the principle of 'good faith' (Art. 2 CC) or the general rules of evidence (Art. 8 CC) which apply to the CO as well and which cannot be excluded by the Parties by stipulation (see Gauch/Schluep, Schweizerisches Obligationenrecht, Allgemeiner Teil, Band I, 4. Auflage (Zurich 1987) S. 6, N. 12 et seq., N. 16)."

II. Nullity of Contracts for Violating Bones Mores

6 "Generally, pursuant to Art. 19(1) CO, the contents of a contract can be established at the discretion of the parties. Such autonomy is - however among other restrictions - limited by the provision that the contents of the contract may not violate bonos mores (Art. 19(2) CO). Contracts which violate bonos mores are, according to Art. 20(1) CO, null and void.
"Generally, a contract is against good morals if it violates ethical and social principles widely recognized by the community of rights as a law system cannot sanction acts of legal significance which are against its own general principles of social life (see Larenz, Schuldrecht, Allgemeiner Teil, 13. Auflage, p. 52; see also E. Bucher, Schweizerisches Obligationenrecht, Allgemeiner Teil, 2. Auflage, p. 255 et seq. (Moralische Minimalanforderungen)). Correspondingly, the freedom to shape the contents of a contract at the discretion of the parties ends where either the contents itself or the connection between contents or intentions or substantial motives of at least one party to the contract are contra bonos mores.

"In order to judge upon the validity of the Agreement at issue, the scope of interpretation has to comprise the wider context of the parties' relationship. This results from Art. 18 CO which holds that the real intent 'which is mutually agreed upon shall be considered and not an incorrect statement or method of expression used by the parties, whether due to error or with the intention of concealing the true nature of the contract. In other words: the goal of interpretation is to ascertain the real intention of the parties beyond the words used in their agreement. With respect to this principle, all circumstances - prior and contemporary to the Agreement at issue as well as posterior to it - have to be taken into consideration as long as they are functionally connected with the object of interpretation (see Becker, Berner Kommentar, VI, OR, Allgemeine Bestimmungen (Bern 1941) Art. 1-183 OR, ad Art. 18 CO, p. 70 et seq.; see also Kramer, Berner Kommentar, VI, OR, Allgemeine Bestimmungen (Bern 1986) ad Art. 18 N. 16 et seq., N. 44).

"In defendant's submissions, the Last Agreement - on which the claim at issue is based - was violating bonos mores since it was entered into in flagrant contradiction to the fiduciary obligation resulting from the Supervision Contract signed by the Group as owner or principal and the architectural firm as consultant ... (Supervision contract). In claimant's view, the Last Agreement did not impede the architectural firm to perform the Supervision Contract properly. Claimant emphasizes that the Group was entirely satisfied with the services rendered by the architectural firm under the Supervision Contract. Accordingly, claimant contests that the Last Agreement violated the rights of the Group under the Supervision Contract and maintains that it acted in accordance with bonos mores.

"Apart from the issue of fact which shall be dealt with infra, defendant's argument raises the question whether at all a contract concluded between A and B (Last Agreement) may be void on the ground that it violates a contract entered into between two - partly or wholly - different parties B and C or C and D (Supervision Contract). At first sight, the doctrine of privity of contract would lead to a negative answer. However, it is not disputed in Swiss doctrine and in Swiss court practice that a different approach is justified if the violation of the third party's contractual rights is particularly offensive [besonders anstößig, see BGE [Swiss Federal Court Decisions] 102 II 340; Jean-Baptiste Zufferey-Werro, Le contrat contraire aux bonnes moeurs (Fribourg 1988) n. 1057 et seq.; Felix Zulliger, Eingriffe Dritter in Forderungsrechte (Zurich 1988) p. 162 et seq.).

"The chronology of the two conflicting contracts is of no relevance. The contract violating a third party's contractual rights may be entered into prior and in view of a planned contract which would form the basis of that third party's rights, or following the conclusion of such contract. Since the latter is more frequent, this Award shall designate the contract which might be violative of a third party's contractual rights, as 'subsequent contract.' " (....)

