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FRENCH REPUBLIC

ON BEHALF OF THE FRENCH PEOPLE

PARIS COURT OF APPEAL

Division 5 - 16

International Chamber of Commerce

JUDGMENT OF 27 OCTOBER 2020

(No /2020, 9 pages)

Proceedings for annulment of an arbitration award

General Directory Entry Number: **RG No 19/04177 – Portalis No 35L7-V-B7D-B7MII**

Decision referred to the Court: Arbitration award given on 24 January 2019 in Paris under the International Court of Arbitration by the Arbitral Tribunal composed of (...)

APPELLANT

REPUBLIC X

Having its offices: Building of the directorate general of the Treasury and public accounting - R Acting by the judicial agent of the Treasury,

Represented by its legal representatives,

Represented by Me Luca DE MARIA from SELARL SELARL PELLERIN – DE MARIA – GUERRE,
Having as his pleading lawyer Me Emmanuelle CABROL from LLP ASHURST LLP, lawyer at

RESPONDENT

Company XX

Registered in the Trade and Companies Register under the number RCCM RB/COT/15B15094

Having its registered office:

Reprensented by its legal representatives

Company XY

A company incorporated under American law and registered in the Delaware (USA) Trade and Companies Register

Having its registered office: 1000, Potomac Street NW, Washington DC 20007 (USA), Represented by its legal representatives

Represented by Me Charles-Hubert OLIVIER from SCP LAGOURGUE & OLIVIER, lawyer Having as his pleading lawyer Me

COMPOSITION OF THE COURT

The case was heard on 14 September 2020, in open Court, before the Court composed of:

Mr François ANCEL, President

Ms Fabienne SCHALLER, Judge

Ms Laure ALDEBERT, Judge

who ruled on the case. A report was presented at the hearing by Mr François ANCEL in accordance with Article 804 of the Code of Civil Procedure.

Clerk at the hearing: Ms Clémentine GLEMET

JUDGMENT:

- ADVERSARIAL

- judgment made available at the Clerk's office of the Court, the parties having been notified in advance under the conditions provided for in the second paragraph of Article 450 of the Code of Civil Procedure.

- signed by François ANCEL, President and by Clémentine GLEMET, Clerk to whom the minute was delivered by the signatory judge.

I- STATEMENT OF FACTS AND PROCEEDINGS

1. Company XY is an American company specialized in installing airports' passengers' screening systems.

2. On 18 November 2015 and 26 January 2016, Republic X has signed a contract with this company for the safe-proofing of international airports at (…) and at (…) entitled: "supply contract of a security system for the Government of Republic X's civil aviation and immigration in accordance with the norms of construction, maintenance, and transfer", for a duration of 20 years.

3. In order to execute the contract, American company XY has constituted on 17 December 2015 at (…) a subsidiary, company XX.

4. The safety system implemented was operational starting from Mars 2016.

5. Through a Statement issued on 11 May 2016 by the Council of Minister put in place by the new government elected, it had been decided to terminate the contract and to have the General Direction of the National Police reinstall the equipment, deeming that company XX did not have the status to deal with personal data, a claim that company XX challenged.

6. Its in this context that on 12 May 2017, companies XY and XX introduced a request for arbitration with the Secretariat of the ICC's International Court of Arbitration in Paris, relying on the arbitration clause of articles 3.2 and 3.3 of the contract.

7. In an Award handed down in Paris on 24 January 2019 by the Arbitral Tribunal composed of (…), the Arbitral Tribunal considered that the contract was wrongfully terminated by Republic X. It has ordered the State to pay to companies XY and XX the sum of USD 6,071,859.00 in settlement of the invoices issued; the sum of USD 80,856,576.00 for lost profit, in addition to USD 439,600.00 in respect of interest, expenses and costs incurred in the arbitration proceedings, and USD 267,101.44 in legal fees.

8. By statement of 25 February 2019, Republic X has brought an action before the Paris Court of Appeal to set aside this award on the basis of Article 1520, (5°) of the Code of Civil Procedure.

