4A_528/2007[1]

Judgement of April 4, 2008

First Civil Law Division

Federal Judge CORBOZ, Presiding
Federal Judge KLETT (Mrs)
Federal Judge ROTTENBERG LIATOWITSCH (Mrs)
Federal Judge KOLLY
Federal Judge KISS (Mrs)
Clerk of the Court: LUCZAK

Club X._____,
Petitioner,
Represented by Mrs Franziska BUOB

v.

Y._____ S/A,
Respondent

Facts:

A.
In an award of August 7, 2007, the Court of Arbitration for Sport (CAS) ordered the Petitioner Club X._____ to pay an amount of USD 2'882'490.- with interest at 5% since September 1, 2007 to the Respondent, which is incorporated in Brazil. The Petitioner was represented by Belgian attorney A._____, the Respondent by the Brazilian attorneys B._____ and C._____. The composition of the Arbitral Tribunal was communicated to the Parties on

[1] Translator's note: Quote as Club X. _____ *v.* Y. _____ S/A, 4A_528/2007. The original of the decision is in German. The text is available on the web-site of the Federal Tribunal www.bger.ch.

April 12, 2007. D._____ was Chairman, E._____ and F._____ were Arbitrators appointed by the Petitioner and by the Respondent. That composition was also mentioned in the Order of Procedure signed by the representatives of the Parties on June 3 and 4, 2007 and it was mentioned in the Arbitral Award of August 7, 2007, which was notified to the Parties in original on August 27, 2007.

B.

In a request for revision of December 18, 2007, supplemented on December 27, 2007, the Petitioner asked the Federal Tribunal to annul the CAS award of August 7, 2007 and to dismiss the Respondent's claims, subsidiarily to send the matter back to the CAS for a new decision. Additionally, the Petitioner asked the Federal Tribunal to stay the enforcement of the award during the revision proceedings.

C.

On January 24, 2008, the Respondent applied for an extension of the term to express its position on the petition for revision and asked that the Petitioner be obliged to provide security for costs of the Federal Tribunal and of the Respondent. The Federal Tribunal could not address this request as the corresponding submission was signed by Brazilian lawyers who were not authorized to practice in Switzerland (Art. 40 (1) BGG)[2] and within the extended time limit the request was not renewed by an attorney authorized to practice according to BGG or by an organ entitled to represent the Respondent. However, the Respondent expressed its position as to the petition for revision through its Chairman. It submitted that the matter was not capable of revision and subsidiarily that the petition should be rejected. The CAS submitted that the petition should be rejected. On January 21, 2008, the enforcement of the award was stayed.

Reasons:

1.

The Petitioner claims that the Arbitral Tribunal would have violated rules on the composition of the Tribunal or on challenges (Art. 121 (a) BGG). Additionally, the Petitioner claims to have subsequently discovered some important facts (Art. 123 (2)(a) BGG). Through a letter from a Geneva attorney to its Belgian representative of December 4, 2007, the Petitioner would have

[2] Translator's note: BGG is the German abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173.110.

heard for the first time of an organisation called "G._____". According to its website, eight of its twenty-six members, including F._____, were arbitrators at the CAS. B._____, who represented the Respondent in the arbitral proceedings, was also a member of the organisation G._____ and he chose F._____ as party appointed arbitrator. The latter would not only be the Chairman of G._____ but also a founding member of G.Z._____ SL, which would be connected to the firm of F._____ in another context. Under such circumstances, it was excluded that the Arbitrator appointed by the Respondent could have been independent, as attorneys belonging to the association G._____ would systematically appoint other members of G._____ as arbitrators, who, in their turn, would choose a member of G._____ as chairman. According to the Petitioner, this very institutional connection through G._____ constitutes an important fact appearing subsequently within the meaning of Art. 123 (2)(a) BGG, which would not only suggest lack of independence but also possibly influence the outcome of the proceedings. Additionally, the Petitioner would have to assume that the Respondent or its counsel would have been informed in advance of the content of the award. There would be no other explanation as to why the Respondent suddenly broke up a well-advanced settlement negotiation a short time before an award in its favour was issued.

2.

2.1 The Federal Statute on International Private Law of December 8, 1987 (PILA)[3] contains no provision with regard to the revision of arbitral awards within the meaning of Art. 176 ff. PILA. According to case law of the Federal Tribunal, which supplemented that lacuna, Federal law provides the parties to an international arbitration with the extraordinary legal remedy of revision, for which the Federal Tribunal has jurisdiction (BGE 118 II 199 at 2 and 3 and see also BGE 129 III 727 at 1, p. 728). If the Federal Tribunal upholds a petition for revision, it does not decide the matter itself, but it sends the matter to the Arbitral Tribunal which issued the decision or to a new Arbitral Tribunal to be constituted (Decision 4P_102/2006 of August 29, 2006 at 1).