III. Privileged fiduciary Rights

"The violation of a third party's rights may be particularly offensive if that party's trust in the independence and loyalty of his contractual partner represents an essential element of the relevant contractual relationship. This element is a characteristic aspect of contracts with respect to the representation of the interests of the other party (the principal). Such relationships with fiduciary elements exist for example between the lay client and his professional advisor or agent, the company and its directors, a state and its officials and - depending on the employee's function - between the employer and the employee, but not between a customer and a craftsman or between a buyer and a seller. The borderline does not necessarily follow the categories of specific contract types; e.g. there are agency agreements with and without essential fiduciary duties of the agent (see Hofstetter, Schweizerisches Privatrecht, Vol. VH/2, p. 32).
13 "The two categories of contractual relationships - with and without essential fiduciary duties - are well illustrated by a legal provision governing the brokerage contract (Art. 415 CO):

'The broker shall forfeit his right to a fee and to reimbursement of his expenses by the principal if he acts on behalf of another person in violation of his contract, or if he has arranged for a promise of a fee also from that other person contrary to good faith.'

It has been decided by the Swiss Federal Court that a broker may act for two different parties with conflicting interests if the function of such broker is restricted to providing an opportunity to conclude a contract. However, if the broker's duties include also consultancy services with respect to the contents of business transactions or negotiations on behalf of the principals, he may not act for both sides of the planned transaction (BGE 111 II 368).

14 "The representation of the principal's interests may involve making decisions on his behalf. However, this aspect is not decisive; the fiduciary element may also be essential if the agent exercises only some influence on the decisions of the principal or of the principal's other agents by providing recommendations or advice (see unpublished decision of the Swiss Federal Court, dated 22 July 1980)....

15 "The more the fiduciary element is essential in a contractual relationship, the more an interfering subsequent contract is violative of bonos mores.

16 "In certain contractual relationships, the obligation of loyalty and independence is particularly accentuated. Accordingly, any kind of dual representation of conflicting interests is contrary to such contractual duties. Often, the duty to represent exclusively the principal's interests in full independence of the agent's own or any third party's interests is laid down in codes of professional conduct. This applies among others to lawyers and certain other professional consultants. Independently of whether the consultant is formally bound by such rules or not and whether such rules are explicitly incorporated into the contract between the principal and his consultant, they express the significance of the fiduciary element normally connected with the services rendered by the profession.

17 "Fiduciary rights which are particularly meriting protection against conflicts of interests, may be qualified as privileged fiduciary rights. It is undisputed in Swiss doctrine that the architects form part of the professions with a particularly strict duty of loyalty towards their principals. They have to avoid any conflict of interests which could bias their consultancy services (see Gauch/Tercier, ed., Das Architektenrecht (Fribourg 1986) pp. 93 and 122). The rules of professional conduct of the Swiss Association of Engineers and Architects set forth that the architect shall serve the client conscientiously and that he shall not accept any advantages from third parties such as contractors and suppliers (see Art. 1.4 of the Reglement concernant les prestations et honoraires des architectes, no. 102)....

18 "It follows from the above considerations that the architect's duties normally fall within the category of contractual relationships which grant the principal privileged fiduciary rights meriting legal protection against interference due to subsequent contracts."

IV. Influencing the Consultant or Agent to Disregard his Fiduciary Duties

19 "This second element as to the definition of the particularly offensive nature of a contract contradicting fiduciary rights of a third party refers to the common intent of the Parties to this subsequent contract. The element which makes the relationship between the two contracts offensive, is the Parties' intention to influence certain decisions to be made by the agent on his principal's behalf or certain recommendations to be provided by the consultant to his principal in a way that they are not in such principal's exclusive interests but also or exclusively in the interest of one or both parties to the subsequent contract (see the list of court decisions summarized in J.-B. Zufferey-Werro, Le contrat contraire aux bonnes moeurs (Fribourg 1988) no. 1108-1124).

20 "Often, the intention to influence a decision to the benefit of the parties to the subsequent contract includes the intention to influence the behaviour of the consultant or agent to act against the interests of his principal. This is certainly relevant when the extent of the offensiveness of a subsequent contract has to be determined: the more a subsequent contract is contrary to the interests of the beneficiary of the privileged fiduciary rights as defined hereinabove, the more
the subsequent contract is offensive. However, it is not a decisive element; the essential aspect is that the principal is frustrated in his trust that his agent or consultant is acting exclusively in his principal's interests (see Anne Héritier, *Les Pots-de-Vin* (Genève 1981) p. 16).

