10 Solonos Street, Kolonaki,106 73 Athens, Greece.

Tel.: +30 210 36 25 943 | Fax: +30 210 36 47 925

ICC Arbitration – Res judicata: On cherry-picking and apples

ICC Arbitration Case

(Main text)

The facts (abridged in order to maintain confidentiality).

The parties involved

- Claimant: a German company (Contractor)

- **Respondent: a** Greek company (Subcontractor)

Claimant and Respondentwere involved in a dispute before an Arbitral Tribunal of the International Court of Arbitration for a second time.

The First Action

Above arbitral dispute was preceded by a first arbitration ("the First Action").

In the First Action, the German company E. GmbH filed a claim whereby it argued it was entitled to tort compensation due to alleged tortious behavior of P.S.A.

Said tortious behavior by Respondent allegedly consisted in (a) acts of corruption (briberyof/collusionof certain of Claimant's executives) concerning the conclusion of the Subcontracts between the parties, and (b) fraudulent overpricing of the Subcontracts to the amount of nearly € 10.000.000,00. Collusion and bribery were allegedly the particular/constituent actions which supplemented/facilitated the fraudulent behavior and in essence comprised the tort.

In addition to tort compensation, the Claimant argued it was entitled tomoral damages to the amount of 5,000,000 Euros.

The validity of the Subcontracts was not questioned by Claimant, indeed the Claimant accepted their validity as a prerequisite for its tort compensation claim.

By means of the final award in the First Action ("First Final Award") the Arbitral Tribunal held that the Claimant's claim was unfounded in fact and dismissed the alleged fraud, collusion and overpricing in their entirety on the merits.

In connection to the overpricing allegation, the Subcontracts were held to have been concluded between the parties in reasonable market prices. Thus, there was no harm/property damage of Respondent.

The Second Action

By means of the Second Action the Claimant requested from the ICC Arbitral Tribunal: (a) to recognize the total nullity/invalidity of the Subcontracts, (b) to hold Respondent liable for the overpricing of the Subcontracts and return to Claimant the total amount of approximately €10.000.000,00. This time through the initial RfA the above amount was claimed under the guise of unjust enrichment (a different legal provision from tort. However, eventually, theClaimant reverted to tortious liability as the legal basis for its claim.

The main defence of Respondent was the inadmissibility of the Second Action due to the effect of res judicata in view of the issuance of the First Final Award.

Issues and findings

Was the Second Action inadmissible based on the principle of res judicata?

Yes.

Extracts from the judgment

"205. The tortious compensation claim submitted by Claimant must be dismissed, because it is covered according to article 324 Greek Code of Civil Procedure by the res judicata of ICC 20059/AGF/ZF/AYZ Final Award, which was issued between the same parties […]

206. […] in both the arbitration trials the subject-matter for the court diagnosis was the tortious compensation claim of the Claimant to the total amount of € ……. against the Respondent.

208. A Claimant, who based its lawsuit request on a certain factual background in the context of a trial, is not precluded from basing a similar request with a new lawsuit/action on a different factual background, if the first lawsuit was rejected. Whether the new lawsuit/action is based on the same or on a different factual background will be judged taking into account the rejecting (first) award […] the rationale of the first award must be taken into account concerning the factual background, on which the first award was based, and the reason for the rejection […]

213. [The Arbitral Tribunal quoted extensively from the First Final Award and then ruled as follows] […] it becomes obvious that the factual background of the Claimant's tortious claims is the same in the two trials. The factual background of the subject-matter of both trials comprises the reported events of bribing an executive of the Claimant by the Respondent, the collusion between executives of the Respondent, the Claimant [and

Owner of the Works] and the consequent overpricing of the [Works] undertaken by the Respondent as a result thereof.

214. Furthermore, in both arbitral trials the invoked legal bases of tortious liability are exactly the same (articles 919 NS 914 Greek Civil Code […] For the particularization of the lawful grounds for liability of articles 919 GCC, or else 914 GCC Claimant invokes also exactly the same tort (intentional and immoral or else intentional and unlawful infliction of damage) by Respondent. In particular, what […] creates the intentional immoral […] nature in the behavior of the involved persons is common both in the [First Action] and in the present [Second Action]. That is to say, what is critical according to the allegations of Claimant for the fulfillment of the requirements needed to apply the rules on tortious liability is in both the arbitral trials the <u>bribery – collusion</u> of the involved executives [of the Claimant] and of the Respondent.

