

4A_763/2011¹

Judgment of April 30, 2012

First Civil Law Court

Federal Judge Klett (Mrs), Presiding
 Federal Judge Corboz,
 Federal Judge Rottenberg Liatowitsch (Mrs),
 Federal Judge Kolly,
 Federal Judge Kiss (Mrs),
 Clerk of the Court: Carruzzo.

X. _____,

Represented by Mr. Pierre-Yves Tschanz and Mr. Franck Spoorenberg,
 Petitioner,

v.

Y. _____,

Represented by Mr. Saverio Lembo and Mr. Vincent Guignet,
 Respondent,

Facts:

A.

A.a Y. _____ is a private limited liability company incorporated in [name of place omitted]. It is a fully held subsidiary of company A.Y. _____ which is itself entirely held by company B.Y. _____.

X. _____ is a joint stock company incorporated in [name of place omitted]. It belongs to the eponymous group of companies.

A.X. _____ is a private limited liability company. It is held and controlled by X. _____.

A.b In 2005 X. _____ and Y. _____ held respectively 52,91% (class B shares; hereafter: the Shares) and 47,09% (class A shares; hereafter: the A Shares) of the capital of V. _____ a company that held a majority (51%) in another company, V. _____.

On March 25, 2005, X. _____ and Y. _____ as well as A.X. _____ signed a framework agreement (Letter Agreement²) with a view to concluding a contract for the sale by X. _____ to Y. _____ of all Shares against payment of a price provisionally set at USD 3'103'761'647. That

¹ Translator's note: Quote as X. _____ v. Y. _____, 4A_763/2011. The original of the decision is in French. The text is available on the website of the Federal Tribunal www.bger.ch

² Translator's note: In English in the original text.

agreement was valid for sixty days, namely until May 23, 2005 and would lapse if the sales contract was not signed in the meantime.

Y._____ endeavored to meet the requirements of the Letter Agreement and circulated a final draft of a sales contract on April 19, 2005.

However the sales contract was never signed. On May 23, 2005 X._____ publicly announced that it intended to work on other alternatives to the contract.

B.

On May 27, 2005 Y._____ (hereafter: the Claimant), relying on the arbitration clause contained in the Letter Agreement filed a request for arbitration against X._____ (hereafter: the Defendant) and A.X._____ with the Court of Arbitration of the International Chamber of Commerce (ICC). Subsequently it withdrew the claim against A.X._____; this company will accordingly be omitted hereunder. A three members arbitral tribunal was constituted to resolve the dispute. The seat of the arbitration was in Geneva and it took place in three phases.

B.a

The Claimant first sought performance by the Defendant of its obligation to deliver the Shares based on the Letter Agreement and the draft sales contract. Moreover it reserved the right to obtain an assessment of the Shares by the Arbitrators.

On January 15, 2007 the Arbitral tribunal issued a first interim award. After rejecting the objections to jurisdiction raised by the Defendant and a similar argument based on the failure to attempt preliminary conciliation, the Arbitrators examined whether the Parties had agreed on the terms of the sales contract or not. Based on the statements by individuals implicated in the negotiation of the contract and applying the rules of good faith they answered the question in the affirmative and held that the sales contract had been tacitly concluded on May 9, 2005 as the Defendant had raised no objections to the draft submitted by the Claimant on April 19, 2005. Consequently they ordered the Parties to make all good faith efforts to ensure performance of the sales contract.

B.b After the aforesaid award was notified the Claimant sought the permits from the competent bodies to which the Defendant's obligation to deliver the Shares was subject. Claiming that it could not obtain them as a consequence of its partner's fault it again went to the Arbitral tribunal to obtain an order that the Defendant transfer the Shares and to assess their value.

On July 29, 2009 the Arbitral tribunal issued a second partial award. It ordered the Defendant to turn the Shares over to the Claimant against payment of USD 3'103'761'647 and assessed the value of the Shares as of June 30, 2007 to USD 1'809'000'000. According to the Arbitral tribunal this was the date at which the performance of the sales contract would have taken place if the Defendant had not acted in bad faith and prevented the fulfillment of the prerequisites on which the Parties had agreed.

B.c

In order to understand the dispute in front of this Court certain additional events concerning the Parties must be recalled before addressing the final award.

B.c.a U._____ is a fully held subsidiary of U.A._____ a company of group Z._____.

