4A_596/2008[1]

Judgement of October 6, 2009

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: M. RAMELET.

X._____ (formerly A._____),

Defendant[2] and Petitioner,

Represented by Mr Philippe NEYROUD and Mrs Nathalie OPPATJA

v.

1. Y._____ Company in liquidation,

Claimant and Respondent[3],

Represented by Mr Bernhard BERGER and Mr Christian WITSCHI

2. Z._____ limitada,

Claimant and Respondent

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[1] Translator's note: Quote as X._____ *v.* Y._____ and Z._____, 4A_596/2008. 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: The word "Defendant" has been used intentionally. It refers to the arbitral proceedings and is used to avoid confusions with the Respondent in the proceedings in front of the Federal Tribunal.

[3] Translator's note: Respondent in the proceedings in front of the Federal Tribunal and Claimant in the arbitration proceedings.

Facts:

A.

A.a At the end of the years 1980, the state of B._____[4] considered the acquisition of a new fleet of frigates for its navy (the so called MM._____ project).

In September 1989 a delegation of state B._____ went to the state of D._____[5] where it received a presentation of the new NN._____ frigate, then in project. Further to that visit, the superior officers of state B._____ recommended the acquisition of the frigates of state D._____ of the NN._____ type. On October 5, 1989, the ministry of defence of state B._____ approved the choice of the aforesaid frigates.

In December 1989, state D._____ granted the export licence. However, in January 1990, the government of the aforesaid state, faced with the opposition expressed by state C._____[6], changed its position at the request of Mr E._____[7], then minister of state and minister of foreign affairs of state D._____, so that the licence previously granted for the anticipated contract was cancelled.

A.b However, negotiations took place with a view to resolving the stalemate generated by the veto of state D._____.

On July 12, 1990 F._____[8], then the director for general matters of group G._____[9] and in charge of the Swiss branch of the same group, as well as Y._____ Company (today in liquidation), represented by Mr H._____, entered into a fiduciary agreement[10]. According to that agreement, the principal (F._____) gave to the fiduciary (Y._____

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[4] Translator's note: The state referred to here is the Republic of China (Taiwan).
[5] Translator's note: Reference is made here to France.
[6] Translator's note: This means the People's Republic of China.
[7] Translator's note: This means Mr Roland DUMAS, then French minister of foreign affairs.
[8] Translator's note: Reference is made here to the late Mr Alfred SIRVEN, one of the key characters in the investigation of the ELF bribery scandal.
[9] Translator's note: What is meant here is ELF AQUITAINE.
[10] Translator's note: A "fiduciary" in Swiss parlance means someone who is empowered to act in his name but in reality on someone else's behalf. The position of a "fiduciary" is somewhat similar to that of a trustee.

Company) the right to act in its own name. It has been found that F._____ was thus empowered to issue direct instructions to Y._____ Company.

A week later, in a contract letter of July 19, 1990, A._____, which had become X._____, promised to Company Y._____ compensation for the help that the latter Company would give to the former in connection with the sale of the frigates to state B._____ and would keep A._____[11] regularly informed of the status of the matter with regard to its operational, financial, technical and commercial aspects. As a counterpart for its services, Y._____ Company was to receive a net payment of 1 % on the total amount of the sales contracts of the frigates, to take place when the purchaser would pay the vendor. Under paragraph 9 of the contract, it was stated that all disputes would be finally resolved according to the Rules of the International Chamber of Commerce by one or several arbitrators appointed pursuant to those rules and with the law of state D._____ applicable.

Paragraph 10 stated that the agreement, concluded *intuitu personae*[12], could not be assigned to any third party without the specific previous written authorisation of A._____. After its execution, the agreement was deposited in the safe of a major bank of state D._____, after it had been read and "examined" by S._____, then an executive of group G._____ and F._____'s trusted man.

The aforesaid contract is not precise as to its contents, to the extent that reading it does not make it possible to determine the nature of the information expected by A._____. The real purpose of that agreement will be discussed hereunder.

On June 20, 1991, Y._____ Company assigned its claims and obligations arising from the July 19, 1990 contract to Company Z._____ limitada (hereafter Z._____). The assignment stated that it was governed by Swiss law and that it would be notified to A._____ through F._____.

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[11] Translator's note: Reference is made here to THOMSON CSF, the future THALES.

[12] Translator's note: In latin in the original text. The expression means strictly connected to the person entering the contract.

