4A_247/2014[1]

Judgment of September 23, 2014

First Civil Law Court

Federal Judge Klett (Mrs.), Presiding
Federal Judge Kolly
Federal Judge Hohl (Mrs.)
Federal Judge Kiss (Mrs.)
Federal Judge Niquille (Mrs.)
Clerk of the Court: Mr. Carruzzo

Y._____ SA,
Represented by Mr. Maurice Harari and Mrs. Delphine Jobin,
Petitioner

v.

B._____,
Represented by Mr. Christopher Koch and Mr. Philip Landolt,
Respondent

Facts:

A.
On September 10, 2003, and March 6, 2006, Y._____ SA (hereafter: Y._____), a company under [name of country omitted] law, known at the time as Y.Y._____ Ltd., and some other companies of Group Y._____ entered into two Consultancy Agreements (hereafter: The Contracts; respectively: the 2003 Contract or the 2006 Contract), with the company under [name of country omitted] law B._____, governed by Swiss law, by which the former entrusted the latter to assist them in preparing tenders with a view to obtaining contracts for the construction and renovation of electrical power plants. An arbitration clause inserted into both Contracts entrusted a three-member arbitral tribunal constituted under the aegis of

[1] Translator's Note: Quote as Y._____ SA *v.* B._____, 4A_247/2014.
The original decision was rendered in French. The full text is available on the website of the Federal Tribunal, www.bger.ch.

the International Chamber of Commerce (ICC) with settling the disputes that arose from the performance of the Contracts. The seat of the arbitration was in Geneva.

The 2003 Contract concluded by Y._____ and its American sister B.Y._____ Inc. concerned equipment for an electrical power plant. B._____ was to receive a commission of 3% of the unit price of the equipment delivered by Y._____.

The 2006 Contract, signed by B._____ with Y._____ and C.Y._____ AG, a German branch of the Y._____ Group, concerned equipment to be installed in another electrical power plant. The commission was 4% of the value of the equipment.

It is not disputed that B._____ furnished its contractual counterparts with all the services it had undertaken to provide. As compensation, it received commissions of USD 974'624 under the 2003 Contract, leaving a balance of USD 115'000. As to the performance of the 2006 Contract, the [name of country omitted] company received EUR 1'448'380. The balance of its commissions in this respect amounted to EUR 935'076.

B.
On November 29, 2012, B._____ sent a request for arbitration against Y._____, B.Y._____ Inc. and C.Y._____ AG severally to the ICC with a view to obtaining payment of the balance of its commissions, namely the USD 115'000 and EUR 935'076, with interest.

As a preliminary issue, the Respondents sought a stay of the arbitral proceedings until B._____'s activity could be clarified. According to them, there were various criminal investigations pending for suspicion of corruption in connection with projects in which Y._____ had participated, in particular in the United States of America through the Department of Justice (hereafter: the DOJ) and in England through the Serious Fraud Office (hereafter: the SFO). Hence, they had no other choice than to suspend payment of the commissions until full clarification of B._____'s compliance with legal provisions concerning corruption could be ascertained, as otherwise they would breach the UK Bribery Act 2010 (hereafter: the Bribery Act) and its American counterpart, the Foreign Corrupt Practices Act (hereafter: the FCPA) and incur heavy criminal sanctions, in particular high fines. To substantiate their statements, the Respondents submitted, among other documents, two written statements from private experts, the English lawyer C._____ and the American lawyer D._____.

In a Procedural Order n. 2 of September 2, 2013, the Arbitral Tribunal rejected the request for a stay of the proceedings. After establishing the facts and formally closing the proceedings by letter of January 22, 2014, it issued a decision on March 3, 2014, rejecting the Respondents' new request to stay the proceedings for 9 or even 6 months. On the same date and in the same document, it issued its final award in which, in particular, it ordered Y._____ to pay to B._____ USD 115'000 and EUR 935'076 with interest at 5% from December 6, 2012, while rejecting the claim insofar as it concerned B.Y._____ Inc. and C.Y._____ AG.

C.
On April 7, 2014, Y._____ filed a civil law appeal with a view to obtaining an annulment of the final award of March 3, 2014, (case 4A_231/2014).

In a separate judgment also issued today, the First Civil Law Court rejected the appeal insofar as the matter was capable of appeal.