During the first half of 2005 U._____ undertook to provide the Defendant with the funds enabling it to fulfill certain obligations towards the authorities of [name of country omitted]. As a counterpart it obtained partial and indirect control of the Shares. For that purpose the Defendant created a new entity in November 2005, entirely under its control, company C.X._____ to which it transferred the Shares. It then sold 49% of its shareholding in C.X._____ to U._____. As for the remaining shares of C.X._____ (51%) they were assigned to another subsidiary of the Defendant, D.X._____, which then pledged them to guarantee a loan made by U._____ to the Defendant. These transactions resulted in V._____ – which should have been controlled by the Claimant only, already the holder of 49,09% (the A Shares) if the contract of sales had been performed – belonging now not only to the Defendant (51% of 52,91%), via D.X._____ and C.X._____, but also to U._____ (49% of 52,91%) via C.X._____.

In April 2007 U._____ started an arbitration against the Defendant. Claiming in substance that the latter had not fulfilled its obligations under the loan contract it claimed to have validly exercised its pledge on 51% of the shares of C.X._____ belonging to D.X._____ thus becoming the sole shareholder of C.X._____ and the indirect holder of the Shares. This arbitration appears to be still pending.

For its part A.Y._____ introduced a request for arbitration on August 16, 2005, in short with a view to a finding that the aforesaid agreement between U._____ and the Defendant by which the former obtained indirect control of the Shares, was in breach of a 1999 agreement binding the shareholders of V._____. In an interim and partial award of March 1st, 2005 the ICC arbitral tribunal acknowledged the existence of the breach and ordered the Defendant to do all it could to recover the Shares of C.X._____ assigned to U._____. It is not known whether that arbitration is finished.

B.c.b On November 11, 2009 B.Y._____, A.Y._____ and the Claimant (hereafter collectively referred to as the Y Parties) entered into a joint venture agreement (hereafter: the JVA) with U._____ and U.A._____ (hereafter collectively referred to as the U._____ Parties). The JVA provided among other things that the Y._____ Parties and the U._____ Parties undertook to regroup their direct and indirect shareholdings in W._____ and in company F._____ with a view to creating a first rate international company and to conquer emerging markets.

Pursuant to Art. 5 of the JVA the Parties also undertook to pursue and resolve the arbitration between the Claimant and the Defendant – as well as the arbitration initiated by U._____ – according to the modalities set in an enclosure 5 to the JVA (hereafter: Enclosure 5). According to Enclosure 5 in short, the Claimant renounced its claim for performance of the contract of sales of the Shares, seeking damages from the Defendant instead. As a counterpart U._____ paid the amount of USD 50'000'000 immediately. Moreover it undertook to pay USD 100'000'000 in the days after the final award against a power of attorney enabling it to enforce the award against the Defendant. As to the amounts thus recovered or directly paid to the Claimant by the latter they were to be used firstly to reimburse the USD 150'000'000 advanced by U._____, the balance being mostly kept by U._____ according to an apportionment formula and to a number of scenarios anticipated in this document.

B.d On November 19, 2009 the Claimant wrote a letter to the Arbitral tribunal. Alleging that the Defendant kept refusing to perform and that indirect control of the Shares had been transferred to a

third party, it stated that it would no longer seek performance of the contract of sales but damages for breach. A press release issued by B.Y._____ on November 12, 2009 and describing the JVA in broad terms was attached to the letter, which mentioned the JVA.

The third phase of the arbitration thus initiated resulted in the final award dated September 1st, 2011. The Defendant was ordered to pay USD 932'000'000 to the Claimant as damages for breaching the obligation to deliver the Shares to its contractual counterpart pursuant to the May 9, 2005 sales contract. Interest on that amount was awarded to the Claimant as from June 30, 2007, the date at which performance should have taken place.

To assess the amount of damages the Arbitrators took two elements into consideration: on the one hand the difference between the real value of the Shares as of June 30, 2007 (USD 3'292'000'000) and their selling price (USD 3'104'000'000), namely USD 188'000'000; on the other hand an illiquidity discount³ of USD 744'000'000 (*i.e.* the 20% of the market value of the share of the capital of W._____ represented by the A Shares) which reflected the depreciation due to the fact that the Claimant held a minority in V._____, a depreciation that would have been suppressed if the Claimant had effectively become the owner of all the shares of that holding company by acquiring the Shares and thus obtaining control of W._____.

C.

The Defendant stated its intent to seek revision of the award and on December 5, 2010 the Claimant sent to the Federal Tribunal a "preventive brief" with a view to opposing a stay of enforcement which could be applied for should a request for revision be filed.