A.c During the first half of 1991, the government of sate D._____ changed its position and finally gave its approval to the exports of the six frigates.

The political obstacles arising from the reticence of the diplomacy of state D._____ and the opposition of state C._____ to the sale of the frigates having been removed, the so-called RR._____ contract was entered into on August 31, 1991 between J._____ Corporation, representing the interests of the state of B._____ and A._____. It concerned the sale by A._____ of six observation and surveillance ships (type NN._____ frigates) to be built in state B._____ on behalf of the navy of that state; the gross price was set at USD 2'512'585'152.-, with a price adjustment mechanism. Art. 18 of the so-called RR._____ contracts forbade the use of any intermediary and the payment of any commission. An amendment to the aforesaid contracts eventually provided for the building of the frigates in state D._____ and not in state B._____.

On November 26, 1991, Z._____ asked the Chairman of A._____, Mr K._____ to pay part of the compensation foreseen by the July 19, 1990 contract. On December 4, 1991, A._____ refused because the services anticipated by the contract had not been performed.

B.

B.a On September 2, 1992, the companies Y._____ and Z._____ (the Claimants) filed a request with the ICC concerning the dispute with A._____ (the Defendant). Claimants sought payment of FF 160'000'000.- as compensation for the services given to the Defendant pursuant to the July 19, 1990 contract. They claimed that the purpose of that agreement was to solicit the services of L._____, a consultant of group G._____ in the state of C._____, so that he would use his network of relationships in the aforesaid state to cause the opposition of that state to the conclusion of the contract for the sale of the frigates to state B._____ to cease.

A._____ principally submitted that the July 19, 1990 contract should be found to be null and subsidiarily rescinded, the claims being adjudicated as groundless. In particular, it claimed that L._____'s intervention had as its real purpose to pay a third party who had been able to obtain the authorisation of the government of state D._____ to conclude the sale of

the frigates with state B._____. The obligation to pay anticipated by the July 19, 1990 contract would thus have an illicit cause according to the law of state D._____ and be contrary to public policy, whether internal or international, namely influence peddling, from which it was to be found that the agreement was null.

On November 17, 1992, the ICC approved the choice of the arbitrators appointed, namely M._____ for the Claimants and N._____ for the Defendant. On January 6, 1993, the ICC appointed O._____ as Chairman of the arbitral tribunal.

Terms of reference were signed in Paris on July 12, 1993, according to which the seat of the arbitration was in Geneva and the proceedings would be conducted in French. According to the Terms of reference, the points in dispute included in particular the existence and the validity of the July 19, 1990 contract letter and that of the assignment of rights and obligations resulting from the June 20, 1991 contract.

The arbitral tribunal held two hearings to examine witnesses in March 1994; on March 15, it heard F._____ and L._____, then correspondent of group G._____ in the state of C._____, P._____, then in charge of international matters at A._____ and S._____; on March 16 were heard Q._____, then deputy director of A._____ in charge of the international division for Asia and R._____, then an executive of A._____ who had been in charge of the negotiation of the contract for the frigates.

After hearing CC._____, a movie producer and a friend of Mrs T._____[13] then employed for public relation purposes by group G._____ on July 19, 1994, the arbitral tribunal heard Mr U._____ then the general manager of A._____ on April 25, 1995.

On November 21, 1995, the arbitrators heard again L._____, S._____ and F._____ in Paris. Asked to appear at the same hearing, H._____ the director of Y._____ Company and of Z._____ did not appear, taking the view that his lawyers would represent him sufficiently; V._____ chief executive of group G._____ until

[13] Translator's note: Reference is made here to Mrs Christine DEVIERS-JONCOUR, a key character in the ELF scandal.

1993 and, at the aforesaid date, Chairman of group W._____, did not heed the arbitrators' invitation but sent them a letter dated November 20, 1995.

B.b On July 21, 1996, the three arbitrators issued an arbitral award. According to that award, written in one block, the assignment of rights by Y._____ in favour of Z._____ was not binding on A._____; accordingly, Z._____ had no standing to claim; the July 19, 1990 contract was not null and accordingly valid and had to produce all its effects; it was found that A._____ entered into the anticipated contract with state B._____ and that as a consequence payments were made to its advantage; A._____ was ordered to pay to Company Y._____ an amount of USD 25'125'851.52 and FF 12'691'040.-; A._____ was ordered to pay interest at the rate set by the law of state D._____ from the date of receipt of each payment made by state B._____. The arbitral tribunal found that from the hearings and confrontations which it had carried out it resulted "beyond any contestation the reality of the services expected from Mr L._____ and carried out by him". L._____ had thus been entrusted by A._____ to appease the hostility manifested by state C._____ towards the sale of the frigates to state B._____, a task he had performed to A._____'s satisfaction. From that the arbitrators deducted that the July 19, 1990 contract had a real cause and that the services arising from that cause had been performed by Company Y._____ and Z._____ through L._____ (paragraph 59 and 60 of the July 31, 1996 award).