[…]

223. […] the request of Claimant for recognition of the nullity of the Subcontracts must be rejected due to the res judicata principle for each one of the following reasons taken in isolation: i) because the validity of the Subcontracts has already been adjudicated as a main issue in the context of the [First Action] [GCCP 324] and ii) in any case because the Claimant could have raised as a plea the invalidity grounds for the Subcontracts in the [First Action], which however Claimant did not do (GCCP 330) […]

226. […] the acknowledgement by the First Arbitral Tribunal that the validity of the Subcontracts "is not questioned" means that both Parties acknowledged and did not doubt the validity of the Subcontracts in the context of the [First Action] […]

227. […] Indeed from […] Law 2957/2001 it turns out that, when the statement of volition of the victim of corruption was influenced (only) from the act of corruption, then the relevant agreement is voidable. In that case it is a matter for the victim of corruption to choose whether to request its annulment and compensation […] or to accept the contract and request only compensation […]

228. It is self-evident that in the course of the second of the above choices [...] the compensation claim cannot be raised without the acceptance of the validity and the lack of negative consequences of the act of corruption on the validity of the contract […] The "acceptance" of the contract has the meaning that the affected by corruption contracting party *no longer has the right to question the validity and the force of the contract, i.e. it is not going to invoke negative consequences of the act of corruption on the validity and force of the contract* […] (emphasis by the Arbitral Tribunal)

229. The expressed "acceptance" of the contract through the filing of a compensation claim only means that the affected by corruption acts contracting party invokes the force

of the contract and states that this contract is and will remain unaffected by the acts of corruption, i.e. the bribery, collusion etc. […]

230. […] By ascertaining the acceptance of the validity of the Subcontracts also on the part of the Claimant the Arbitral Tribunal itself ruled at the same time that the status of said contracts was not affected by the invoked acts of corruption.

231. Said ruling of the First Arbitral Tribunal is inherent in the diagnosis of the acceptance of the validity of the Subcontracts by Claimant […]

233. Through its request for the recognition [by the present Arbitral Tribunal] in the context of the present [Second Action] of the nullity/voidness of the Subcontracts Claimant requests the determination of the **legally opposite** in relation to the above binding ruling of [the First Final Award] (emphasis by the Arbitral Tribunal)

234. […] the force of the Subcontracts was determined in the context of the [First Action] as a main and not as an incidental ["παρεμπίπτον"] issue …

236. In any case the [force of] res judicata extends according to Article 330 Greek Code of Civil Procedure to the pleas/objections which were submitted in the first trial, as well as to those which could have been submitted and were not […] In particular the precedent covers […] all the abusive (καταχρηστικές) objections […] even where they were not submitted in the context of the first trial […]

238. […] Among the abusive objections […] the objection of invalidity of the contract as being contrary to morality according to Articles 178 and 179 Greek Civil Code is included […]

240. […] [The invalidity grounds invoked by Claimant] are […] abusive objections and are covered by the force of res judicata.

…

247. What is more, Claimant not only could, but also ***ought to/should*** have questioned the force of the Subcontracts in the context of the [First Action], if indeed it really wished to choose this possibility, due to the special provision of […] Law 2957/2001 […]

251. Finally, the argument by Claimant that the arbitral awards do not produce res judicata effect as to the preliminary legal relationships which were adjudicated therein cannot be considered persuasive […]

252. In particular, it is claimed with convincing argumentation that […] res judicata power must be produced as to preliminary issues reviewed by an arbitral tribunal, if said issues are within the ambit of the arbitration agreement […] In the same context the danger of issuing contradictory decisions is especially emphasized, since the party would

otherwise be obliged to have recourse to the arbitral tribunal anew submitting other requests from the same basic/main legal relationship […]

Ballas, Pelecanos & Associates LPC Senior Partner Gregory Pelecanos argued for Respondent as lead counsel. The legal team included Senior Associate, Alexander Rammos, and Senior Associate, Panayiotes Yiannakis.