On December 23, 2011 the Defendant (hereafter: the Petitioner) seized the Federal Tribunal of a request for revision with a request for a stay of enforcement. It submitted that the three aforesaid awards should be annulled and the matter sent back to the Arbitral tribunal for new arguments and a new decision. Alternatively the Petitioner applied for leave to prove the facts stated in support of its request for revision.

The Claimant (hereafter: the Respondent) expressed its view on the stay of enforcement in a brief of January 16, 2012. It then filed its answer on February 1st, 2012 submitting that the request for revision should be rejected.

By letter of its Chairman of January 16, 2012 the Arbitral tribunal stated that it had no comments on the merits or on the stay of enforcement.

In a reply of February 17, 2012 and a rejoinder of March 6, 2012 the Petitioner and the Respondent confirmed their previous submissions.

³ Translator's note: In English in the original text.

Reasons:

1.

According to Art. 54 (1) LTF⁴ the Federal Tribunal issues its decision in an official language⁵, as a rule in the language of the decision under appeal. When the decision was issued in another language (here English), the Federal Tribunal uses the official language chosen by the parties. In front of the Arbitral tribunal they used English and in the brief 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 set in Geneva. At least one of the Parties (in this case both) did not have its domicile in Switzerland at the decisive time. The provisions of Chapter 12 of PILA⁶ are accordingly applicable (Art. 176 (1) PILA).

2.2

The Federal Private International Law (PILA; RS 291) contains no provision as to the revision of arbitral awards within the meaning of Art. 176 ff PILA. The Federal Tribunal supplemented the lacuna in its case law. The grounds for revision of awards were those at Art. 137 OJ⁷. They are now contemplated at Art. 123 LTF. The Federal Tribunal is the competent judicial body to adjudicate a petition for revision of any international arbitral award, whether final, partial or interlocutory; its jurisdiction in this field extends only to the awards binding the arbitral tribunal which issued them as opposed to mere orders or procedural orders which can be modified or rescinded during the proceedings. If the Federal Tribunal grants revision it does not decide the merits but sends the matter back to the arbitral tribunal which issued the award or to a new arbitral tribunal to be constituted (ATF 134 III 286 at 2 and references).

In this case, the Petitioner invokes a ground for revision contained in the law (the discovery of pertinent new facts within the meaning of Art. 123 (2) (a) LTF). It claims to have become aware of them only on October 24, 2011 at the earliest. Filed on December 23, 2011, namely within 90 days after the ground for revision was discovered (Art. 124 (1) (d) LTF) the petition in front of the Federal Tribunal is admissible from a formal point of view, whether it addresses the final award or the two previous partial awards. Moreover the Petitioner explains that if the new facts it alleges were taken into consideration, they would lead the Arbitral tribunal to issue a new award which would release the Petitioner from any payment to the Respondent or would significantly reduce the amount to the very least. It has accordingly a legally protected interest to seek a finding that such facts exist so that the Arbitrators will issue a new decision in the case against the Respondent after annulling the three awards challenged, which gives it standing to seek revision (ATF 114 II 189 at 2 p. 190).

⁴ Translator's note: LTF is the French abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173.110.

⁵ Translator's note: The official languages of Switzerland are German, French and Italian.

⁶ 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.

⁷ Translator's note: OJ is the French abbreviation for the previous Statute organizing Federal Courts, which was abolished by the LTF.

3.

3.1

Pursuant to Art. 123 (2) (a) LTF revision may be sought in civil matters if the Petitioner discovers after the award some pertinent facts or conclusive evidence which it could not have invoked in the previous proceedings, to the exclusion of facts or evidence taking place after the decision for which revision is sought. Except on some points concerning revision for a violation of the ECHR the rules of the OJ as to revision were taken over by the LTF. Some systematic and editorial changes were however made. Thus, as opposed to Art. 137 (b) OJ, Art. 123 (2) (a) LTF no longer contains the inaccurate wording "new facts" but clearly states that they must be pertinent facts discovered afterwards to the exclusion of facts after the award. Yet case law concerning "new facts" remains entirely pertinent as to the merits. Therefore revision can only be justified by facts taking place until the time at which in the previous proceedings some facts could still be alleged but were not known by the Petitioner acting diligently; moreover the facts must be pertinent, *i.e.* such as to modify the factual findings on which the award challenged is based and to lead to a different solution on the basis of correct legal assessment (judgment 4F_3/2007 of June 27, 2007 at 3.1 and references). There is lack of diligence when the discovery of the facts or the evidence results from investigations which could and should have been done in the previous proceedings. It is only with reserve that it should be found that it was impossible for a party to state a specific fact in the previous proceedings because the ground for revision based on unknown facts at the time must not be used to remedy the Petitioner's omissions in the conduct of the previous proceedings (judgment 4A_528/2007, quoted above, at 2.5.2.2 and the authors quoted).