The arbitrators stated that according to the law of state D._____, applicable to the dispute, it was certain that a contract providing for payment for influence peddling is void due to Art. 1108 and 1113 of the applicable Civil code[14], such nullity being not germane to the law of state D._____ as it is also consecrated by international public policy (par. 63). Explicitly referring to the statements by L._____ and F._____ as well as to the letter from V._____ sent on November 20, 1995, they then held that the July 19, 1990 contract did not pay for any favour solicited from any authority of state D._____ (in this case the government of that state), nor from any authority of state B._____ but exclusively for the steps taken towards the authorities of state C._____, so they would lift the political objections they had raised with the government of state D._____ (par. 68 and 69). Stating that no influence had been peddled with the authorities of state D._____ - or those of

[14] Translator's note: This means the French Civil code.

state B._____ - , nor with the authorities of state C._____, the arbitral tribunal rejected A._____'s argument based on the presence of an illicit clause affecting the contract in dispute (par. 70). Finally, the arbitrators found that the assignment of claims and obligations arising from the July 19, 1990 contract by Y._____ Company to Z._____ was not valid under the law of state D._____, A._____ having failed to approve the assignment in advance and specifically as required by Art. 10 of the July 19, 1990 agreement. Consequently they found that Z._____ had no standing to claim (par. 74 and 75). After finding that A._____ had not disputed the figures presented by Y._____ Company, the arbitral tribunal found that the Defendant was to pay to that Claimant the contractually agreed percentage of 1 % of the price of the sale of the frigates (par. 80 and 81).

On September 4, 1996, the competent court[15] of state D._____ declared the award enforceable. On December 20, 1996 A._____ appealed that decision in front of an appeal court of the aforesaid state[16].

B.c Seized of a Public law appeal within the meaning of Art. 191 of the Federal law on International Private Law of December 18, 1987 (PILA[17]; RS 291) and 85 (c) OJ[18] by A._____ against the arbitral award, the Swiss Federal Tribunal rejected the appeal to the extent that the matter was capable of appeal and did so in simplified proceedings according to Art. 36 (a) OJ in a decision of January 28, 1997 (case 4P.240/1996). The Appellant had to pay CHF 60'000.- for costs and to compensate Y._____ and Z._____ as joint creditors for an amount of CHF 70'000.- as a share of their costs.

The federal court essentially held that the arbitral tribunal had not violated the Appellant's right to be heard from the point of view of Art. 190 (2) (d) PILA by not hearing H._____ and that the award was not inconsistent with public policy as encompassed in Art. 190 (2) (e) PILA when it held, particularly on the basis of all the testimony received (see par. 59 of the award), that L._____ had diligently carried out the mission he had accepted to

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[15] Translator's note: This means the presiding Judge of the ordinary court of Paris (*Tribunal de grande instance*).

[16] Translator's note: This means the Paris court of appeal.

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

[18] Translator's note: OJ is the French abbreviation for the statute in force at the time, which organised the Federal courts in Switzerland.

accomplish on A._____'s behalf, which was to remove the hostility of state C._____ to the sale of the frigates to state B._____.

B.d

On February 26, 1997, A._____ filed a criminal complaint and intervened as plaintiff against unknown for attempted fraud and complicity. The complaint was filed with the senior examining magistrate[19] of the capital of state D._____[20]. The plaintiff alleged that the arbitrators' opinion had been distorted by several written and verbal testimonies, which would have wrongly persuaded the arbitrators that L._____ had carried out some services in state C._____ which would justify the payment of the commissions under dispute when in reality L._____'s services were imaginary.

On March 7, 1997 the competent state attorney[21] requested an investigation for attempted fraud. The matter was entrusted to examining magistrate AA._____[22]. F._____, CC._____, Mrs T._____, V._____, L._____, S._____ and DD._____, a former executive of A._____ were put under investigation.