2.2 Under the system of the OG[4] the parties could claim the grounds for revisions at Art. 137 OG and Art. 140 to 143 OG could be applied by analogy (BGE 118 II 199 at 4, p. 204; Decision of the Federal Tribunal 4P_120/2002 of September 3, 2003 at 1.1, published in Praxis 91/2002 Nr. 199, p. 1041 ff.). Such jurisprudence remains fundamentally valid under the new BGG,

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[3] Translator's note: PILA is the most commonly used English abbreviation for the Federal Statute mentioned in the text.

[4] Translator's note: This is the German abbreviation for the previous Federal law organizing Federal courts, which was substituted by the BGG of June 17, 2005.

namely for the grounds for revision according to Art. 123 (2)(a) BGG, which corresponds to that of Art. 137 (b) OG (BGE 134 III 45 at 2.1, p. 47).

2.3 Under the aegis of the OG, the subsequent discovery of an inappropriate composition of the arbitral tribunal would not constitute a ground for revision (Art. 136 OG, presently Art. 121 BGG), for instance because one arbitrator was partial, or even if it had been subsequently discovered that one of the arbitrators was corrupt. A revision based on procedural breaches was justified due to the lack of a functional judicial review above the Federal Tribunal. Since revision was tied to a time limit beginning with the judgement (Art. 141 (1)(a) OG) which once expired made it no longer available, arbitral tribunals were treated similarly, to the extent that the inappropriate composition of the arbitral tribunal could be raised in front of the Federal Tribunal within the time limit (Art. 190 (2)(a) PILA). There was accordingly no need to fill a lacuna (BGE 118 II 199 at 4, p. 204; Decision of the Federal Tribunal 4P_104/1993 of November 25, 1993 at 2, with references).

2.4 Under the aegis of the BGG, Art. 124 (1) BGG drew a distinction as to the time limit for revision, depending on whether a violation of rules of challenges or "other procedural rules" was claimed. As to the former, the thirty days time limit started running with the discovery of the ground for challenge (Art. 124 (1)(a) OG) unlike as to the claim of a violation of other procedural rules where the time limit would start running with the receipt of the fully reasoned decision. For a violation of the rules on challenges or for an illegal composition of the tribunal (Escher, Basler Kommentar, N. 2 at Art 124 BGG) a judgement of the Federal Tribunal can be the object of a revision even after the thirty days time limit has expired. This raises the question of the extent to which the jurisprudence under the OG retains it meaning for cases to be adjudicated after the entry into force of the BGG.

2.4.1 Some legal writing recommends that even under the aegis of the BGG the application of Art. 121 BGG to arbitral awards should be excluded (Berger/Kellerhals, Internationale und interne Schiedsgerichtsbarkeit in der Schweiz, Reference 1788, p. 627). Such a view is justified considering the subsidiary character of revision and the possibility to appeal an award for irregular composition of the Arbitral Tribunal under Art. 190 (2)(a) PILA (see BGE 118 II 199 at 4, p. 204).

2.4.2 Other legal writing already under the aegis of OG suggested that the Federal jurisprudence should be changed in order to allow a revision based on Art. 136 OG, at least when the arbitrator had failed to comply with his obligation to disclose (Poudret/Besson, Comparative Law of Arbitration, 2nd edition, p. 789; see also Besson, Le recours contre la sentence arbitrale internationale selon la nouvelle LTF, in ASA Bulletin 2007, p. 2-26; Poudret, Le recours au Tribunal fédéral en matière d'arbitrage interne selon les projets de lois sur le Tribunal fédéral et de procédure civile suisse, In: Jametti Greiner/Berger/Güngerich (collective), Rechtssetzung und Rechtsdurchsetzung, Festschrift für Franz Kellerhals, p. 86).

2.4.3 Still other legal writing points out that at least a ground for challenge hidden or deceitfully undisclosed should be considered as a newly discovered fact pursuant to Art. 123 (2)(a) BGG in the relationship between arbitrator and party, thus opening the way to a revision pursuant to Art. 123 (2)(a) BGG (Kaufmann-Kohler/Rigozzi, Arbitrage international, Reference 859, p. 320 f; see also at Art. 137 OG, Knoepfler/Schweizer, Arbitrage international, p. 170).

2.5 From a factual point of view, the ground for challenges subsequently discovered (Art. 121 (a) BGG) is similar to the discovery of new relevant facts (Art. 123 (2)(a) BGG). It is not necessary to decide definitively whether the previous case law should be confirmed pursuant to which no revision should be allowed for the reasons available for an appeal according to Art. 190 (2) PILA (BGE 129 III 727 at 1, p. 729 with references) or if, to the contrary, a revision based on Art. 121 or Art. 123 BGG becomes possible after the introduction of the BGG in such cases, when the ground for challenge is discovered only after the expiry of the term to appeal. Indeed, the conditions of a revision pursuant to Art. 121 or Art. 123 BGG are not met here.