3.2

In support of revision the Petitioner claims that on October 24, 2011 a newspaper mentioned the commentaries made by the management of W. _____ as to the amounts paid by U.A. _____ to group Y. _____ (hereafter referred to as U. _____ and Y. _____ [substituted by the Respondent], to adopt the names used by both Parties). These commentaries referred to an intermediate report (January to September 2011) published by the Respondent on the 19th of the same month, in which it announced that it had received the amount of USD 100'000'000 from U. _____ on October 7, 2011 in fulfillment of the agreement concluded in November 2009 (*i.e.* the JVA) after receiving USD 50'000'000 from the same source when the agreement was signed. The Petitioner adds that on the following day, October 25, 2011, both companies published a press release in which they explained that the payments had been made with a view to uniting their efforts to enforce the award issued by the ICC tribunal against the Respondent after the Respondent renounced the right to seek the transfer of the Shares.

According to the Petitioner the undertaking by U. _____ in the JVA to compensate the Respondent up to USD 150'000'000 as a counterpart to its renunciation to seeking the delivery of the Shares, then the payment of part of that amount during the proceedings unbeknownst to the Petitioner, are new and pertinent facts in two ways: on the one hand they would show that the Respondent did not act in good faith in the arbitral proceedings, which would affect all the conclusions drawn by the arbitrators in the three awards they issued successively and should have led them to deny the very existence of the sales contract that allegedly became effective on May 9, 2005; on the other hand the evidence to be adduced would establish that the compensation given to the Respondent was overvalued by an amount equal to at least USD 150'000'000 without taking interest into account.

3.3

The Respondent denies that the facts alleged by the Petitioner would be new or pertinent. It is appropriate to start with reviewing the first of these two defenses for should the first requirement of Art. 123 (2) (a) LTF fail to be met this would by itself cause the petition for revision to be rejected and render superfluous the analysis of the other cumulative condition that such a petition must fulfill.

3.3.1 According to the Respondent the Petitioner knew, or at least it could have known by exercising a little bit of diligence, the new facts on which it bases its petition for revision.

First of all the JVA concluded on November 11, 2009 was accessible to the general public as it had been registered with the United States Securities and Exchange Commission (SEC) by way of the 13D form and published on the SEC website. Moreover the November 19, 2009 letter (see B.d above), which was copied to counsel for the Petitioner, made an express reference to it by referring to an explanatory press release attached. Furthermore the Respondent's report for the year 2009, published on March 22, 2010, pointed to the JVA under the heading "Highlights and achievements" (p.3) and mentioned twice an amount of [figure omitted] paid pursuant to that agreement (pp.9 and 36). Finally the Petitioner itself mentioned it in the brief entitled "Answer to Claimant's Request for Damages", which it put into the arbitration record on March 31st, 2010 (see § 74 and 76 to 79 of that brief with reference to exhibit RX-126 at footnote 69, corresponding to the 13D form). It is thus established that it was aware of the JVA some five and a half months before the hearing of the Arbitral tribunal devoted to the assessment of damages (September 13 and 14, 2010) and even more if the decisive date is that of the filing of its Post-Hearing Brief, namely October 19, 2010. Yet, says the Respondent, the JVA contained at its Art. 5 a specific reference to the arbitration proceedings at hand ("the YX Claim", defined at p. 3 (I) of the JVA): "*The Parties agree to pursue and resolve the ... Claim and the YX Claim and then proceed following resolution of those claims as set out in Schedule 5 to this Agreement*". Moreover the Petitioner acknowledges in its request for revision (§ 53) that according to Art. 5 of the JVA the conditions agreed by U. _____ and the Respondent to resolve the dispute which is the object of the arbitration are contained in Enclosure 5. Therefore, still according to the Respondent, the Petitioner, a company very experienced in business matters should at the very least have wondered as to the scope of the JVA and specifically as to Art. 5 of this agreement, which would have necessarily led it to worry about the contents of Enclosure 5, which was not in its possession. To be fully clarified in this respect it would have been enough for the Petitioner to ask its opponent to produce the document and it would then have become aware of the facts which it alleges today to support its petition for revision. Under such conditions, according to the Respondent, the Petitioner forfeited the right to invoke the ground for revision based on Art. 123 (2) (a) LTF.