D.
On April 14, 2014, Y._____ (hereafter: the Petitioner) filed a request for *revision* of the same award. Invoking as a new fact within the meaning of Art. 123(2)(a) LTF,[2] the indictment in the United States of a citizen of [name of country omitted] by the name of F._____ under suspicion of receiving bribes in the tendering process of various construction projects of electrical power plants, it submits that the award of March 3, 2014, should be annulled and the case sent back to the arbitral tribunal for a new decision or to a new arbitral tribunal. In its answer of May 14, 2014, B._____ (hereafter: the Respondent) invites the Federal Tribunal to find that the matter is not capable of revision or to reject the petition.

The Respondent filed some short observations as to the answer in a submission of June 12, 2014.

A stay of enforcement was issued in the revision process by decision of the presiding judge of July 9, 2014.

Reasons:

1.
According to Art. 54(1) LTF, the Federal Tribunal issues its decision in an official language,[3] as a rule in the language of the decision under appeal. When the decision was issued in another language (here: English), the Federal Tribunal resorts to the official language chosen by the parties. Before the Arbitral Tribunal they parties used English. In the briefs submitted to the Federal Tribunal both used French. In accordance with its practice, the Federal Tribunal will consequently issue its decision in French.

2.
2.1. The seat of the arbitration was in Geneva. At least one of the parties did not have its domicile in Switzerland within the meaning of Art. 21(1) PILA[4] at the decisive time. The provisions of Chapter 12 PILA are accordingly applicable (Art. 176(1) PILA).

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[2] Translator's Note: LTF is the French abbreviation of the Federal Statute of June 17, 2005, organizing the Federal Tribunal, RS 173. 110.

[3] Translator's Note: The official languages of Switzerland are German, French, and Italian.

[4] Translator's Note: PILA is the most commonly used English abbreviation for the Federal Statute on International Private Law of December 18, 1987, RS 291.

2.2. PILA does not contain any provision concerning revision of international arbitral awards. The Federal Tribunal filled the lacuna in its case law. The grounds for revision of such awards were those at Art. 137 OJ.[5] They are now contained at Art. 123 LTF. The Federal Tribunal is the competent judicial body to adjudicate a request for revision concerning any international arbitral award, whether final, partial, or interlocutory. If the Court upholds a request for revision, it does not decide the merits itself but sends the case back to the arbitral tribunal that issued the award or to a new arbitral tribunal to be constituted (ATF 134 III 286[6] at 2 and the references).

2.3. Pursuant to Art. 123(2)(a) LTF, revision may be sought in civil matters if the petitioner finds some pertinent fact or conclusive evidence that he could not invoke in the previous proceedings, to the exclusion of facts or evidence subsequent to the decision, which are the subject of the request of revision. Except as to certain issues concerning revision for violation of the ECHR, the rules of the OJ concerning revision were adopted in the LTF. However, certain systematic and editorial changes were introduced. Thus, Art. 123(2)(a) LTF no longer contains the inadequate wording "new facts," in contrast to Art. 137(b) OJ, but points out that they must be pertinent new facts discovered after the fact to the exclusion of facts arising subsequent to the judgment. Yet, as to the merits, the case law concerning "new facts" retains its pertinence. Revision may therefore be justified only by facts occurring up to the time at which new facts may no longer be submitted in the previous proceedings but that were not known to the petitioner despite his diligence; moreover, the facts must be pertinent, that is, they could alter the factual findings on which the decision at issue is based and lead to a different solution pursuant to correct legal assessment. Failure to act diligently occurs when the discovery of new facts or evidence is due to investigations that could and should have been carried out during the previous proceeding. It is only with restraint that one should conclude that it was impossible for a party to state a specific fact in a previous proceeding because the ground of revision based on new facts is not there to remedy the petitioner's omissions in conducting its previous case (judgment 4A_570/2011[7] of July 23, 2012, at 4.1).

For the reasons stated at Art. 123(2)(a) LTF the request for revision must be filed with the Federal Tribunal under penalty of forfeiture within 90 days after the discovery of the ground for revision, taking into account that the time limit is suspended in the situations described at Art. 46 LTF (judgment 4A_666/2012[8] of June 3, 2013, at 5.1) but at the earliest from the notification of the full award (Art. 124(1)(d) LTF). This is an issue of admissibility and not one of merits, as opposed to determining whether the Petitioner was late in discovering the ground of revision invoked. The discovery of the ground of revision implies that the

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[5] Translator's Note: OJ is the French abbreviation for the previous federal statute organizing the Swiss Federal Courts, which was then substituted by the LTF as to the Federal Tribunal.