21 "This aspect leads to the element of secrecy. There is no offensive influence where the principal is fully aware of the fact that the decisions made or the recommendations submitted by his agent or consultant might be influenced by considerations of such agent or consultant for his own or other parties' interests (see Anne Héritier, *supra*, para. [20], p. 11 et seq.).

22 "Another important element for determining the extent to which a subsequent contract is offensive and thus violating *bonos mores*, is the motive for the behaviour of the agent or consultant violating the fiduciary duties he has towards his principal.

23 "A high degree of offensiveness is reached if the agent or consultant is promising to misuse his influence not on the ground of his friendship towards another person or for similar non-egoistic motives but against a remuneration as reward for betraying the principal. Such 'traitor's' rewards are commonly referred to as 'bribes', 'corruption money', 'secret commissions', 'pots-de-vin', or 'kickbacks'. This Award shall designate such remunerations as 'secret commissions'.

24 "With respect to the offensiveness of such arrangements, reference may be made to the Swiss Law on Unfair Competition which prohibits all methods of competition which entail the bribing of a competitor's agents or employees. Often, the amount of the secret commissions is made dependent on the extent to which the parties are 'successful' in disregarding the consultant's fiduciary duties to the advantage of the payer of the secret commission. Thus, the consultant's remuneration may be linked directly - by way of a commission expressed in a certain percentage of the intended business volumes or of other economic advantages - with the result of the betrayal of the third party's interest. If the consultant and/or his client's economic advantages correspond to a similar loss on the side of the third party, the arrangement represents a particularly shocking example within the different forms of remunerated violations of third party's contractual rights.

25 "The offensiveness does not depend on whether the agent or consultant bound by qualified fiduciary duties towards his principal and the person promising against remuneration to exercise influence against such rights, are one and the same person. Offensive arrangements may be made indirectly as well. Thus, it may be that a chain of several parties exists between the agent or consultant bound by fiduciary duties at the one end and the person making the promise to exercise influence and receiving or directing the receipt of the remuneration at the other end. For the qualification as an offensive arrangement there must be a link which enables the latter person to forward the instructions with respect to the intended influence to the person bound by privileged fiduciary duties either through additional secret commission agreements, or through exercising corporate control, or through similar chains of influence.

26 "There is no doubt under Swiss law that a contract by which a party bound by distinct fiduciary duties towards a principal, promises against a remuneration to secretly influence such principal's decisions for the benefit of the promisee or another party different from the principal, is contrary to

*bonos mores* and thus - pursuant to Art. 20 CO - null and void (see Anne Héritier, *supra*, para. [20], p. 106; J.-B. Zufferey-Werro, *supra*, para. [10] p. 73 et seq.; P. Gauch, *Der Werkvertrag* (Zurich 1985) N. 851; BGE 47 II 86, 95 II 39, 96 IT 233; see also the non-published decision of the Swiss Federal Court, dated 22 July 1980)....

27 "Since in the case at issue none of the Parties has its domicile or its principal office in Switzerland it should be emphasized that the attitude of Swiss law towards secret commission agreements is in accordance with international public policy.

'International interests and the general interest in a normal functioning of international trade appear to coincide and to justify the conclusion that there does exist a principle of truly international or transnational public policy which sanctions corruption and "bribery-contracts"' (see P. Lalive, 'Transnational (or Truly International) Public Policy and International Arbitration', in: *Comparative arbitration practice and public policy in arbitration*, P. Sanders, ed., *ICCA Congress Series no. 3* (1987) p. 276 et seq.).
This also corresponds to the practice in the domain of international commercial arbitration (see ICC awards nos. 2730 and 3916, in Journal du droit international (Clunet) (1984) pp. 914 and 930)."(...)

V. The Supervision Contract

28 "Both Parties fundamentally differ as to their description of the contents of the Supervision Contract entered into by the Group as the owner of the Project and the architectural firm as consultant on....

