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PARIS COURT OF APPEAL

**International Commercial Chamber
DIVISION 5 - CHAMBER 16**

JUDGEMENT OF 5 DECEMBER 2023
(n° 86 /2023 , 9 pages)

General Directory Entry Number: **RG no. 22/20051 – Portalis no. 35L7-V-B7G-CGYMS**

Decision referred to the Court: award handed down on 6 September 2023, in [Locality 2], under the International Commercial Chamber Rules of Arbitration, in the case registered as (no. 25237/DDA/AZO/SP).

CLAIMANT IN THIS ACTION:

EGYPTIAN SPONGE IRON & STEEL CO. S.A.E.(ESISCO)

A company under Egyptian law, having its registered office at: [Address 1] (EGYPT) represented by its legal representative,

Represented by Mr. Charley HANNOUN, lawyer at the Bar Council of PARIS, bar number: G201

DEFENDANT TO THIS ACTION:

DANIELI & C.OFFICINE MECCANICHE S.P.A.

A company under Italian law, having its registered office at: [Address 2] (ITALY) represented by its legal representative,

Represented by Mr. Benjamin MOISAN of the SELARL BAECHLIN MOISAN Associés law firm, counsel with right audience at the Bar Council of PARIS, bar number: L34

Assisted by Mr. Jean-Yves GARAUD and Mr. Guillaume DE RANCOURT of the CLEARY, GOTTLIEB, STEEN & HAMILTON LLP law firm, litigators at the Bar Council of PARIS, bar number: J021

COMPOSITION OF THE COURT:

The case was heard 9 october 2023, in open court, before the Court composed of:

Mr. Daniel BARLOW, President of Chamber

Ms. Fabienne SCHALLER, President of Chamber

Ms. Laure ALDEBERT, Judge

who have ruled on the case.

A report was delivered at the hearing by Ms. [M] [K], under conditions referred to in Article 804 of the French Code of Civil Procedure.

COURT CLERK, at the hearing: Ms. Najma EL FARISSI

JUDGEMENT:

- adversarial

- by making the judgement available at the Court Clerk's office, the parties having been previously notified under conditions referred to in the second paragraph of Article 450 of the French Code of Civil Procedure

- signed by Mr. Daniel BARLOW, President of the Chamber, and Ms. Najma EL FARISSI, Court Clerk to whom the judgement's original version was handed over by the judge signatory.

I. **FACTS AND PROCEEDINGS**

1- An action for the annulment of an arbitration award, handed down in [Locality 2] on 6 September 2022 was brought before the Court. The above-mentioned award was handed down under the International Commercial Chamber Rules of Arbitration, in a contractual dispute between the company Egyptian Sponge Iron and Steel Co. S.A.E. (hereinafter ESISCO), registered under Egyptian law and the subsidiary of the [X] Steel group, against the company Danieli C. Officine Meccaniche S.P.A., a company registered under Italian law (hereinafter Danieli) specialised in supplies for the steel industry.

2- The dispute at the origin of this award concerns an agreement for the supply of a rolling mill of lightweight sections for the production of steel bars, signed on 29 June 2007 between Danieli (supplier) and ESISCO (the "Rolling Mill Agreement"), followed a year later by the signature on 12 June 2008 of an agreement for the supply of a welding machine ("Endless Welding Rolling Process" or "EWR"), to be installed inside the Rolling Mill (the "EWR Agreement").

3- ESISCO complained of technical problems with the equipment installed in its factory, it was considered to be defective and to have failed to fulfil the contractual obligations.

4- It is against this background that, on 8 April 2020, ESISCO decided to initiate arbitration proceedings with the secretariat of the International Commercial Chamber and under the arbitration clause inserted in the supply agreements for the “Rolling Mill Agreement” and the “EWR”. Therefore, ESISCO sought damages for breach of the ten-year warranty and, alternatively, for the breach of having not fulfilled the agreement.

5- During the arbitration proceedings, Danieli objected to these claims by arguing that the industrial equipment complied with contractual requirements, that its warranty had expired and that it was not responsible for the low profitability of ESISCO's factory.

6- Danieli counterclaimed for repayment of the bank guarantee and payment of costs and losses incurred.