[6] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/request-for-revision-of-an-arbitral-award

[7] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/federal-tribunal-rejects-request-for-revision-facts-that-were-kn

[8] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/time-limit-seek-revision

Petitioner has sufficiently sure knowledge of the new fact to be able to invoke it, even though he may not be able to prove it with certainty; a mere assumption is not sufficient. As to new evidence specifically, the Petitioner must have a document establishing it or sufficient knowledge to require its introduction into evidence. It behooves the Petitioner to establish the circumstances justifying compliance with the time limit (judgment 4A_570/2011, as cited above, *ibid*.).

Moreover, revision is an alternate legal recourse as compared to the appeal based on Art. 190(2) PILA (ATF 129 III 727 at 1, p. 729) and it cannot be based on one of the grounds in that provision discovered before the time limit to appeal expired (judgment 4A_234/2008[9] of August 14, 2008, at 2.1).

3.
The request of revision must be reviewed in the light of these principles of case law to assess its admissibility and, as the case may be, the merits of the ground invoked.

3.1. In a letter of counsel of March 3, 2014, the Petitioner informed the president of the Arbitral Tribunal that a [name of country omitted] citizen by the name of F._____ had been indicted in the United States of America on suspicion of having received bribes paid through consultants such as the Respondent acting on behalf of foreign companies seeking to be awarded contracts through the tendering process of various electrical power plant construction projects. An indictment of February 10, 2014, by the Grand Jury for the District of Maryland in the case *United States of America v. F.*_____ was attached to the letter.

In an email of March 4, 2014, the president of the Arbitral Tribunal advised the Petitioner that he had received the aforesaid letter when the final award had already been signed by all members of the Tribunal. He confirmed this in a letter of May 5, 2014, setting forth in detail how the award at issue was adopted.

3.2. The Respondent principally submits that the matter is not capable of revision. Based on a DOJ press release of February 10, 2014, concerning F._____'s indictment, it argues that the Petitioner waited three weeks to bring this to the knowledge of the Arbitral Tribunal without any explanation for such procrastination when, by acting diligently, it could have enabled the arbitrators to take the indictment into account either by reopening the case or by assessing this fact. According to the Respondent, the Petitioner withheld the information intentionally to ensure that there would be no debate before the Arbitral Tribunal as to the fact at issue, thus avoiding a situation where the Arbitral Tribunal would issue the same award despite the indictment so that the Federal Tribunal, if seized of an appeal, would have been bound by the finding that the indictment of the aforesaid [name of country omitted] citizen was not sufficient to establish the Respondent's involvement in any bribing of this individual (answer n. 12 to 17).

The Respondent's argument is not convincing. The Petitioner strongly disputes it in its reply and appears credible when it emphasizes that the three weeks between the public announcement of F._____'s

[9] Translator's Note: The English translation of this decision is available here: http://www.swissarbitrationdecisions.com/renunciation-to-appeal-revision-of-award-within-time-limit-to-ap

indictment and the transmission of the information to the Arbitral Tribunal represent the time it needed with Swiss and American counsel to carry out the necessary preliminary investigations before disclosing and to cross-check the information with that which was already in the arbitration file. Moreover, and this is doubtlessly a critical objection to the aforesaid argument, the Petitioner rightly claims that its good faith could not be questioned considering that when it informed the Arbitral Tribunal of the indictment of the [name of country omitted] citizen, it did not know and could not know that the final award had already been signed by the three arbitrators.

Moreover, there is no denying that the ground invoked in support of the request of revision was raised within the time limit set in Art. 124(1)(d) LTF.

Therefore, there is no reason not to address the petition.

3.3.

3.3.1. F._____ was formally indicted on February 10, 2014. This indictment constitutes a fact taking place before March 3, 2014, when the final award was issued. The Petitioner certainly became aware of it before then. However, it could not introduce it into the arbitral proceedings through no fault of its own (see above 3.2) as the award had already been made at the time it attempted to do so. This is accordingly a new fact which in itself could form the basis of a request for revision under Art. 123(2)(a) LTF or new evidence within the meaning of the provision as to the document submitted to prove the fact at issue, namely the aforesaid indictment (see 3.1, 1st par. *i.f.*). It remains to be seen if the fact can be found to be pertinent, in other words, if its being taken into consideration could lead to a different outcome, more favorable to the Petitioner, on the basis of correct legal assessment.

