4A_42/2008[1]

Judgement of March 14, 2008

First Civil Law Division

Federal Judge CORBOZ, Presiding
Federal Judges KLETT (Mrs.) and ROTTENBERG LIATOWITSCH (Mrs.)
Federal Judge KOLLY
Federal Judge KISS (Mrs.)
Clerk of the Court: HÜRLIMANN

X. _____ AG,
Petitioner,
Represented by Dr Erich RUEGG and Dr Frédéric KRAUSKOPF

v.

Y. _____ Corporation,
Respondent,
Represented by Dr Philipp HABEGGER and Dr Marco STACHER

Facts:

A.

Y. _____ Corporation (Claimant in the arbitration proceedings, Petitioner) is a company based in Taiwan. On February 12, 1997, the Petitioner entered into a contact with X. _____ AG (Respondent in the arbitration proceedings and here) actually with its predecessor, purporting among other things a consultancy with regard to the conclusion of an Operation and Maintenance Agreement for an electrical plant between its owner and X. _____ AG.

A.a On September 15, 2004, Petitioner initiated arbitration proceedings with the Zurich Chamber of Commerce, which appointed a sole arbitrator. After consulting with the parties, the arbitrator

[1] Translator's note: Quote as 4A_42/2008 (March 14, 2008). The original of the decision is in German. The text is available on the web-site of the Federal Tribunal www.bger.ch.

adopted some procedural rules on January 13, 2005 and found that he had jurisdiction in a partial award of June 28, 2005.

A.b In a procedural meeting of October 5, 2005, the parties agreed that the proceedings would first relate to the issue of the validity and existence of the consultancy agreement of February 12, 1997. The Respondent had indeed objected that the contract had not been validly executed, that it was void on the basis of Art. 20 OR[2] and probably waived through an agreement of May 29, 2002.

B.
In a partial award of February 23, 2007, the sole arbitrator found that the consultancy agreement of February 12, 1997 had validly come into force; neither had it been terminated through the agreement of May 29, 2002 and therefore it was still valid and binding (par. 1). He also ordered the Respondent to pay costs to the Petitioner (par. 2). The sole arbitrator specifically rejected the Respondent's argument that the consultancy agreement of February 12, 1997 in dispute had been concluded with a view to corruption and was therefore invalid according to Art. 20 OR.

C.
In a request for revision of January 28, 2008, Petitioner seeks the following from the Federal Tribunal:

"1. The request for revision being granted, the interim award of February 23, 2007 in the arbitration number [omitted] shall be overturned and the object of the arbitration shall be sent back to the sole arbitrator for a new decision taking into account the new facts and evidence according to par. IV hereafter…"

The Petitioner also sought provisional measures preventing the sole arbitrator from issuing any decision which would contain financial obligations. In the reasons for its request for revision, the Petitioner relied on Art. 123 (2)(a) BGG[3] and argued that it found new documents in its archives, whereby it would now be in a position to prove that bribes were actually paid.

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[2] Translator's note: This is the German abbreviation for Code of Obligations, the general provisions of contract law in the Swiss legal system.

[3] Translator's note: This is the German abbreviation for the Federal Statute of June 17, 2005 organising the Federal Tribunal, RS 173.110.

D.

The Respondent took the view that the matter was not capable of a request for revision and subsidiarily that the request should be rejected. It also opposed the release of provisional measures. The sole arbitrator did not take a position.

Reasons:

1.

The request for provisional measures becomes moot with the judgment of today.

2.

PILA[4] contains no provision with regard to requests for revision of awards of an Arbitral Tribunal within the meaning of Art. 176 ff PILA. According to case law of the Federal Tribunal, which supplemented the loophole, the parties to an international arbitration proceeding may avail themselves of the extraordinary legal remedy of a request for revision, which falls within the jurisdiction of the Federal Tribunal (BGE 118 II 199 E. 2 and 3 S. 200 ff; see also BGE 129 III 727 E. 1 S. 729). If the Federal Tribunal grants the request for revision, it does not decide the matter itself, but sends it back to the Arbitral Tribunal which decided the matter or to a new arbitration tribunal to be constituted (BGE 118 II 199 E. 3 S. 204; Decision 4P_117/2003 of October 16, 2003 E. 1.1).

2.1 Under the procedural rules of the OG[5], the grounds for revision were the ones in Art. 137 OG and the procedure was governed by Art. 140 – 143 applied analogically (BGE 118 II 199 E. 4 S. 204; Decision 4P_120/2002 of September 3, 2002 E. 1.1 published in Pra 2002 nr. 199 p. 1041). This remains so in principle under the new BGG, including as to the grounds for reconsideration in Art. 123 (2)(a) BGG, which correspond to those of Art. 137 (b) OG (BGE 134 III 45 E. 2.1 S. 47). According to Art. 123 (2)(a) BGG, revision may be sought when the requesting party discovers important facts or decisive evidence, which it could not bring forward in the previous proceedings, to the exclusion of facts and evidence which took place after the decision. According to Art. 124 (1)(d) BGG the request for revision must be filed within ninety days after the ground for revision is discovered, and at the earliest after receipt of the complete text of the award.

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[4] Translator's note: PILA is the generally used abbreviation for the Swiss statute on international private law of December 18, 1987, RS 291.

[5] Translator's note: This is the German abbreviation for the old Federal Statute organising federal courts, which was substituted by the BGG, Law on the Federal Tribunal of June 17, 2005, RS 173110.