29 "In claimant's view, the obligations of the architectural firm resulting from the Supervision Contract were not general obligations of an agent, but were limited to the technical supervision of the Project. In claimant's interpretation, the consultant's duties were restricted mainly to reviewing drawings, specifications and tender documents, instructing the contractor in accordance with the recognized technical principles, discussing the construction programme, monitoring the contractor's staff, checking the materials, reviewing safety-measures, reviewing and correcting discrepancies or errors, in the drawings.

30 "In defendant's interpretation, however, the architectural firm was the owner's representative on the Project, entrusted by the Group with the entirety of the administration of the Group's contract with the Joint Venture for the performance of the works. Defendant emphasizes that the review of the contractor's prices was one of the consultant's most important duties and his recommendations as to the reasonableness and accuracy of such prices were normally accepted by the Group.

31 "Pursuant to ... the Supervision Contract, it was the consultant's duty to monitor and follow up the execution of the contract for construction works signed between the Group and the contractor and to do his best for the interest of the Group regarding all matters related to the Supervision Contract. It is not disputed between the Parties that the contractor referred to in the Supervision Contract was the 'Joint Venture' (Contractor) and that defendant was the main partner (approx. with a 95% share) in that joint venture. (....)

32 "...[T]he consultant's duties went far beyond merely technical matters such as measuring quantities of works and materials and included important consultancy and fiduciary services with respect to economically essential matters such as advising the Principal about the appropriate prices for changes of the Project, and, more generally, to represent the owner's interest in all his relations with the contractor.

33 "Pursuant to its by-laws as summarized in the extract from the commercial register the architectural firm offers services as architects, designers, engineers and consultants. Clients may expect that the firm and its personnel render their services in accordance with normal professional standards as laid down in the law applicable at the place where the firm is registered and in the relevant codes of professional conduct, independently from the question whether or not the firm is a member of a professional association issuing such rules of conduct. As explained in [17] above, Swiss law as well as Swiss rules of conduct for architects point out an increased obligation of loyalty and independence on the side of the architect. The Supervision Contract provides for architectural services. The Group was therefore entitled to expect that the architectural firm would follow the main rules of professional conduct.

34 "Since the architectural firm is a wholly owned subsidiary of another firm in which Mr. Z held a 50% share and since Mr. Z's letterhead referred to his fellowship - among others - in the 'Institute' it may be noted that the professional standards for architects as laid down in the Code of Professional Conduct issued e.g. by the 'Institute' emphasize not less than the Swiss standards the architect's duty to act independently from third parties' interests; more specifically, he 'shall not take discounts, commissions or gifts as an inducement to show favour to any person or body.'

35 "It is therefore irrelevant whether - as claimant alleges - practices and moralities in [a Middle Eastern country] are different from the ones of a European country like Switzerland ... and whether such practices would allow a less strict performance of duties with respect to the architect's independence and loyalty. By choosing a European firm of architects, the Group opted for a supervising consultant which would adhere to the European practices and moralities.
"It may be added that the Last Agreement which forms the basis of the claim at issue, is governed by the Swiss Code of Obligations. It follows from this choice of law - in the words of the Swiss Federal Court:

'As the parties have submitted their relations to Swiss law, it is this law that determines whether the contract is null and void because it is contrary to bonos mores. The argument in the appeal on customary practices in the Middle East are therefore without relevance (see unpublished decision of the Swiss Federal Court, dated 22 July 1980,...' [original in French]

"In the light of such duties of the architectural firm, the Supervision Contract created without any doubt privileged fiduciary rights on the side of the Group. Correspondingly increased and qualified were the fiduciary duties on the side of the architectural firm. Such duties were not only obligations of the ... firm itself, but of its personnel as well (The Consultant and his personnel shall do their best for the interest...’ (Supervision Contract). While Mr. Z was not a formal employee of the architectural firm, he was - within the architectural firm partnership - the partner in charge of the Project and personally involved in the performance of the Supervision Contract whenever important matters had to be discussed with the Group. Accordingly, the special fiduciary duties resulting from the Supervision Contract applied also to Mr. Z personally." (....)

VI. The Last Agreement

"In its introductory part, the Agreement referred to a contract extension agreed upon between the Group as Owner and defendant (more precisely: the Joint Venture) as contractor of the Project. Pursuant to such introductory remarks, revised Bills of Quantities had been submitted to the Group in.... They stipulated an estimated final overall account value of ... (excluding certain minor items) for the works partly performed at that time and partly to be performed as additional works beyond the original contract value....

