Final award in case no. 6497 of 1994

Facts

Over a period of approximately ten years, the parties entered into a number of consultancy agreements designated as "Basic Agreements". The main object of those agreements was to provide the services of claimant for respondent to obtain construction contracts in a number of countries including a certain Middle Eastern country (country X). In their dealings, claimant was represented by its top manager, Mr. Z, and respondent was represented by Mr. B, a special representative chosen for this purpose, and acting under the authority of Mr. A, a member of respondent's board of directors. During this ten-year period, respondent obtained a number of contracts in country X. In conformity with the Basic Agreements, claimant was to receive a percentage of 1.5% of the amounts received by respondent. However, in addition to the Basic Agreements, the parties entered into a great number of specific 'Product Agreements', providing additional remuneration as well as, in some cases, new obligations for claimant. Claimant's remuneration over this period amounted to approximately 5.5% of the amounts received by respondent. The Basic Agreements as well as each Product Agreement contained a "termination date".

A dispute arose between the parties regarding the payment of the balance of the payments with respect to certain contracts. All these contracts contained an ICC arbitration clause and arbitration was initiated in Geneva. In the Terms of Reference, the parties agreed that Swiss law was applicable to the merits of the case. Claimant sought the payment of the amount due related to a number of contracts while respondent argued that no payments were due because the real object of the agreements was to bribe officials in country X.

The arbitral tribunal first held that it is the party alleging bribery which has the burden of proof. This could under certain
circumstances be reversed. The arbitral tribunal then found that although the amounts paid to claimant were very high, and the effective costs of claimant have been only a small fraction of such amount, such payment was not perceived as being "abnormal for a consultancy agreement, without any bribery nature". With respect to Product Agreement Q, however, the arbitral tribunal found that there was a high enough degree of probability that the real object of Product Agreement Q was to channel bribes to officials in country X for this to be considered a case of bribery.

Excerpt

I. BRIBERY

1 "Respondent alleges that the real object of all agreements between the parties was to organise the 'bribing' of officials of country X, through claimant. Respondent has no direct written evidence about the bribery nature of the agreements and about the bribes in particular. However, they rely on ... 'circumstantial' written evidence and on their witnesses (in particular Mr. A)."

2 "If the bribery nature of the agreements would be demonstrated, such agreements would be null and void in Swiss law. This is not because such bribe would be prohibited by the criminal law of the country in which bribes had been paid, but because the bribes in themselves cannot be, in Swiss law, the object of a valid contract (ATF 95 II p. 37 ss = JT 1970 I p. 79 ss). This is also admitted in most legal systems. (By the way, the result of such nullity is not necessarily equitable. The enterprise having benefited from the bribes (i.e., having obtained substantial contracts thanks to the bribes) has not a better moral position than the enterprise having organised the payment of the bribes. The nullity of the agreement is generally only beneficial to the former, and thus possibly inequitable. But this is legally irrelevant.)"

3 "The demonstration of the bribery nature of the agreement has to be made by the Party alleging the existence of bribes (hereafter the 'alleging party'). A civil court, and in particular an arbitral tribunal, has not the power to make an official inquiry and has not the duty to search independently the truth. A civil court has to hear the allegations and the proofs offered by the parties. The 'alleging Party' has the burden of the proof. If its demonstration is not convincing, the tribunal should reject its argument, even if the tribunal has some doubts about the possible bribery nature of the agreements."

4 "The 'alleging Party' may bring some relevant evidence for its allegations, without these elements being really conclusive. In such case, the arbitral tribunal may exceptionally request the other party to bring some counterevidence, if such task is possible and not too burdensome. If the other party does not bring such counter-evidence, the arbitral tribunal may conclude that the facts alleged are proven (Art. 8 Swiss Civil Code). However, such change in the burden of the proof is only to be made in special circumstances and for very good reasons.

[...]

1 Art. 8 of the Swiss Civil Code reads: "Unless otherwise provided by law, each party shall prove the facts that it has alleged in order to derive its rights from them."

Referring Principles:

IV.7.2 - Invalidity of contract due to bribery