Arbitration Newsletter Switzerland

Revision of an Award for Lack of Independence of an Arbitrator - an Invitation to the Law Maker

On 19 September 2016, the Federal Supreme Court ("the Court") made its most recent decision in the field of international arbitration available on its website.[1] The issue at stake was whether a final award can, by way of a revision[2], be set aside by invoking the arbitrator's lack of independence based on facts which became known to the applicant only after lapse of the 30 day deadline for commencing ordinary set-aside proceedings.

1 Facts

In mid-2000, an Italian company X entered into an agreement with a Dutch company Y, being part of the German Bosch group, for the procurement and installation of an elevator in Italy. After an accident occurred and both parties denied liability for the loss incurred, Y commenced arbitration proceedings under the ICC Rules in December 2011. Shortly thereafter the ICC Court appointed, upon the proposal of the Swiss National Committee, a Zurich-based lawyer as sole arbitrator ("the Sole Arbitrator"). In his final award dated 23 April 2015 the Sole Arbitrator ordered X to pay Y an amount of approx. EUR 2,3 Mio., plus interest.

On 4 August 2015, X requested the Court - by way of a revision - to set aside the final award, to remove the Sole Arbitrator from his office and to send the case to a new arbitral tribunal. As reasoning for the requested revision X alleged the following: originally, X had no reason to question the Sole Arbitrator's independence, neither at the time when he - a lawyer of the Swiss law firm now called CMS von Erlach Poncet AG[3] - signed, on 18 April 2012, the usual ICC statement on acceptance, availability, independence and impartiality nor during the course of the arbitral proceedings. However, on 8 July 2015, one of X's counsel discovered a press release issued by the German law firm CMS Hasche Sigle of 5 December 2014[4] informing that it advised another group company of Bosch, namely Bosch Software Innovations GmbH, on e-mobility. According to X the ties between the Swiss and German CMS law firms are of such nature that they would have justified the removal of the Sole Arbitrator had X learned about the advice given by the German CMS law firm either during the course of the arbitral proceedings or within the 30 day time limit for commencing setting aside proceedings. For this reason, X argued that the challenge must be admissible also by way of a revision.

In its reply of 14 October 2015 Y disagreed. In essence it submitted that X had failed to raise these circumstances within time and, moreover, that the circumstances would not amount to an improper appointment of the Sole Arbitrator. Moreover, lack of independence and impartiality does not form a valid ground for a revision but instead it constitutes only a ground for setting aside an award pursuant to Art. 190(2)(a) PILA.

The Sole Arbitrator also concluded that X's revision should be dismissed. In his view - in addition to X's having submitted its allegation out of time - CMS is not an integrated law firm in which the partners share

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1 BGE 4A_386/2015 of 7 September 2016, in French ("the Decision").

2 A revision is an extraordinary appeal.

3 As usual, the Court disclosed no names in the Decision. In the case at hand, it is, however, obvious that the Swiss law firm referred to therein can only be CMS von Erlach Poncet AG, since the Decision makes reference to a merger of a Zurich based and a Geneva based law firm in 2014. This merger is on public record.

4 See https://cms.law/en/DEU/News-Information/Bosch-Software-Innovations-advised-on-e-mobility-by-CMS, visited on 23 September 2016.

the fees but rather a simple network of independent law firms.

2 Considerations

2.1 Challenge of an Arbitrator as valid Ground for a Revision?

The Court notes that the deadline for filing a revision (30 or 90 days respectively, depending on the ground put forward) is not at issue here because X filed the revision, after having discovered the possible grounds on 8 July 2015, on 4 August 2015, hence within the 30 days deadline.

At issue is, however, the question whether the improper constitution of a tribunal can indeed not be invoked by way of a revision, the improper constitution of a tribunal being one of the five grounds for setting aside an award[5] or whether this should be admissible, so long as the ground has been discovered after the lapse of the 30 day time limit for commencing setting aside proceedings.

The Court analyzed in detail the opinions expressed amongst scholarly writers as to the question whether or not a challenge against an arbitrator can also be put forward in a revision and notes that, apart from situations in which an arbitrator commits a crime, there is no uniform approach, be it regarding international or national arbitration.

2.2 Was the Sole Arbitrator independent and impartial?

The Court in this respect first re-iterated the general principle that arbitrators must adhere to the same standards as state judges, but that the particularities of arbitration, and of international arbitration in particular, must be taken in due consideration as well. It further noted that the appearance of a lack of independence or impartiality of an arbitrator suffices to remove him or her from office, but that for such assessment only objective circumstances may be taken into account. In other words: merely subjective impressions of a party are of no relevance.