7- In an award of 6 September 2023, the arbitral tribunal ruled as follows:

DISMISSES ESISCO’s claims for infringing the ten-year warranty under Article 1792 and seq of the French Civil Code;

DISMISSES ESISCO’s claims for having not fulfilled the agreement;

ORDERS ESISCO to pay Danieli the sum of EUR 1,658,895, plus simple interest at the Italian statutory rate starting from the date of this final award until the date of full and final satisfaction;

ORDERS ESISCO (i) to refund Danieli USD 413,500 in arbitration expenses and (ii) to pay DANIELI EUR 439,293, GBP 383,729.63 and USD 147,597.83 for arbitration expenses;

DISMISSES all other claims raised by ESISCO and Danieli.

8- On 29 November 2022, ESISCO prepared an action for annulment of this award before the Court of Appeal.

10- The inquiry was closed on 26 September 2023 and the case was called for oral arguments on 9 October 2023.

II/ CLAIMS OF THE PARTIES

11- In its final submissions served electronically on 8 September 2023, ESISCO asks the court, by the means of Articles 1520 2° and 5° of the French Code of Civil Procedure, to :

PRIMARILY,

NOTE that the recognition or enforcement of the final award handed down on 6 September 2022 by an Arbitral Tribunal composed of Mr. [N] [L], Mr. [W] [F] and Professor [W] [U] in arbitration no. 25237/DDA/AZO/SP is contrary to international public policy in the sense that it would result in Danieli benefiting from the proceeds of criminal activities,

Accordingly,

ORDER the annulment of the final award handed down on 6 September 2022 in arbitration no. 25237/DDA/AZO/SP;

NOTE that the recognition or enforcement of the final award handed down on 6 September 2022 by an Arbitral Tribunal composed of Mr. [N] [L], Mr. [W] [F] and Professor [W] [U] in arbitration no. 25237/DDA/AZO/SP is contrary to international public policy in the sense that it is vitiated by “procedural fraud”,

Alternatively,

NOTE that the Arbitral Tribunal, composed of Mr. [N] [L], Mr. [W] [F] and Professor [W] [U] and handed down the final award on 6 September 2022 was irregularly composed.

Accordingly, PRONOUNCE the annulment of the final award handed down on 6 September 2022 in arbitration n°25237/DDA/AZO/SP.

IN ANY CASE

ORDER Danieli to pay to ESISCO the sum of EUR 300,000 under Article 700 of the French Code of Civil Procedure

ORDER Danieli to pay the full costs pursuant to Article 695 of the French Code of Civil Procedure.

12-According to its last summary submissions served electronically on 19 September 2023 the Danieli Company requests the Court ;

Dismiss the action for annulment against the award handed down in [Locality 2] on 6 September 2022 ;

In any case, order ESISCO to pay the sum of EUR 350 000 under Article 700 of the French Code of Civil Procedure ;

Order ESISCO to pay the full costs, including diversion in favour of SELARL Baechlin Moisan Associates pursuant to Article 699 of the French Code of Civil Procedure.

III/ GROUNDS OF THE RULING

On the first plea for, alleging that recognition or enforcement of the award is contrary to international public policy

13- ESISCO maintains first of all that the award is contrary to international public policy in that it has the effect of allowing Danieli to benefit from the proceeds of criminal activities suggesting the existence of a corrupt agreement.

14- It claims that the ruling that dismissed its claims for redress is based on certificates of performance tests intended to prove the proper functioning of the equipment supplied by Danieli, which are forged documents, manufactured by three ESISCO employees who were bribed by the defendant to the action.

15- In this respect, it features the judgement of the Cairo Criminal Court (6th Circuit) handed down on 6 March 2022 following the filing of its complaint in 2020 with the institution of a civil claim, which convicted *in absentia* Mr. [X], who at the time held the office of CEO of ESISCO, to five years in prison for having intentionally forged nine performance test certificates, drawn up between 18 February and 22 April 2014, with the complicity of his first assistant, Mr. [J], who was convicted to one year's imprisonment with labour.