2.5.1 According to the principle of good faith and the prohibition of abuse of rights, it is not allowed for formal means to be brought forward after an unfavourable result when they could have been raised earlier in the proceedings (BGE 129 III 445 at 3.1, p. 449 with references). In an arbitral procedure, in which two equally strong parties face each other and have to collaborate in the constitution of the arbitral tribunal, both must be clear about the meaning of the choice of the arbitrators. They are under a duty to timely undertake the enquiries which can be expected from them in order to recognize possible grounds for challenges (BGE 129 III 445 at 4.2.2.1, p. 465 with references). Should a party fail to do so, it shall no longer be heard when bringing forward grounds for challenge of an arbitrator discovered after the expiry of the time limit to appeal the arbitral award (thoroughly on this, see Decision of the Federal Tribunal 4A_506/2007

of March 20, 2008 at 3.1.2 and 3.2). On the basis of Art. 121 BGG a revision could therefore only be considered when the petitioner was not in a position to recognize and to raise the ground for challenge in the arbitral proceedings.

2.5.2 From that point of view, it makes no difference whether or not the matter is decided in the perspective of Art. 123 BGG.

2.5.2.1 According to Art. 123 (2)(a) BGG, revision may be sought when the petitioner subsequently discovers important facts or decisive means of proof, which it could not have brought into the previous proceedings, excluding facts and evidence which appeared only after the decision. The new facts must be important, *i. e.* they must be capable of changing the factual basis of the judgement in such a way that an appropriate application of the law could have led to another decision (Decision of the Federal Tribunal 4P_102/2006 of August 29, 2006 at 2.1). The alleged membership of G._____ is not adequate to show – and the Petitioner does not explain how it would have an impact on the arbitral procedure – that the alleged "institutional relationship" [would exist].

2.5.2.2 Even if one were to consider that in international arbitration the subsequent discovery of a ground for challenge would be sufficient to constitute a new fact within the meaning of Art. 123 (2)(a) BGG (Kaufmann-Kohler/Rigozzi, *op. cit.*, Reference 859, p. 350 f; Knoepfler/ Schweizer, *op. cit.*, p. 170), only he who could not have discovered them previously by exercising appropriate care could rely on circumstances newly discovered. There is a failure of appropriate diligence when the discovery of new facts or evidence results from enquiries which could and should have been done in the previous proceedings (Seiler/von Werdt/Güngerich, Bundergerichtsgesetz (BGG), N. 8 at Art. 123 BGG). That it would have been impossible for a party to bring certain facts forward in the previous proceedings must be accepted restrictively as the ground for revision based on facts already existing cannot serve to remedy previous omissions in the conduct of the proceedings (see Escher, *op. cit.*, N. 8 at Art. 123 BGG). Also on the basis of Art. 123 BGG, a revision would be possible only if the petitioner could not have recognized and alleged the ground for challenge in the arbitral proceedings.

2.5.3 The Petitioner relies on the fact unknown to him during the proceedings that both F._____ who was involved in the CAS decision and the attorney of the other party were members of G._____. It is surprising that the Petitioner could not have discovered the

Respondent's Brazilian attorney's membership during the arbitral proceedings, as a reference to that is in all of the submissions of B._____ to the Arbitral Tribunal. Not only the cover page but each page of each submission carries a G._____ logo containing the word "member" in the lower right corner. It must be concluded that the Petitioner, by applying the care which could reasonably be expected from him, could and should have recognized in the arbitral proceedings that the attorney for the other Party was a member of the G._____ Association. As to the membership of the Arbitrator appointed by the Respondent, it was pointed out accurately in the brief with regard to the request for revision that the website of the CAS gives easy access to the list of the CAS arbitrators (http://www.tas-cas.org/arbitreslistegen), which describes F._____ as "Chairman of the G.H._____ Asociación". Had the Petitioner exercised even minimal care in the beginning of the proceedings to obtain information on the person appointed as arbitrator by the Respondent, he could not have missed his chairmanship of G._____. Should the Petitioner, as it claims, have not been aware of the details of G._____, it was appropriate to obtain information under such circumstances. Even if the Petitioner was not aware during the proceedings that both the attorney and the arbitrator were members of the same association, this would be attributable to its own negligence (thoroughly on this, Decision 4A_506/2007 at 3.2).

3.

On the basis of the foregoing the petition for revision could not be upheld on the basis of the facts alleged, even if the Petitioner were fundamentally entitled to rely on the improper composition of the Arbitral Tribunal in the revision proceedings according to Art. 121 (a) or Art. 123 (2)(a) BGG. Whether or not a ground for challenge could be deducted from the alleged facts may remain open but it would hardly be so (see quoted Decision 4A_506/2007 at 3.3). In both ways, the Petitioner lost the right to claim the alleged circumstances in good faith and the revision is not to be allowed. Such an issue of the proceedings means that the Petitioner must pay the costs.

Therefore, the Federal Tribunal pronounces:

1.

The matter is not capable of a revision.

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2.

The judicial costs set at CHF 20'000.-- shall be borne by the Petitioner.

3.

The Petitioner shall pay an amount of CHF 22'000.-- to the Respondent for the Federal judicial proceedings.

4.

This decision shall be notified in writing to the Parties and to the Court of Arbitration for Sport (CAS).

Lausanne, April 4, 2008

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

The presiding Judge:	The Clerk:
CORBOZ	LUCZAK