According to X a significant financial income to the benefit of the Sole Arbitrator's law firm derived from CMS Haschle Sigle's advice to the Bosch subsidiary, in particular since at least nine lawyers of the German firm worked on that account. Consequently, X alleged that this amounted to a non-waivable red list situation set out in Art. 1.4 of the IBA Guidelines on Conflicts of Interest in International Arbitration ("the Conflicts of Interest Guidelines"). In the alternative, the situation fitted into Art. 2.3.6 (waivable red list) or Art. 3.1.4, Art. 3.2.1 or Art. 3.2.3 (all orange list) Conflicts of Interest Guidelines.

The Court commenced by noting that the growth and size of law firms as such and their reach out into different jurisdictions is a reality which can nowadays not be denied. The IBA had taken this development fully into account when drafting general standard 6 and its explanations in the Conflicts of Interest Guidelines in stating that the arbitrator is, in principle, deemed to bear the identity of his or her law firm but when considering the relevance of facts or circumstances necessary to determine whether a potential conflict of interest existed, or whether disclosure should be made, the activities of an arbitrator's law firm, if any, and the relationship of the arbitrator with the law firm, should be considered in each individual case.[6] The question to be decided, therefore, in the present case was whether or not the Swiss and the German CMS law firms constitute a single entity.

In this respect the Court held as follows: it cannot be denied that the CMS website puts considerable emphasis on the ties between the different law firms and also highlights the benefits for its clients arising therefrom. However, the description of the "CMS law firm" found on its website[7] revealed nothing unusual compared to any similar law firm networks, just as the Sole Arbitrator stated in one of his submissions concerning how the lawyers from the different CMS law firms collaborated with each other.

Bearing this in mind, the Court concluded that X's allegation that the lawyers in the CMS network must be qualified as being members of one and the same law firm could not be upheld. It further noted as follows: obviously, one cannot simply presume, now and *pro futuro*, the legal and financial independence between the different law firm members of a network before verifying if a lawyer in such a network offers sufficient guarantees for his/her independence and impartiality when conducting arbitral proceedings, be

5 Art. 190(2) PILA.

6 English translation taken from the Conflicts of Interest Guidelines.

7 The Court cites a lengthy passage from the CMS website.

it as sole arbitrator or a member of an arbitral tribunal. However, the Court found no single factual element in the present case justifying an exception to its general rule.

Because the Sole Arbitrator's law firm did not qualify as a member of the "CMS law firm" - as alleged by X - the Court concluded that none of the situations listed in the Conflicts of Interest Guidelines put forward by X applied here. In fact, the Sole Arbitrator and his law firm CMS von Erlach Poncet AG:

- had never advised Y or its sister company Bosch Software Innovations GmbH;
- had never derived any financial income from that company, still less any significant income (Art. 1.4 Conflicts of Interest Guidelines);
- had not a significant commercial relationship (Art. 2.3.6 Conflicts of Interest Guidelines);
- had not acted, within the past three years, for or against X or Y (Art. 3.1.4 Conflicts of Interest Guidelines);
- had not advised one of these parties (Art. 3.2.1 Conflicts of Interest Guidelines);
- neither the Sole Arbitrator nor his law firm had regularly represented Y or X or an affiliate of one of these parties (Art. 3.2.3 Conflicts of Interest Guidelines).

If one would ever have to find a situation listed in the Conflicts of Interest Guidelines applicable to the facts at hand, the Court concluded, then this would be Art. 4.2.1 Conflicts of Interest Guidelines, describing a green list situation.[8]

3 Conclusions

Whilst the revision was rejected the Decision was nevertheless rendered by all five members of the First Civil Chamber of the Court - an indication that the Court attributes significant value to such decision. This is further corroborated by the fact that the Decision will be published by the Court in its volumes of leading decisions.

The Court started its consideration with an almost philosophical introduction by reminding us that in all disputes - be it before state court or an arbitral tribunal - there comes a time where the substantive truth (*veritéé matérielle*), if it ever can be established, must stand back from the judicial truth (*veritéé judiciaire*), as imperfect as it might be, in order to maintain legal certainty. However there are extreme circumstances where justice and equity imperatively require that a final decision cannot stand if based on contaminated circumstances (*premises viciées*).

The relevance of the Decision is twofold:

First, it touches upon a yet unresolved issue, namely whether material facts revealing that an arbitrator was in fact not independent, can form the ground for a revision of this allegedly contaminated award. The Decision contains a detailed analysis of the positions taken in scholarly writings[9] and a very comprehensive analysis of the legal developments in this respect.[10] The Court seems to conclude that a revision of an award should be possible, provided new facts reveal that an arbitrator was actually not independent and such lack of independence had been notified by a request for revision in due time. The Court did, however, refrain from taking a formal decision in this respect since the revision had to be dismissed anyway.