9. The case management procedure was closed on 1st September 2020.

III – CLAIMS OF THE PARTIES

On the grounds for setting aside the award due to its incompatibility with international public policy since it violates the principle of procedural fairness (Article 1520 (5°) of the French Code of Civil Procedure)

12. Republic X contends that the arbitral tribunal disregarded procedural fairness in the admission of evidence, since in its decision, on many occasions, it referred to confidential evidence and evidence obtained in questionable conditions by companies XY and XX, when the arbitral tribunal should have excluded such evidence from the discussion.

13. To support its claim to set aside the award, it argues in substance that the principle of procedural fairness in the admission of evidence is a general principle in civil procedure, protected by the Court of Cassation under Article 9 of the French Code of Civil Procedure and under Article 6§1 of the European Convention on Human Rights and Fundamental Freedoms in a decision handed down in plenary session on 7 January 2011 (No 09-14-316), a principle which cannot be limited except in criminal matters due to the specific nature of the criminal procedure.

14. According to Republic X, the principle of fairness in the admission of evidence is an integral part of international public policy on proceedings, meaning an award which does not comply with this fundamental rule is contrary to international public policy.

15. In response, companies XY and XX claim that the principle of fairness in the admission of evidence does not have the same legal value as a principle protected by international public policy and that an infringement of this principle, if established, is not sufficient to prevent this award from being recognized in the French legal order.

16. In the alternative, the companies claim that by not arguing for the inadmissibility of the disputed evidence during the proceedings, State X effectively forfeited its right to rely on this alleged irregularity later, and that, in any event, this argument cannot prosper in the absence of procedural fraud.

On the grounds for setting aside the award due to its incompatibility with international public policy since it gives effect to a contract tainted by corruption (Article 1520 (5°) of the French Code of Civil Procedure)

17. Republic X claims that the award gives effect to a contract tainted by corruption, and that, despite the evidence brought to the attention of the arbitral tribunal, the tribunal refused to acknowledge this fact by ruling that State X's allegations of corruption and pressure were not founded.

18. Republic X argues that various elements exist which, taken as a whole, constitute a sufficiently serious, specific and corroborative body of evidence of the existence of corruption practices justifying the setting aside of the award.

19. More specifically, Republic X raises the fact that:

- According to sources from international organizations, the term of office of the President of Republic X, Mr Y, whose government signed the disputed contract, was characterized by a rise in corruption and many major financial scandals implicating ministers and high-ranking civil servants, noting that two out of the three Ministers who had signed the disputed contract with company XX were involved in cases of corruption.

- The contract was signed in sudden and precipitous circumstances on 18 November 2015, in the middle of the presidential election campaign, after negotiations had been at a standstill for two years. It was signed by two ministers, Mr G., Minister of Public Works and Transport, and Mr P, Minister of the Interior, who were at first not entitled to do so. Their authorisation to sign the contract came belatedly on 26 January 2016 with the missing signature of the Minister of the Economy, Mr K. Subsequently, the government team hurriedly instituted the 20-dollar fee to be paid to XX by a decree of 15 March 2016, issued after the second round of the presidential election, in which Mr T was elected to replace Mr Y.

- The contract was concluded without resorting to a tender procedure, in violation of the Public Procurement Code and despite the fact that the Council of Ministers had, in its meeting of 9 April 2014, expressed the wish to subject the company XX to a competitive tender process (note S31).

- The fact that XX had access to confidential documents, specifically notes and reports exchanged during the negotiations by the President of Republic X, the Minister of the Interior, the Minister of Public Works and Transport, the Secretary General of the Government and the Director General of the National Police, relating to the progress of the negotiations, without being able to justify their origin or official communication, confirms the tendentious links that may have existed between company XX and the government.

- The disadvantageous nature of the financial and price conditions of the contract for State X, in that they provided, in addition to a tax exemption, for a fee of 20 US dollars, levied on passengers, which is twice as high as the offer made by company M. , a subsidiary of the group M. , which succeeded it.

20. Companies XX and XY reply that the Arbitral Tribunal, after examining the allegations of State X concerning alleged corruption, concluded that the elements put forward, both in isolation and as a whole, did not suffice to conclude that there was corruption.