In a decision of September 7, 1999, the Court of appeal stayed the proceedings in the appeal made by A._____ against the decision of September 4, 1996 declaring the arbitral award enforceable. The stay would remain until a final decision in the investigation triggered by the criminal complaint of A._____.

B.e On October 1st, 2008, examining magistrate AA._____ issued a decision dropping the charges[23]. Based on Art. 6 of the Code of criminal procedure of state D._____ he found that the prosecution of F._____ was no longer possible as he had died on February 12, 2005 during the investigation and he held that there were no sufficient suspicions against CC._____, Mrs T._____, V._____, L._____, S._____ and DD._____. However, the examining magistrate held that F._____ had committed fraud to secure a judgment.

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[19] Translator's note: The French word is "*Juge d'instruction*". The *Juge d'instruction* is a magistrate in charge of investigating criminal cases under French law.

[20] Translator's note: This means Paris.

[21] Translator's note: This means the Paris attorney general "*Procureur de la République*".

[22] Translator's note: This means the French examining magistrate Renaud VAN RUYMBEKE.

[23] Translator's note: The French expression is "*ordonnance de non lieu*", a decision in which an examining magistrate or another court finds that the results of a criminal investigation do not justify sending the defendant to trial.

The reasons of that decision will be referred to hereunder to the extent necessary.

C.

Based on the aforesaid decision of October 1st, 2008 holding that F._____ had committed fraud in the proceedings, X._____ (the Petitioner) filed a request for revision based on Art. 123 (1) LTF[24] against the arbitral award of July 31, 1996. It submits that the award should be annulled with costs.

Y._____ in liquidation (Respondent 1) submits principally that the matter is not capable of revision and subsidiarily that the request should be rejected.

Z._____ limitada (Respondent 2) did not take a position.

The arbitral tribunal, through its Chairman, did not take a position as to the request for revision, limiting itself to providing the Federal Tribunal with the list of exhibits in the arbitral proceedings which led to the July 31, 1996 award.

Reasons:

1.

The Federal law on the Federal Tribunal (LTF) came into force on January 1st, 2007. According to Art. 132 (1) LTF, the law applies to the proceedings initiated in front of the Federal Tribunal after its entry into force; however it applies to the appeal proceedings only to the extent that the decision under appeal was issued after the LTF came into force. Since revision is not an appeal within the meaning of Art. 132 (1) LTF, the exception in that provision is not applicable to revision proceedings (decision 4F_3/2007 of June 27, 2007 at 1; see also PIERRE FERRARI, in Commentaire de la LTF, Berne 2009, n°8 ad Art. 132 LTF p. 1244 and the decision quoted). Consequently, the request for revision made by the Petitioner on December 17, 2008 falls under the LTF, particularly Art. 121 ff of that law.

[24] Translator's note: LTF is the French abbreviation for the Federal Statute of June 17, 2005 organising the Federal Tribunal, RS 173.110, which substituted the previous Statutes know as "OJ" in its French abbreviation.

2.

The Petitioner raises the ground for revision stated at Art. 123 (1) LTF. It claims that the criminal investigation conducted in state D._____ which led to the decision of October 1st, 2008 confirmed that the arbitrators had been misled by the statements of several witnesses as to the beneficial owner of Y._____ in liquidation and with regard to L._____'s alleged activities. It explains that the examining magistrate thus found that fraud had been committed to obtain a decision by F._____ as he testified in front of the arbitral tribunal.

3.

3.1 The Federal Statute on Private International Law contains no provision with regard to the revision of arbitral awards issued in an international arbitration within the meaning of Art. 176 ff PILA. According to case law, which filled that lacuna in the statute, federal law gives the parties in international arbitral proceedings the extraordinary recourse of revision, for which the general jurisdiction of the Federal Tribunal is given without prejudice to the option incorporated in Art. 191 (2) LDIP (ATF 118 II 199 at 2 and 3; 129 III 727 at 1 p. 729). Case law in this respect was recently confirmed (ATF 134 III 286 at 2.2).

The Federal Tribunal accordingly has jurisdiction irrespective of the nature of the arbitral award, which may be final, partial or interlocutory, yet to the extent that the award is finally binding on the arbitral tribunal from which it originates, which is not the case if the award remains subject to a specifically reserved change (ATF 134 III 286 at 2.2; 122 III 492 at 1b/bb p. 494). If the Federal Tribunal grants a request for revision against an international arbitral award, it does not decide the matter on the merits but issues a decision annulling the award (*judicium rescindens*[25] or judgment annulling) and sends the matter back to the arbitral tribunal that decided the case or to a new arbitral tribunal to be constituted (ATF 134 III 286 at 2 p. 287 and cases quoted).