3.3.2. In a preliminary remark, the Petitioner states that it will demonstrate that if the Arbitral Tribunal had been aware of F._____'s indictment in the United States of America, it would have issued a different award "considering the higher risks incurred [by the Petitioner], pursuant to the anti-corruption legislation (particularly the American and English)" (request of revision n. 26). Elsewhere, it quotes a passage of the final award in which the Arbitral Tribunal found that the implied claim of corruption concerning the Respondent was not proved (n. 124 *i.f.*). On this basis, it states that the indictment of the [name of country omitted] citizen, having been known by the Arbitrators, would have lead them to a different result because it is material evidence of the Respondent's probable involvement and that of its sole beneficial owner G._____ in the systemic corruption designed by F._____ in connection with the award of certain contracts (request of revision n. 45). The Petitioner then quotes some passages of the indictment mentioning a company by the name of Y._____, specializing in providing services in connection with electricity, which had a representative as Consultant B, who had paid several bribes into various bank accounts to the benefit of F._____. Cross-checking the information in the request for judicial assistance sent to the Swiss authorities by the DOJ on October 16, 2012, which contains names, it claims in this respect that the F._____ company mentioned in the passages quoted is itself, the Respondent being Consultant B (request for revision n. 46 *f.*). The Petitioner also quotes some statements at the hearing of the Arbitral Tribunal on December 4, 2013, by G._____ and D._____ as to the connections between

the beneficiary of the Respondent with F._____, with a view to demonstrating that such connections were considered "central" by the Arbitral Tribunal but that the evidence adduced in the arbitral proceedings was not sufficient to demonstrate an illicit agreement between the Respondent and the [name of country involved] citizen in the context of the award of the contracts sought by company ZZZ. The Petitioner concludes that F._____'s indictment would lead to the opposite solution in the final award if the Arbitral Tribunal were to decide again in awareness of this new fact because it confirms the DOJ position and the existence of a suspicion of corruption against the Respondent.

The demonstration the Petitioner said it would make as to the impact on the outcome of the dispute of the circumstance invoked in its petition for revision should the Arbitral Tribunal be invited to revisit the case, in other words, the pertinence of this new fact, has failed. It must be recalled, as was emphasized in the judgment issued today as to the civil law appeal against the award for which revision is sought, that what the Petitioner complains of is not so much the alleged corruption impacting the contracts it entered into with the Respondent – it did not argue in the Arbitral Tribunal that they were void and indeed performed them in part – but rather the risk which compliance with the award in dispute would carry for the Petitioner, namely heavy sanctions based on the criminal law provisions adopted by the United States of America and England, namely the FCPA and the Bribery Act (judgment quoted, at 5.2). Yet, the reasons stated in this respect at 5.2.1 and 5.2.2 of the aforesaid judgment remain valid, despite the alleged new fact. Indeed, the indictment in the United States of America of a citizen of [name of country omitted] more or less connected to the Respondent does not fundamentally change the problem at hand as stated in the reasons. It is still not demonstrated why the indictment of February 10, 2014, would be important in connection with the Bribery Act in an investigation conducted by the American authorities or pursuant to the FCPA and the Petitioner itself concedes in its reply that F._____ is not charged with this. Moreover, an indictment is not synonymous with a finding of guilt, as the DOJ points out at the end of the aforesaid press release *("[t]he charges contained in the indictment are merely accusations, and the defendant is presumed innocent unless and until proven guilty"*).[10] Neither does it appear that the Respondent was directly involved in a pending criminal investigation. It is also unclear what risk the Petitioner would incur as a company of [name of country omitted] law to be sentenced in the United States of America or the time limit within which such risk could materialize. The principle expressed in the adage *le pénal tient le civil en l'état* ("the criminal case stays the civil case") which was discussed by the Arbitral Tribunal is not further applicable here, as the new fact invoked by the Petitioner also does not fall within the principle. Moreover, it must be kept in mind that revision is an extraordinary legal recourse, the use of which must remain an exception, particularly when the initiation of such a request could result in (and perhaps seeks to enable) the party that benefited from the services given by its contractual counterpart to not pay for them or, in any event, to avoid paying the full price. This being so, the petition for revision of the award of March 3, 2014, must be rejected.

4.
The Petitioner shall pay the costs of the federal proceedings (Art. 66(1) LTF) and compensate its opponent (Art. 68(1) and (2) LTF).

[10] Translator's Note: In English in the original text.

Therefore the Federal Tribunal pronounces:

1.
The petition for revision is rejected.

2.
The judicial costs set at CHF 12'000 shall be paid by the Petitioner.

3.
The Petitioner shall pay to the Respondent an amount of CHF 14'000 for the federal judicial proceedings.

4.
This judgment shall be notified to the representatives of the parties and to Ms. [name omitted], attorney in Geneva for the ICC Arbitral Tribunal.

Lausanne, September 23, 2014

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

Presiding Judge:	Clerk:
Klett (Mrs.)	Carruzzo