"With reference to such contract extension, the Last Agreement lists the following services to be rendered by claimant:

a) to assist and support defendant in the timely and profitable performance of defendant's obligations and prosecution of its rights under the extended contract with the Group,

b) to conduct all negotiations with the Group with the aim of obtaining definitive approval from the Group of the revised Bills of Quantities as submitted ... to the Group by the architect,

c) to preserve the integrity of such revised Bills of Quantities,

d) to resist any move by the Group to introduce without a price increase fresh items or additional quantities into the revised Bills of Quantities.

"Apart from such duties in relation with the revised Bills of Quantities, claimant undertook to render, among others, the following services: to advise in relation to the most effective manner of submission of any claims, representations, to assist defendant in settling the final account and to secure the issue of completion and maintenance certificates, unconditional take-over by the Group and the unconditional release of all performance bonds, maintenance guarantees and retention monies by the Group.

"It follows from the above lists of services that claimant had to represent interests which were clearly opposed to the Group's interests which the architectural firm had to support under its fiduciary duties:

a) Claimant undertook to exercise influence on the Group in favour of defendant in order that the quantities and prices as proposed in defendant's revised Bills of Quantities be accepted by the Group whereas the architectural firm had the duty to scrutinize such quantities and prices diligently in the sole interest of the Group (see [31] supra).
b) Claimant undertook, more generally, to support defendant's interests in the context of its contractual relationship as contractor with the Group, whereas it was the qualified fiduciary duty of the architectural firm to monitor and follow up the execution of the contract signed between the Group and defendant as contractor by doing his best for the interest of the Group (see [31] supra).

42 "Both Parties wanted to keep their Agreement secret vis-à-vis the Group as results from the explicit confidentiality clause in the Last Agreement. Mr. Z has explicitly stated that the Group was not aware of the Last Agreement or of the previous Agreements.

43 "The claimant's remuneration was agreed upon to be dependent on the extent to which the estimated final overall account ... would be reached in the relationship between the Group and defendant as contractor. The gross maximum entitlement - due if the ceiling ... would be reached - was fixed at .... Thus, the more claimant was successful in representing defendant's interests, the more claimant's remuneration became attractive.

44 "Claimant emphasizes that it rendered important consultancy services which were not related at all with defendant's entitlement against the Group, such as consultancy services with respect to the reimbursement of ... taxes or to the Joint Venture Agreement between defendant on the one side and Construction Company A and Construction Company B on the other side. However, it results from the payment modus clauses of the Last Agreement that the entire commission, as far as outstanding at the time of conclusion of such agreement, has been made dependent on the receipt, by defendant, of payments under the contract for works with the Group; no commission payments have been made conditional on the reimbursement of taxes or any other events. This leads to the interpretation that the main purpose of and the main services contemplated in the Last Agreement were in relation to the intended influence on decisions of the Group and that any additional services of claimant with respect to other aspects of the Project were of an incidental nature only.

45 "In any event, claimant did not substantiate what part of its services might have to be qualified as unrelated to the main purpose and correspondingly, what part of the entire commission should be examined under such different aspects. Thus, this Award concludes that claimant has been compensated for services, if any, of such incidental nature by defendant's previous payments ... and that the balance of the entire commission ... which is at issue in this Arbitration, has to be examined entirely in connection with the main purpose of the Last Agreement.

46 "It follows from the above analysis of the contents of the Last Agreement that defendant had retained claimant against an important remuneration to secretly exercise influence on the decisions of the Group for the benefit of defendant and that this common intent was opposed to the interests which the architectural firm had to represent under its special fiduciary duties resulting from the Supervision Contract. However, the intention of claimant and defendant to exercise such influence on the Group's decisions either remained impracticable and thus inoffensive theory or represented a similarly inoffensive sponsoring agreement if there was no connection between claimant and the architectural firm which allowed claimant to pass on the agreed intentions to the architectural firm as the party bound by qualified fiduciary duties towards the Group.

47 "In defendant's view, such connection was obviously existing. Defendant submits that there was 'identity' between claimant and Mr. Z of the architectural firm, that Mr. Z was the sole or main shareholder of claimant or had otherwise control over claimant. In claimant's submission, Mr. Z was a mere consultant to claimant, which was completely independent from Mr. Z and his group of companies.