21. They submit that State X is repeating the same argument before the Court, without identifying any specific fact or providing evidence of the payment of a sum of money, and that it is arguing in bad faith that there is no evidence of corruption that is sufficiently serious, specific and corroborative.

22. In particular, they contest:

- the allegation that the contract was signed in sudden and precipitous circumstances, since it was signed after two years of negotiations and after numerous meetings held several months before the presidential elections;

- the suspicious nature of the documents, the conditions for obtaining which were discussed before the arbitral tribunal without State X requesting that they be set aside, and which are transcripts of public decisions taken by the Council of Ministers that are not confidential;

- the alleged violation of the French Public Procurement Code, which the Arbitral Tribunal rejected, noting that the State selected within a very short period of time, just a few months, the direct offer of company M., a company strangely registered in (...) on 12 April 2016 and then in X on 23 November 2016, for which State X did not provide any references;

- the fact that State X can rely on the argument of disadvantageous financial conditions, since the fee is borne by the airline companies and not by State X, and the difference in price with its successor, company M. – whose situation is unknown, as is the quality of system it has implemented – is not a relevant factor in determining evidence of corruption.

IV- REASONS FOR THE DECISION

On the grounds for setting aside the award due to its incompatibility with international public policy since it violates the principle of procedural fairness (Article 1520 (5°) of the French Code of Civil Procedure)

23. The fact that companies XX and XY may have disregarded the principle of fairness in the admission of evidence is inoperative insofar as such a breach cannot, in any event, in the absence of procedural fraud (which has been neither invoked nor demonstrated in the present case), constitute one of the grounds for annulment permitted by Article 1520 of the Code of Civil Procedure.

On the grounds for setting aside the award due to its incompatibility with international public policy since it gives effect to a contract tainted by corruption (Article 1520 (5°) of the French Code of Civil Procedure)

24. The fight against corruption is an objective pursued, inter alia, by the OECD Convention on Combating Bribery of 17 December 1997, which entered into force on 15 February 1999, and by the United Nations Convention against Corruption signed at Merida on 9 December 2003, which entered into force on 14 December 2005.

25. According to the international consensus expressed in these texts, bribery of a public official, whether national or foreign, consists in offering him or her, directly or indirectly, an undue advantage, for himself or herself or for another person or entity, in order that he or she perform or refrain from performing an act in the exercise of his or her official duties, with a view to obtaining or retaining a contract or other undue advantage, in connection with international business activities.

26. The prohibition of bribery of public officials is one of the principles whose violation cannot be tolerated by the French legal order, even in an international context. It is therefore a matter of international public policy.

27. However, the judge ruling on the annulment is not judging the contract but the incorporation of the award in the national legal order.

28. His review is limited to ensuring that the recognition or enforcement of the award does not result in a manifest, effective and concrete violation of international public policy.

29. Thus, the award may be set aside only if it is shown by serious, specific and corroborative evidence that the effect of incorporating the award into the domestic legal order would be to give force to a contract obtained by bribery and, in the present case, that the award orders State X to pay sums in performance of a contract covering the bribery of public officials of State X.

30. To this end, it is irrelevant that State X does not explain in its pleadings the nature of the alleged advantage or who was the beneficiary of it, since the annulment judge's examination of the allegation that an arbitral award has allocated sums in performance of a contract covering a corrupt activity can only be based, in view of the concealed nature of the corrupt acts, on the gathering of a body of evidence.

31. Similarly, the possible bad faith of State X is irrelevant, since what is challenged is solely the refusal of the French legal system to provide legal remedy for payment of sums for an unlawful cause.

32. Moreover, as the annulment judge has a specific and distinct purpose, the fact that the arbitral tribunal has already examined elements of corruption in the context of the assessment of the validity or legality of the contract cannot deprive the judge in charge of setting aside the award of the right to re-examine the award in order to ensure that a violation of international public policy has not been established.

33. However, he must carry out this review in accordance with the principle of non-review of arbitral awards.

34. Thus, within his jurisdiction, the annulment judge's role is not to proceed to a new examination of the

elements of corruption in order to assess the lawfulness of the disputed contract, as this would amount to a review of the award or its reasons, which is prohibited. Rather, it is to examine whether these elements are sufficiently serious, precise and corroborative for the inclusion of the award in the domestic legal order to constitute a violation of the international public policy.