3.3.2 This argument is consistent with the documents in support and is persuasive to this Court irrespective of the objections raised by the Petitioner in this respect.

According to the Petitioner the Respondent would have voluntarily omitted to disclose the contents of Enclosure 5; it would have refrained from submitting this document to the SEC and it would have presented the agreement with U. _____ misleadingly in its press release published on October 25, 2011 and would still be concealing some important documents such as the power of attorney provided at Art. 8 of Enclosure 5. The Petitioner's allegations impute intentions to the Respondent. Indeed the

⁸ Translator's note: In English in the original text.

very fact that the Respondent did not produce Enclosure 5 in the arbitral proceedings or elsewhere does not mean that it would have had the intent to conceal that document from its opponent. It would have been in vain if it had because the existence of Enclosure 5 clearly appeared in the very text of the JVA, so that the Petitioner could simply request the production of that document to defeat such a purpose. Moreover the Respondent credibly explains the reasons in support of its persuasion that it always took the view that the JVA and Enclosure 5 had no direct impact on the computation of the damage it suffered as a consequence of the breach of the contract of sale of the Shares. Moreover one does not see why the press release after the final award would confirm the intent to conceal attributed to the Respondent. The same applies to the aforesaid power of attorney, which the Respondent, incidentally, produced *sua sponte* after becoming aware of the argument concerning it.

The Petitioner argues furthermore that neither the JVA in its entirety nor its Art. 5 or the Respondent's report for the year 2009 would have enabled it to guess the existence of the commitment taken by U. _____ as to the payment of the USD 150'000'000 to the Respondent and as to the payment it had already made for part of that amount, namely USD 50'000'000. It adds that even if it had been requested to do so, the Respondent would have refused to produce Enclosure 5 anyway. However the latter argument is only hypothetical, which deprives it of any credit. Moreover the Petitioner does not claim and *a fortiori* does not demonstrate that it would not have been in a position to override a possible obstruction by the Respondent by resorting to proper proceedings. Furthermore the Petitioner's argument does not appear convincing: it does not matter that the aforesaid commitment by U. _____ towards the Respondent would not result directly from the JVA or from the aforesaid report. The fact is that it was mentioned black on white in Enclosure 5. Yet, no matter what the Petitioner says under the circumstances of this case and considering the considerable amounts in dispute in the arbitration, the most elementary prudence required the Petitioner to enquire as to the contents of Enclosure 5 of which it could not but discover by reading Art. 5 of the JVA that it concerned in part the arbitral proceedings against the Respondent, a signatory of the JVA. The Petitioner would thus have become aware of the existence of the fact that it claims to have discovered only after the final award was notified.

Finally, contrary to the Petitioner's opinion, the investigations which could and should have been carried out during the arbitral proceedings did not imply a general discovery obligation on its part (as to the institution of discovery see among others POUURET/BESSON, Comparative Law of International Arbitration, 2nd ed. 2007, nr 652). The duty to carry them out simply arose from the very nature of the petition for revision and from the duty of diligence, even curiosity, which is inherent to this extraordinary legal recourse. It was not akin to a procedure purporting to gather evidence, which could have a more or less close connection with the dispute.

3.4

The foregoing shows that one of the two cumulative requirements of Art. 123 (2) (a) PILA is not met in this case. Consequently the petition for revision can only be rejected and it is not necessary to review the merits of the second requirement.

The outcome given to the petition for revision renders moot the request for a stay of enforcement that it contained.

4.

The Petitioner shall pay the costs of the federal proceedings (Art. 66 (1) LTF) and pay compensation to the Respondent (Art. 68 (1) and (2) LTF).

Therefore the Federal Tribunal pronounces:

1.

The petition for revision is rejected.

2.

The judicial costs set at CHF 100'000 shall be borne by the Petitioner.

3.

The Petitioner shall pay to the Respondent an amount of CHF 200'000 for the federal judicial proceedings.

4.

This judgment shall be notified in writing to the Parties and to the Chairman of the ICC tribunal.

Lausanne, April 30, 2012.

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

The Presiding Judge:

The Clerk:

Klett (Mrs)

Carruzzo