48 "The issue of the alleged 'identity' between claimant and Mr. Z may remain undecided. As discussed in [25] above, the relevant issue is whether there was a chain between claimant and the architectural firm which enabled claimant to transmit the instructions with respect to the intended influence to the architectural firm.

49 "When examining the connection between claimant and the architectural firm, the following elements result from the file:

a) Mr. Z was claimant's sole consultant with respect to the Project. No other persons were involved when...
claimant rendered the services under the Last Agreement. It was in accordance with defendant's intention when signing the Last Agreement that Mr. Z would perform personally all the services contemplated in that Agreement as claimant's duties. Therefore, Mr. Z's involvement with the services can be deemed as *sine qua non* for the conclusion of the Last Agreement.

b) Mr. Z was a partner with a 50% share together with Mr. J in ... the firm of which the architectural firm was a wholly owned subsidiary. Mr. Z was the partner in charge of the Project. It is true that the architectural firm - while not employing personnel of its own in [locally in Europe] - employed several engineers, quantity-surveyors and other staff on the site of the Project. However, all important negotiations with the Group - such as negotiations with respect to the final acceptance of bills of quantities and accounts - were conducted exclusively and personally by Mr. Z as the partner in charge of the Project.

50 "Accordingly, the chain along which the instruction of influence intended by claimant and defendant could be transmitted from claimant to the architectural firm as the Group's consultant was extremely short, safe and efficient: it went from Mr. Z as claimant's sole consultant to the identical Mr. Z as the partner in charge of the Project within the architectural firm.

51 "It results from the evidence presented in this Arbitration that the exercising of influence in the sense described above, was not only agreed upon by the Parties and possible in view of Mr. Z's personal involvement, but also realized in an efficient way. This may be illustrated by two examples.

52 "When discussing the pricing of the final Bills of Quantities with defendant, Mr. Z knew that defendant would have been prepared to accept a reduction of ... on its final total account amount. As partner in charge of the architectural firm, Mr. Z had the duty to agree on that reduction or even to ask defendant for a further reduction in the interest of the Group. As claimant's consultant, he had the duty to preserve as much as possible the integrity of the revised Bills of Quantities and to resist against reductions of the final account. Between these two opposing interests, Mr. Z chose to represent partly defendant's interests as well by seeking a reduction of only ... as compared with the higher amount which defendant was prepared to accept.

53 "Since claimant is requesting, in this Arbitration, the payment of the total outstanding amount of its commission which was made dependent on successfully preserving the integrity of the revised Bills of Quantities ... it appears that the Group - influenced by the recommendations received from its consultant the architectural firm - agreed to a reduction of ... only, whereas defendant would have been willing to accept a reduction of ....

54 "Pursuant to the original tender documents, defendant as contractor should have adhered to Standards of country A with respect to construction rules, technical equipment etc. [Defendant became aware of certain cost disadvantages connected with these Standards, and asked to be allowed to follow the Standards of country B instead. When discussing this issue with Mr. Z as partner in charge within the architectural firm, it became apparent that important savings ... would result from such switch to standards of country B.

55 "In accordance with the architect's special fiduciary duty to represent the principal's interests (see Supervision Contract), the architectural firm should have made its recommendation to agree to country B standards conditional on a reduction of costs in favour of its principal. The architectural firm did not act in accordance with this duty and recommended to agree to country B standards without requesting any reduction of costs from defendant. Obviously, the architectural firm was influenced by Mr. Z, consultant to Company C and to claimant, its successor, which companies were promised certain fees by defendant for such services.

56 "The documents in the file establish that further examples of efficiently exercising influence were planned and realized.... Even if these Agreements are not at issue, they are functionally and chronologically connected with the Last Agreement and therefore appropriate to render evidence for the Parties' intentions.

57 "Claimant's assertion that the architectural firm performed its duties under the Supervision Contract correctly and independently from claimant, is - as results clearly from the examples referred to above - not in accordance with the facts.
of the case at issue."

**VII. Conclusion: The Last Agreement is Null and Void**

58 "All characteristic elements of an offensive secret commission agreement are assembled in the Last Agreement: Claimant and defendant intended to secretly exercise influence on the decisions of the Group for defendant's benefit by inducing the architectural firm to disregard the Group's privileged fiduciary rights under the Supervision Contract.