35. In this case, the following circumstances are considered to be established by the award and are not disputed by the parties:

- After two years of negotiations that started in 2013 without a publicly advertised invitation to tender or competing proposals, the contract for the supply of security systems to X's airports was signed between State X and companies XX and XY, in a staggered manner, on 18 November 2015 and on 26 January 2016, when the ministers' signatures were ratified.

- The purpose of the contract was to provide immigration access control through automated fingerprinting and biometric identification of arriving and departing passengers at airports.

- The contract was structured according to the practice followed by Company XY, which consisted of financing the installation of the equipment and the civil aviation and immigration security system (CAISS) and remunerating itself during the term of the contract by means of a fee on aircraft tickets, imposed and guaranteed by the State, levied on passengers by the airlines, and then passed to Company XY.

- Company XY, via the company XY set up for this purpose, started to fulfil its obligations from the end of 2015.

- By interministerial order of 15 March 2016, the Ministers for Home Affairs and for Public Works and Transportation instituted the "internal security fee" of USD 20 per passenger, on arrival and departure *"at Republic X international airports on all international commercial flights"*, as retained in the contract.

- The Fee order was issued two days after the second round of the presidential election, in which Mr T was elected President of Republic X.

- The first round of the election took place on (xxx), and Mr T. took office on (xxx).

- During this period in the first quarter of 2016, XY continued the installation of its system for CAISS services and delivered a training programme to police officers attached to the airport's emigration and immigration department.

- The system was operational in early March 2016.

- In a *communiqué* summarizing the decisions taken at its meeting on 11 May 2016, the Council of Ministers, on the proposal of the Minister for Home Affairs, Mr L., after recalling the decision of 26 January 2016 to sign the contract, concluded that the contract took away from the National Police a large part of its sovereign prerogatives, in particular with regard to the management of "*immigration data*", leading a private operator to be in a position to collect personal data without prior authorisation from the French National Commission for Information Technology and Civil Liberties (CNIL), in disregard of the law (...) on the protection of personal data.

- The Council of Ministers therefore ordered the National Police to reinstall its own security equipment, and the National Police duly informed Company XY.

- Company XY contested that, arguing that it was only providing technical support to public security personnel, without taking part in the management of personal data, and attempted to remain in the premises until it was evicted on 6 January 2017.

- It is not disputed that on 18 November 2016 the Council of Ministers agreed to the unsolicited offer of company M., which succeeded company XY, in return for the establishment of a fee, levied directly on the price of the air ticket on departure and arrival of passengers, of USD 11 (EUR 10).

36. To obtain the annulment of the award, State X relies, apart from the disadvantageous nature of the contract for State X, on the same argument as that which it developed before the arbitral tribunal, namely the allegation of corruption and undue pressure based on what it considers to be sufficiently serious, precise and corroborative elements relating to the precipitous nature of the signing of the contract corroborative on 18 November 2015 by two unauthorized ministers in the midst of the presidential election campaign, the

deliberate disregard of the rules of the X Public Procurement Code in order to ratify a private agreement without going through an invitation to tender procedure, and the production by XY and XX of confidential government documents obtained by means of procedures of dubious origin.

37.It should first be noted that while the lack of open competition is a significant indication of corruption, the arbitral tribunal, under Section 10. 2 entitled "*On the alleged violation of the Public Procurement Code*", rejected State X's argument that the national rules relating to the award of public contracts were applicable, holding in particular that the Public Procurement Code (CMP) did not apply, since it was a national security contract excluded by the provisions of Article 7 of the CMP, which states that its provisions "*are not applicable to contracts for public works, supplies, services or intellectual creative services when they concern national defense and security needs requiring secrecy or for which the protection of the essential interests of the State is incompatible with advertising measures*".

38. Unless the award is re-examined, the judge in charge of the annulment cannot therefore reconsider the decision of the Arbitral Tribunal applying X law, meaning that the violation of this law being ruled out, this element loses its seriousness in the annulation judge's appreciation of the violation of the principle of international public policy. Moreover, it has been observed that State X's position is also contradicted by the fact that it has chosen company XX's successor without resorting to a tender procedure.