16- Despite this, it points out that the arbitral tribunal, which nevertheless stated that it had been notified of the award, did not take that into account at all the content of the award was produced at the hearing (Exhibit Case C 428).

17- It adds that after the award, another Egyptian ruling was handed down by Alexandria Criminal Court on 18 April 2023, which corroborates the decision of 6 March 2022.

18- It points out in this regard that the Alexandria Criminal Court held that the certificate of final acceptance of the kiln was in fact a forged document, forged by a former director of ESISCO, Mr. [V], [C], [D] (successor of Mr. [A]), convicted *in absentia* to five years' imprisonment.

19- It notes that the corruption index also derives from the disturbing links between ESISCO staff members and Danieli, which obtained that Messrs [T] and [P], engineers employed by ESISCO, testified on his behalf before the arbitral tribunal.

20- Secondly it maintains that the ruling is tainted by procedural fraud which results from the finding that the arbitrators' decision was surprised by forged documents, consisting of certificates of performance tests and final approval which played a key role in the arbitral tribunal's resolution of the dispute.

21- In reply, Danieli contests having paid money from ESISCO staff for the manufacture of forged certificates of performance, which the arbitral tribunal recognised as valid.

22- It submits that the claimant in this action does not establish the slightest piece of evidence of unlawful conduct on its part, let alone of an act of corruption, arguing that it was ESISCO that put pressure on its staff to produce forged certificates.

23- It claims that having failed to make its employees lie in front of the arbitrators, ESISCO has used the Egyptian justice system to put pressure on them.

24- It contests the probative value of the Egyptian criminal rulings of 6 March 2022 and 18 April 2023, arguing that those rulings were handed down in questionable circumstances which could not corroborate the theory of corruption put forward by the claimant in this action, while referring to the criminal proceedings, refrained from claiming that the documents were forged.

25- It points out that it drew the attention of the arbitral tribunal to the Egyptian proceedings expedited by Mr. [X] (president of [X] Steel, parent company of ESISCO and negotiator of the agreements), which it describes as a "parody of justice", by producing the ruling of the Cairo

Commercial Court of 27 December 2021, which convicted Mr. [J], without verification of the evidence, to one year's imprisonment and labour for allegedly spying on Mr. [X] with a microphone.

26- It points out that the ruling which was based on the Egyptian rulings mentioned by ESISCO on the testimony of a member of the [X] family, was set aside in its entirety by the Cairo Court of Appeal on 13 June 2022, which found him not guilty of the criminal charges with which he was charged after spending a year and a half in prison.

27- Finally, it claims that there can be no ground of procedural fraud / irregularity since, as the claimant in this action maintains in its submissions, the arbitral tribunal was duly informed of the criminal convictions handed down against Mr. [J] and Mr. [A] and ruled with full knowledge of the facts.

THEREUPON:

On the allegation of corruption

28- According to Article 1520, 5° of the French Code of Civil Procedure, the annulment of the award may be pursued when its recognition or enforcement is contrary to international public policy.

29- The international public policy in the light of which the judge's review is carried out is understood as the French legal system's conception of it, that is to say, the values and principles of which the latter cannot suffer ignorance, even in an international context.

30- The purpose of such review is only to examine whether the enforcement of the provisions made by the arbitral tribunal is manifestly contrary to the principles and values embodied in that international public policy.

31- The prohibition of corruption is one of the principles whose breach of the French legal order cannot be tolerated, even in an international context. It is therefore a matter of international public policy.

32- Since the court is not the judge of the agreement or transaction, annulment is only incurred if it is shown by serious, precise and consistent evidence that the incorporation of the award into the domestic legal order would have the effect of an agreement obtained through corruption or of allowing a party to benefit from the proceeds of such activities.

33- Such a search, carried out in defence of international public policy, is neither limited to the evidence submitted to the arbitrators nor bound by the findings, assessments and qualifications made by them. However, the Court must ensure that the production of evidence respects the adversarial principle and the principle of equality of arms.

34- The claimant company maintains in that regard that the arbitral tribunal based its award on data performance and data receipt of the industrial equipment intended to establish the proper functioning of the equipment, which are forgeries, manufactured by members of ESISCO for the benefit of Danieli, who were presumably bribed and that, by doing so, it enables Danieli to reap the benefits of a corrupt operation.

