Sentence finale dans l'arbitrage CCI no 7047/JJA du 28 février 1994

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Final Award between W., a Corporation organized and existing under the laws of the Republic of X. (Claimant) and F., a State agency (Defendant 1), and U., a bank authorized and existing under Y. law (Defendant 2), rendered by the Arbitral Tribunal consisting of Messrs. Hilmar Raeschke-Kessler (Chairman). Me. Jean Patry and Prof. Dr. Dobrosav Mitrovic.

The place of Arbitration was Geneva, Switzerland.

A. FACTS

I.1) The Claimant is a Corporation organized and existing under the laws of X. ...

On ...., the parties concluded a contract under the heading "Agreement", in which Defendant 1) is referred to as "Principal", Defendant 2) as "Guarantor" and the Claimant as "Consultant". The Amendments I - IV are part of the .... Agreement.

....

Page: 302

It was the purpose of the Agreement that Claimant was to assist Defendant 1) in the sale of military products and armaments to the State of Z., represented by the Ministry of Defence - MoD - among others of M-84-tanks manufactured in Y.

The Defendants signed the ... Agreement in B.

2) On ... Defendant 1) and MoD signed a contract on the delivery of 215 different M-84-tanks at the total sales price of US-$ 500.546.004,- and UK£ 11.440.326,29 - the M-84-contract.

Prior to conclusion of the M-84 contract, the MoD supplied to Defendant 1) a circular - the MoD-circular - containing the request that contracts on the delivery of arms, ammunition and spare parts be made directly with the MoD without the participation of an agent or intermediary.

....

The MoD also handed circular Nr. 4 A/88 to Defendant 1). Circular Nr. 4 A/88 u.a. obliges the partners to contracts with MoD to refrain from paying moneys to an agent. The partner also has to assure to the MoD that his prices do not contain commissions for agents or similar moneys. It is disputed between the parties whether Defendant 1) already knew of the MoD-circular and of circular Nr. 4 A/88 when concluding the Agreement with Claimant, and whether the MoD-circular is
applied by the Z. authorities.

3) Defendant 1) was instigated by the MoD-circular to send the following letter to Claimant on ...

"Dear Sirs,

Due to its impact an implementation of the contract signed on ........ between W. and F., with U. as Guarantor, please find enclosed hereto a copy of the Circular. At the time of signing the contract we were not aware of the content of the Circular. You were surely acquainted, at the time of contract signature, with the limitations imposed by this legal enactment."

On ......, Defendant 1) sent another letter to Claimant, reading as follows:

"Dear Sirs,

Since the Agreement, signed on ..... between W. and F., is not in accordance with the compulsory laws and regulations of both the State of Z. and Y., we are ready to negotiate with you the terms and conditions of termination of the said Agreement.

We are prepared to start the discussion on the termination by the end of July and would very much appreciate your information on the date of your arrival to B .... to that end.

In respect of the aforementioned, we do not expect you to proceed with the activities regarding the matter you are referring to in your letter dated ...."

Defendant 1) considers the letter of ......, to constitute the termination of the Agreement of ........ The request to Claimant to cease its activities on behalf of Defendant 1) has been repeated in other letters subsequently.

4) On ......, Defendant 1) and the MoD concluded a contract on the construction of M-84-training-facilities - construction-contract. (According to Amendment I to that contract, the construction price payable by the MoD to Defendant 1) was to be US-$ 39.109.528,00.

5) In performance of the M-84-contract, Defendant 1) delivered tanks, ammunition, and spare parts to Z. The tanks were used by Z. in the war against I. The scope of deliveries and the considerations received by Defendant 1) from the MoD are disputed between the parties.

Defendant 1) has received an advance payment of US-$ 6.000.000, on the construction-contract. It is disputed between the parties whether the construction-contract continues to exist and whether Defendant 1) has performed its obligations due to the MoD under that contract.

The payments made by the MoD to Defendant 1) were not transacted by Defendant 2) but by the National Bank of Y.

6) After the Agreement of ..... was concluded the Claimant sent numerous telefax letters to Defendant 1), relating mainly to the M-84-project between Defendant 1) and the MoD, but also to other projects between Defendant 1) and the MoD. All letters are unsigned. The Claimant continued to send such letters after ...... Prior to ......, Col. S., who was in charge of the M-84-project for Defendant 1), confirmed the receipt of several such letters. The same was done by Mr. D., at the time Y's ambassador to Z.