59 "It was the common intent of claimant and defendant when they entered into the Last Agreement that claimant would render the planned services exclusively through its consultant Mr. Z. Both parties to such agreement knew

| a) that Mr. Z would be in a position to represent defendant's interests successfully since he was the partner in charge of the Project within the Group's consultant the architectural firm, |
| b) that the architectural firm had strict and marked fiduciary duties to represent the interests of the Group as the owner of the Project, |
| c) that the owner's interests were clearly opposed to defendant's interests. |

60 "Claimant promised to render its services against an important remuneration which was made dependent on the extent to which the exercising of influence was beneficial to defendant. In some instances, defendant's economic advantages, resulting from such influence, corresponded to similar economic disadvantages on the side of the Group.

61 "Thus, this Award concludes that the Last Agreement represents a particularly offensive violation of a third party's rights. It is therefore entirely null and void pursuant to Art. 20 CO.

62 "Although defendant participated in the conclusion of the immoral contract and took advantage of claimant's activities, it is - contrary to claimant's opinion - not estopped from invoking the nullity by the general provisions in Art. 2(2) CC (abuse of a person's rights) (see J.-B. Zufferey-Weroro, Le contrat contraire aux bonnes moeurs (1988) nr. 1643). Consequently, claimant's claim must be rejected in its entirety."

**VIII. Costs of Arbitration and Legal Assistance**

63 "Claimant, having failed entirely in its claim, should bear all the costs of this Arbitration in the sense of the fees and expenses of the Arbitral Tribunal and the administrative costs....

64 "With respect to the legal costs incurred by the Parties, a different approach appears to be appropriate since defendant's own corrupt attitude cannot remain unnoticed completely. Defendant participated in entering into the immoral Last Agreement as well as into the previous Agreements and - as long as it profited from such agreements - made claimant believe that it would carry out its promise to pay commissions. While the prevailing party is normally entitled to be awarded its legal costs, Art. 2(2) CC bars the assertion of a contractual claim if the party invoking the invalidity of the contract not only wanted and supported this contractual defect but also took advantage of it (see BGE 78 II 227 and 52 II 165; E. Bucher, Obligationenrecht, Besonderer Teil (1988) p. 125 et seq.). It would not be fair and just if the prevailing defendant which cooperated in the conclusion and performance of the immoral Agreements, would be awarded its legal costs (see decision of Handelsgericht Zürich of 9 May 1968, published in Schweizerische Juristen-Zeitung 64 [1968] p. 354 et seq.; J.-B. Zufferey-Weroro, Le contrat contraire aux bonnes moeurs (1988) nr. 1645). In view of these considerations, the right course to follow is that each Party should bear its own legal costs."

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1. Art. 8(3) of the ICC Rules of Conciliation and Arbitration reads: "3. Should one of the parties raise one or more pleas concerning the existence or validity of the agreement to arbitrate, and should the International Court of Arbitration be
satisfied of the *prima facie* existence of such an agreement, the Court may, without prejudice to the admissibility or merits of the plea or pleas, decide that the arbitration shall proceed. In such a case any decision as to the arbitrator's jurisdiction shall be taken by the arbitrator himself.

2. Art. 178(3) of the *Swiss Private International Law* Act reads: “3. The validity of an arbitration agreement cannot be contested on the ground that the main contract is not valid or that the arbitration agreement concerns a dispute which has not yet arisen.”

3. Art. 2 of the Swiss Civil Code reads: “Every person shall exercise his rights and perform his obligations in accordance with the rules of good faith. A manifest abuse of right is not protected by the law.”

4. Art. 8 of the Swiss Civil Code reads: “Unless otherwise provided by law, each party shall prove the facts that it alleges, in order to derive its rights therefrom.

5. Art. 19(2) of the Swiss Code of Obligations reads: “Contracts deviating from what is permitted by law are valid only where the law does not provide for an absolute prohibition, or where the deviation does not violate public policy, bonos mores, or basic personal rights.”

**Referring Principles:**

- IV.7.1 - Invalidity of contract that violates good morals ("<em>boni mores"</em>)