35- First of all, it should be pointed out that the court's decision, which concluded that the contractual warranty had expired and declared ESISCO's claims for compensation for lateness, was based on the rolling mill's "final acceptance certificates" (CRF*) and the EWR – CRF 2014 and CRF 2015 – which were used to calculate the starting point of the contractual warranty period provided for in Article 10.1 of the agreements, at the expense of the supplier.

36- The award establishes that, after considering the examination raised by ESISCO concerning the reliability of the data collected by the parties as a result of performance tests which led to the issuance of the CRFs signed in 2014 and 2015 by ESISCO and Danieli, the court held that the CRF were valid and ESISCO had not been misled about the test results, so that the contractual warranty for the rolling mill and EWR had expired on the day ESISCO filed its claim for arbitration on 8 April 2020 (pages 112 to 121 of the award).

37- To prove the facts of corruption alleged, the claimant in this action points out to Danieli's relations with former employees who testified on its behalf and to the Egyptian criminal convictions handed down against Messrs [A], Mr. [J], and Mr. [D], former members of its staff, for forgery, which accordingly constitute serious, precise and consistent evidence of corruption on the part of Danieli to obtain the certificates that led the arbitral tribunal to reject its claim.

38- However, the Egyptian criminal rulings, which are the only evidence produced by ESISCO in support of its claim, are insufficient to give credit to the hypothesis that fake performance certificates have been produced.

39- Moreover, the suspicions expressed about the integrity of the ties between Danieli and ESISCO staff members and the probity of the testimonies gathered by the court are nothing more than allegations devoid of any evidence.

40- Indeed, the Cairo Criminal Court convicted Mr. [A] to five years' imprisonment on 6 March 2022 on the ground that he had intentionally forged the nine performance certificates in 2014, with the complicity of his first assistant, Mr [J]. However, it should be noted that its decision was handed down without having heard Mr. [A], on the basis of a technical engineering report by Egyptian experts which had not been provided to the court and to which the defendant company, which was not a party to the criminal proceedings, did not have access.

41- In this regard, the award establishes that ESISCO chose to rely on other technical reports before the arbitral tribunal to argue that it had been misled about the results of the tests between 2013 and 2014 and that it would never have signed the CRF, if it had been aware of the actual situation of the factory.

42- In the context of the discussion of the validity of the CRF, which was a decisive point of the award on which the arbitral tribunal devoted lengthy elaborations, ESISCO merely provided the content of the ruling of the criminal conviction of 6 March 2022 by means of a notarised statement of 22 March 2022, without alleging the existence of forgeries which on this day she opposes before the Court.

43- In order to confirm the existence of the corruption, ESISCO does not explain why it waited to be in front of the annulment judge to draw the consequences of the existence of forged certificates and does not provide any evidence to corroborate its analysis, apart from this decision made on its own initiative, without the presence of Danieli, on an expert report that has not yet been produced.

44- With regard to Mr. [J] who was subject to two criminal proceedings in 2021 and 2022, it is established that the decision of 27 December 2021 convicting him to one year's imprisonment for eavesdropping on a complaint by ESISCO was set aside by the Cairo Court of Appeal in 2022, the court noting that the decision had been discussed during the arbitration proceedings not by ESISCO but by Danieli, who had been warned by the family of Mr.[J] of the seriousness of the involvement of this employee in the case.

45- Finally, the Court notes that the Egyptian ruling of Alexandria Criminal Court on 18 April 2023 which convicted Mr. [D], former manager of the company ESISCO, to five years imprisonment in his absence, on the testimony of Mr. [X] vice-chairman of the board of directors of ESISCO and of a committee of experts to examine the functioning of the non-adversarial facilities, had been handed down under the same circumstances as previous Egyptian rulings.

46- This ruling does not give any credit to the allegation of a corruptive agreement, since it is not clear from the reading of the ruling that Mr. [D] has established a forgery but rather has signed the documents without authority.

47- It results that there is no evidence of serious, precise and consistent indications of the existence of a corruptive agreement between Danieli and the former ESISCO employees challenging their probity, so that the plea on that regard lacks facts.