Defendant 1) alleges that the information contained in the letters was useless and did not promote its projects with the
MoD, and that they were the only activities performed by Claimant.

There is no dispute that Claimant was not directly involved in the negotiations between Defendant 1) and the MoD. It is disputed, however, whether Claimant was engaged in any activities involving the MoD in favour of Defendant 1), other than writing the letters. The nature of Claimant's activities is also disputed.

II. Claimant requested the Defendants to pay the "Consultant's fees" pursuant to sect. 4 of the Agreement of ...., and demanded Defendant 2) to open the letters, of guarantee, pursuant to sect. 6 of the Agreement, for the M-84-contract and for the construction-contract. Those issues were negotiated between Claimant and Defendant 1) at B......, L...... and C......, without result.

By letter of ....., Defendant 1) directed Defendant 2) to make no payments whatsoever to Claimant.

C. REASONS

III. In Particular: Agreement of ..... not Invalid due to Alleged Illicit Activities of Claimant

7) No Evidence of Bribery by Claimant

The Defendants deduce from the amount of fees stipulated that on conclusion of the Agreement Claimant intended to use part of the expected fees to bribe officials of the MoD, without the Defendants' knowledge. The majority of the Arbitral Tribunal does not think so.

Defendant 1) put its suspicion forward for the first time in its Final Brief of ....., alter the hearing of evidence, and repeated it in the oral Final Pleadings held on .... and .... .

a) These are new allegations of Defendant 1) not submitted within the time granted for stating facts, and contrary to Order No.5 sect.5 of ....., which said that the written submissions in preparation of the Final Pleadings must not contain new facts or allegations.

During the hearing of evidence the Defendants also refrained from asking one of the witnesses clearly whether the Agreement of ..... had anything to do with bribery.

b) Although the letters sent to Defendant 1) are unsigned, and merely indicate that Claimant sent them but do not identify Mr. A. as the author, the majority of the Arbitral Tribunal does not see this as substantive evidence of bribery or other illicit intentions of the Claimant.

Mr. A. has satisfied the Tribunal as to his motives. He said that an address was given, which was the fax of his L. lawyer. This is in conformity with sect. 16 of the Agreement and therefore not to be construed as malicious intent, especially as
Defendant 1) did not allege that its own purposes pursued with the Agreement were illicit. As Mr. A. said also, uncontestedly, Defendant 1) never protested that the letters were unsigned.

c) The Claimant has presented exhibits called "top state secrets" by Defendant 1). This does not point to bribery or other illicit activities. It merely shows that the Claimant had good contacts with the people making the decisions for Z., which was probably why Defendant 1) secured Claimant's services. Defendant's 1) director, Lt. General J., said that Defendant 1) had a special procedure "how to choose agents and consultants".

d) Defendant 1) sees the Claimant as an "international paper vehicle" because of its X. domicile. The majority of the Arbitral Tribunal holds that this also does not indicate any secret intentions of the Claimant, such as bribery or other illicit activities, on conclusion of the Agreement.

The Defendants failed to submit their suspicions in their written briefs before the hearing of witnesses. Their subsequent allegations must be regarded as speculative, and insufficient to convince the majority of the Arbitral Tribunal.

e) The majority also holds that bribery renders an agreement invalid. In arbitration proceedings, however, bribery is a fact which has to be alleged and for which evidence has to be submitted, and at the same time constitutes a defence, nullifying the claims arising from a contract. The consequences of this are decisive.

If a claimant asserts claims arising from a contract, and the defendant objects that the claimant's rights arising from the contract are null due to bribery, it is up to the defendant to present the fact of bribery and the pertaining evidence within the time limits allowed to him for presenting facts. The statement of facts and the burden of proof are therefore upon the defendant. The word "bribery" is clear and unmistakable. If the defendant does not use it in his presentation of facts an Arbitral Tribunal does not have to investigate. It is exclusively the parties' presentation of facts that decides in what direction the arbitral tribunal has to investigate,


If the claimant's claim based on the contract is to be voided by the defence of bribery, the arbitral tribunal, as any state court, must be convinced that there is indeed a case of bribery. A mere "suspicion" by any member of the arbitral tribunal, communicated neither to the parties nor to the witnesses during the phase to establish the facts of the case, is entirely insufficient to form such a conviction of the Arbitral Tribunal.

[...]

1See also above, p. 222, the decision an appeal of the Swiss Federal Tribunal of 30.12.1994.

Referring Principles:

IV.7.2 - Invalidity of contract due to bribery