39. The same applies to the alleged evidence resulting from the admission of certain documents, of which the content and veracity is not disputed.

40. Regarding the elements related to obtaining the documents produced by unfair means, the grounds for appeal relates to the unexplained conditions under which company XY obtained said documents, which State X considers to be unlawful and which demonstrate the tendentious nature of the relationship between company XY and a number of public authorities. However, it is clear from the documents produced and the statements in the judgment that State X had not requested the exclusion of these documents from the debates before the Arbitral Tribunal, and that, in view of Mr S.'s hearing, the disputed documents had been handed over by the ministers (in charge of the case) themselves or, in the case of one of the documents, in a sealed letter by a third party, so that the obtention of documents by unfair or illegal means is not characterized.

41. Furthermore, the violation of the duty of professional discretion imposed on State's employees under Article 43 of the law (...) relating to the status of permanent State employees in Republic X, is not characterized since this law "*authorizes confidential documents to be revealed to third parties*" and it was found by the Arbitral Tribunal that this "*authorization may also be issued in any circumstances by a Minister, which implies that Ministers are the final judges of the confidentiality of a document produced by their ministry or which has been transmitted to them*" (§ 99).

42. On the elements of background surrounding the contract's conclusion, it will be observed that, in order to justify the sudden and hurried nature of the contract's signature on 18 November 2015, the allegation supported for the first time by State X according to which the discussions had been at a standstill for two years is a statement which is not supported by evidence, on the contrary, the so-called "*confidential*" documents in the file demonstrate, that the discussions had not ceased.

43. Indeed, it is clear from the documents, and in particular from the ministerial communications of 3 February 2015 and 21 September 2015, that the authorities were seriously studying Company XY's offer, several months before the contract was signed.

44. Thus, while the contract was entered into in a hurry, as the Arbitral Tribunal noted in the award, highlighting that "*Mr. S. recognized at the hearing that, in his view, the contract was concluded in a hurry because of the threat that (...) the airport would not be served anymore*", the conclusion of the contract was preceded by long negotiations, over a period of almost three years, leading the tribunal to hold that "*This context makes it difficult to believe the allegation made by the Respondent at the hearing that XY took advantage of the pressure exerted by (...) on the Government to impose these conditions on the State. Moreover, as Mr. S. explained, the apparent precipitation did not prevent work meetings from being held between 15 and 18 November 2015, during which the State requested and obtained amendments to the Contract, including the reduction of the fee from USD 25 to USD 20 and the inclusion of the (...) airport in the Contract*" (§ 284 and 285).

45. Similarly, even though the contract was allegedly signed by two ministers on 18 November 2015 in spite

of the lack of official authorization, it is not disputed that the necessary formalities for proper conclusion of the contract were completed by the Council of Ministers' official decision of 29 November 2015 and 26 January 2016.

46. Finally, the claim that the contract was disadvantageous for Republic X based solely on the allegation of a higher price than the price for its successor does not constitute a sufficient indication of corruption, as no information is provided on the market price or the terms of company M's contract.

47. It follows from the above that there is no evidence of serious, specific and corroborative evidence of corruption in the present case; the plea to set aside the award due to a contract concluded by bribery shall therefore be rejected and the appeal shall be dismissed.

Costs and expenses;

48. Republic X, the losing party, should be ordered to pay the costs of the proceedings.

49. In addition, Republic X should be ordered to pay to companies XX and XY –which had to incur unrecoverable costs in order to assert their rights – damages under Article 700 of the Code of Civil Procedure, which it is fair to set at the total sum of EUR 40,000.00.

V- FOR THESE REASONS

The court,

1. Declares inadmissible the plea based on the failure to respect the principle of fairness in the admission of evidence;

2. Dismisses the action for setting aside the award rendered on 24 January 2019 under the aegis of the International Chamber of Commerce;

3. Orders Republic X to pay the total sum of 40,000 euros to companies XX and XY under Article 700 of the Code of Civil Procedure;

4. Orders Republic X to pay the costs;

The Clerk

The President

C. GLEMET

F. ANCEL