On the procedural fraud

48- The procedural fraud committed in the context of an arbitration may be sanctioned under international procedural public policy. It implies the production of forged documents, the taking of forged testimony or the fraudulent concealment of documents relevant to the settlement of the dispute from the arbitrators, so that the arbitrators' decision was unexpected.

49- In this instance, the forgery of performance certificates of equipment, acknowledged by the Egyptian court and brought to the arbitrators' attention during the arbitration (C 428), was admitted by ESISCO in its submissions. The arbitral tribunal's decision, which cannot be criticised for not mentioning it in its reasoning, was not influenced by fraud but was based on an informed assessment of the documents' accuracy and significance. This assessment is not subject to court review.

50- The plea will therefore be dismissed in its entirety.

On the second plea, alleging the irregularity of the constitution of the arbitral tribunal

51- ESISCO submits that the president of the arbitral tribunal (Mr. [L]) breached his duty of disclosure by not disclosing that he was the subject of a complaint by the Republic of Congo to the French National Financial Prosecutor's Office (PNF Parquet National Financier) accusing him, while presiding over an arbitral tribunal, of having secret financial ties with one of the parties and that a judicial inquiry had been opened in France by means of an indictment dated 15 April 2022 on charges of active and passive bribery.

52- Danieli replied that the complaint lodged against Mr. [L] was a well-known fact of which ESISCO was necessarily aware, so that it was inadmissible to raise it under Article 1466 of the French Code of Civil Procedure.

53- It adds that the charges brought against Mr. [L], which at most damage his reputation, does not raise any reasonable doubt to his impartiality and independence.

On the admissibility of the grievance

57- According to Article 1466 of the French Code of Civil Procedure, made applicable to international arbitration by Article 1506, a party which, knowingly and without a legitimate reason, refrains from alleging an irregularity in due time before the arbitral tribunal is deemed to have waived the right to allege it.

58- Pursuant to this text, a party which, during the arbitral proceedings, has not objected to a known fact likely to call into question the independence of the arbitrator is not admissible to rely on it in the application for annulment, its abstention being assessed in the light of each of the circumstances likely to affect that independence.

59- It is for the judge to ascertain whether, in respect of each of the facts and circumstances alleged to constitute an irregularity, the party relying on it had knowledge of it while the arbitral proceedings were in progress, so that it should have availed itself of it and, failing that, is deemed to have waived it.

60- In this instance, it is clear from the proceedings that the information on which ESISCO relies was widely known, having been the subject of numerous publications, in the GAR's specialised newspaper of 11 October 2021, but also on the Internet, in the context of publicly available information at the time of the arbitration proceedings, as attested by the numerous exhibits provided by the claimant in this action itself, so that it cannot claim not to have been aware of it.

61- It follows that that plea based on the arbitrator's failure to disclose that information is inadmissible, since ESISCO does not establish how that information, unrelated to the arbitration in question, was such as to cast doubt on the arbitrator's independence and impartiality.

62- Due to all the foregoing considerations, the action brought by the company must be dismissed in its entirety.

On the costs and expenses

63- ESISCO, which is unsuccessful, is ordered to pay the costs, dismissing its application for non-recurring costs.

64- In addition, it will be ordered to pay Danieli the sum of EUR 50,000 on the basis of Article 700 of the French Code of Civil Procedure.

IV Operative part of the judgement

The court hereby:

- 1) Dismisses the action for annulment brought by Egyptian Sponge Iron and Steel Co. S. A. E. against the arbitral award handed down on 6 September 2023 in [Locality 2] under the International Commercial Chamber Rules of Arbitration (ICC case no° 25237/DDA/AZO/SP)**
- 2) Dismisses of its application for a under Article 700 of the French Code of Civil Procedure;**
- 3) Orders Egyptian Sponge Iron and Steel Co. S. A. E to pay Danieli C. Officine Mecchaniche S. P. A the sum of EUR 50,000 (€50,000) pursuant to the provisions of Article 700 of the French Code of Civil Procedure**
- 4) Orders ESISCO to pay the costs.**

THE COURT CLERK

THE PRESIDENT,