2.2 The Federal Tribunal has jurisdiction for all requests for revision of international Arbitral Tribunals awards, irrespective of whether they are final, partial or interlocutory awards (BGE 122 III 492; Decision 4P_102/2006 of August 29, 2006 E. 1 partially published in SZIER 2007 p. 102 ff; see also Christoph Müller, Das schweizerische Bundesgericht revidiert zum ersten Mal einen internationalen Schiedsspruch, SchiedsVZ 2007 p. 64; see also BGE 130 III 76 E. 3 S. 78 f). However, the award must be binding for the Arbitral Tribunal, because only a decision in force may be subject to revision, which is not the case when a subsequent modification is expressly reserved, albeit under special conditions (BGE 122 III 492 E, 1b/bb S. 494; Decision 4P_237/2995 of February 2, 2006 E. 3.2 published in Pra 2006 nr. 148 p. 1017).

2.3 The request for revision at hand relates to a partial award finding that the contract of February 12, 1997 on which the Petitioner bases its claim was valid. It is not to be found in the partial award that the preliminary decision may not be binding for the Arbitral Tribunal and this was not claimed by any party. To the contrary, the sole arbitrator held in a procedural order nr. 31 of December 17, 2007 produced by the Petitioner that the February 23, 2007 award under review would not be examined again unless both parties agreed.

3.

The Petitioner sought to demonstrate that the time limit of Art. 124 (2)(d) BGG was complied with to the extent the Respondent denied in its brief of August 20, 2007 that the loan, the existence of which had been proved by documents, would have been paid at all and that such a claim had been so surprising and bizarre that the Respondent's organs set up an examination of the accounts with a view to finding documentary evidence of payments to the Petitioner. In that occasion, a discussion took place with a legal advisor on October 29, 2007, during which the person in charge of financial matters remembered a place in the archives in which a binder wearing the name of witness B. _____ would have been noticed. The new evidence was consequently discovered there. Whether or not the Petitioner thus sufficiently established compliance with the ninety days time limit, which the Respondent challenges, may remain open as the requirements for revision are not met.

4.

In par. 61 ff of its request of revision, the Petitioner referred to several documents (Memoranda and letters from B. ____, Consultancy agreement of January 23/26, 1997, requests for special payments of April 2, 1997, Loan agreement of December 11, 1996 between the parties, orders of

payment and debit advices, etc…), with which it sought to prove its claim that the Consultancy agreement of February 12, 1997 served corruption purposes.

4.1 The new facts must be important, which means they must be capable of changing the factual basis of the judgment in such a way that their proper legal evaluation could lead to a different decision. New evidence must either serve to prove the new important facts supporting the request for revision or be capable of proving facts, which were known in previous proceedings, but remained unproved to the Petitioner's disadvantage. Should the new evidence prove facts already brought forward in the proceedings, the Petitioner must demonstrate that it could not produce the evidence in the previous proceedings. Evidence is important when it must be assumed that had the Tribunal been aware of it in the main proceedings, this could have led to a different decision. It is decisive that the evidence should not merely relate to the evaluation of the facts but to their actual finding. A ground for revision is not to be found when the Tribunal wrongly evaluated some facts which were already known in the main proceedings. It is necessary that the inadequate evaluation must have taken place because some facts, which were important for the decision remained unproved (BGE 110 V 138 E. 2 S. 141; see also BGE 118 II 199 E. 5 S. 205; 121 IV 317 E. 2 S. 322 with references). Should the revision of an international arbitral award be sought, the Federal Tribunal must assess on the basis of the reasons for the decision to what extent the fact was important and whether or not it would likely have led to another decision, had it been proved (Decision 4P_102/2006 of August 29, 2006 E. 2.1).

4.2 The Petitioner claimed that the new evidence on which it sought to rely was important, particularly the October 9, 1996 Memorandum because it showed that Mr C. _____ and Mr B. ____ (witnesses in the arbitration proceedings) would have been aware of bribes being offered; the Petitioner could now claim the new fact that bribes were offered and paid. The Petitioner thus hardly relied on important evidence. However, a detailed evaluation of the importance of the new evidence is not necessary as the Petitioner failed to show that it could not have produced such evidence in the arbitration proceedings timely. Indeed, according to the Petitioner, the documents on which the claim for new evidence is based were found in its own archives. It is obviously for the Petitioner only to organise its internal documents in a way ensuring access to the useful documents when they are needed as attachments. Whether the Petitioner organises its archives centrally, by location or otherwise is irrelevant to the issue as to whether or not the Petitioner had the documents in its control. If it did not succeed in timely presenting documents in its own archives, this was due to its own behaviour and it cannot allege that it would have been objectively impossible to produce the documents by exercising proper care. Since the Petitioner

had in its own archives the documents which it now wishes to introduce as new evidence, the requirements for revision on the basis of new evidence are obviously not met. A ground for revision within the meaning of Art. 123 (2)(a) BGG is not given and whether or not the formal requirements of Art. 124 (1)(d) BGG were met may therefore remain open. The request for revision is to be rejected, to the extent that the matter is capable of revision. The judicial costs, computed on the basis of the amount in dispute, shall be born by the Petitioner (Art. 66 (1) BGG). The Petitioner shall compensate the Respondent, represented by counsel, for its costs in these proceedings (Art. 68 (2) BGG).

Therefore, the Federal Tribunal pronounces:

1.
The request for revision is denied, to the extent that the matter is capable of revision.

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2.
The judicial costs of CHF 25'000.--, shall be paid by the Petitioner.

3.
The Petitioner shall pay the amount of CHF 28'000.-- to the Respondent for the Federal court proceedings.

4.
This decision shall be notified in writing to the parties and to the Arbitral Tribunal of the Zurich Chamber of Commerce.

Lausanne, March 14, 2008

In the name of the First Civil Law Division of the Swiss Federal Tribunal

The presiding judge: The Clerk:

CORBOZ HURLIMANN