Nevertheless, the Court used this opportunity to extend a clear invitation to the Swiss legislature to clarify this relevant issue. As a matter of fact, chapter 12 PILA is presently under review by the Department of Justice, supported by a team of experts[11], with a view to enhancement. The omission from chapter 12 PILA of any provisions regarding the revision of an international arbitral award rendered in Switzerland was in fact one of the main reasons for such enhancement.

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[8] "*A firm, in association or in alliance with the arbitrator's law firm, but that does not share significant fees or other revenues with the arbitrator's law firm, renders services to one of the parties, or an affiliate of one of the parties, in an unrelated matter.*"

[9] *Cf.* consid. 2.3.2 Decision.

[10] As the revision of an international arbitral award rendered in Switzerland is not addressed in chapter 12 PILA, the Court applied, in previous decisions, the provisions for a revision of state court decisions *in analogiam.* The pertinent legal provisions underwent however certain changes over the past years. All of this is properly reflected in the analysis of the Court, *cf.* consid. 2.2 Decision.

[11] Prof. Gabrielle Kaufmann-Kohler, Prof. Felix Dasser, Prof. Daniel Girsberger and Elliott Geisinger.

The present Decision not only provides a detailed summary of the positions taken by the Court and of scholarly writings so far, but also proposes a suggestion to the legislature as how to proceed in this respect. Reading between the lines, it seems that the Court expects the legislature to accept the revision of international arbitral awards if the lack of independence of an arbitrator comes to light only at a later stage.

As to the timing of the request for revision it should be noted that the Court accepted at face value X's statement that it had learned about the professional involvement of CMS, as declared in the press release of 5 December 2014, only on 8 July 2015, and consequently the Court accepted X's request for revision dated 4 August 2015 as being filed within time. In many previous cases the Court has taken a much tougher stance in this respect[12] - as a matter of fact most of the previous challenges based on lack of independence of an arbitrator in set-aside proceedings have been dismissed by the Court on the basis that such challenge had been made out of time. However, it may be that the Court might take a more liberal approach, as in the present case, once the arbitrator has been appointed and declared his independence and also complied with his duty to report any changes of relevance which might put his independence into question.

Second, as to the merits of the case, *i.e.* whether the Sole Arbitrator's independence has been contaminated by the fact that another CMS firm was acting for a Bosch subsidiary, the Court has taken a liberal approach. In doing so, it has again confirmed the relevance of the Conflicts of Interest Guidelines.[13] The source of this liberal approach lies in the awareness of the Court of the legal market with the growing size of law firms, particularly in the field of international arbitration. The Court did not give that much weight to the way CMS describes its services on its website or in said press release[14] but rather to its legal structure, according to which each of the CMS law firms acts independently and there is no shared economical interest.[15]

Nevertheless, networks of law firms such as CMS, are hybrid vehicles: on the one hand they operate under a joint brand, thus strengthening their market coverage, advertise their large number of lawyers operating under such joint brand and emphasize their full service ability, in most cases all over the world and, on the other hand, they still maintain that they provide their services as legally independent firms - a balancing act with implied risks!

However, in the present circumstances it was certainly appropriate to dismiss X's request for revision. The Sole Arbitrator had been independent at the time he had rendered his Award.

However, the Decision does not allow for a free ride in the sense of "anything goes" for an international network of law firms. Rather to the contrary: also in future, each disputed independence of an arbitrator will have to be analyzed based on the particularities of the individual case. For that purpose it is relevant whether objective or subjective standards are applied as the yardstick: could the challenged arbitrator have known about the critical facts[16] or did he actually know[17]?

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Enclosure: BGE 4A_386/2015 of 7 September 2016

This newsletter can also be found on our website www.thouvenin.com.

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[12] BGE 136 III 605 (imposing a 'duty of curiosity'), 4A_110/2012.

[13] For the first time dealt with in 4A_506/2007, where the Conflicts of Interest Guidelines were qualified as "*useful working tool*"; *cf.* also our Newsletter of 16 May 2008.

[14] "*CMS is one of the ten leading international law firms […] with more than 3'000 lawyers and 59 offices in 33 countries, […] CMS holds long standing local as well as cross-border expertise.*"

[15] The website of CMS reveals that there is a CMS Legal Services EEIG (European Economic Interest Grouping) which has, however, only coordinating functions between the CMS member firms and does not provide client services.

[16] Cour de Cassation, Arrêt n° 1433 F-D, of 16 December 2015.

[17] High Court of Justice, Knowles J, W Limited v M SDN BHD [2016] EWHC 422 (Comm) of 2 March 2016 where Knowles J in despite of the fact that circumstances of the case qualified under the non-waivable red list Art. 1.4 Conflicts of Interest Guidelines still concluded that the sole arbitrator's independence could not be challenged since he was not aware of the pertinent facts.

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