3.2 Under the aegis of the Federal Statute Organising Courts of December 16, 1943 (OJ), abrogated as of December 31st, 2006 (Art. 131 (1) LTF), the grounds for revision of an international arbitral award were those stated at Art. 137 OJ and Art. 140 to 143 OJ applied by analogy to the revision proceedings (ATF 118 II 199 at 4 p. 204). The entry into force of

[25] Translator's note: In latin in the original text.

the LTF on January 1st, 2007 (Art. 133 LTF) did not change that, particularly to the extent that the ground for revision of Art. 123 (1) first sentence LTF is derived from the rule contained at Art. 137 (a) first sentence OJ, making revision possible "when a criminal investigation establishes that the judgment was influenced to the Petitioner's detriment by a crime even if no sentence was issued" (see FERRARI, op. cit., n° 1 at Art. 123 LTF). Accordingly, case law issued with regard to Art. 137 (a) OJ and legal writing in this respect entirely retain their value.

3.3 Should a petitioner avail itself of a ground for revision based on Art. 123 LTF, as does the Petitioner in this case, he must act within 90 days following its discovery (Art. 124 (1) (d) LTF) under penalty of forfeiture (FERRARI, op. cit., n° 2 at Art. 124 LTF). In the case of Art. 123 (1) LTF, the time limit runs from the time when the Petitioner knows of the enforceable sentence or, when that is no longer possible, when he knows of the existence of the crime and the evidence proving it (FERRARI, op. cit., n° 7 in fine at Art. 124 LTF, referring to POUDRET Jean-François, Commentaire de la loi fédérale d'organisation judiciaire, Berne 1992, vol. V, n° 1.2 at Art. 141 OJ, p. 60). As an exception to the absolute time limit of ten years beyond which revision is no longer possible according to Art. 124 (2) *in initio* LTF, revision remains possible beyond ten years after the decision under challenge became enforceable if the latter was influenced by a crime to the Petitioner's detriment (Art. 124 (2) (b) LTF).

In this case the Defendant filed a criminal complaint against unknown in the state of D._____ for attempted fraud and complicity because the arbitrators had been misled by several testimonies as to the services really performed by L._____ and it did so less than a month after the Federal Tribunal, in judgment 4P.240/1996 of January 28, 1997, rejected the public law appeal filed by the Defendant against the arbitral award of July 31st, 1996. After a very long investigation, the examining magistrate, in his decision of October 1st, 2008, found that a criminal prosecution against F._____ was no longer possible as he had died during the investigation, yet (the examining magistrate[26]) found that the latter had committed fraud in the proceedings by misleading the arbitrators in a plot purporting to have the Defendant ordered to pay some undue commissions to the Claimants.

[26] Translator's note: Added for the sake of clarity.

Represented by two Geneva lawyers, the Petitioner filed its request for revision of the award with a Swiss post office on December 17, 2008, *i.e.* 77 days after it learned of the examining magistrate's decision and it complied with the 90 days time limit of Art. 124 (1) (d) LTF. Also, as was just seen, the absolute time limit of ten years to seek revision is not applicable when the ground for revision is that of Art. 123 (1) LTF as raised by the Petitioner.

Consequently, the Petitioner did not forfeit its right to revision as claimed by Respondent Y._____ in liquidation.

3.4 As a Defendant in the arbitral proceedings which led to the July 31st, 1996 award, there is no denying that the Petitioner has standing to seek revision of that decision.

3.5 Revision is subject to the existence of a legal interest worthy of protection. The Petitioner must have a present and specific interest to the modification of the decision the revision of which is sought, such as the anticipated success may assure him (ATF 114 II 189 at 2 p. 190). As stated by POUDRET, the requirement of a present interest is for instance lacking when the Petitioner seeks the revision of a judgment of extradition that has already been carried out and the Petitioner has been sentenced abroad.

In this case, the court of appeal stayed the appeal proceedings by the Defendant against the decision of September 4, 1996 declaring the arbitral award enforceable in state D._____ and did so on September 7, 1999 until a final decision would be issued in the criminal investigation initiated as a consequence of the Petitioner's criminal complaint against unknown for attempted fraud on February 26, 1997.

The criminal investigation was brought to an end by the decision of October 1st, 2008 dropping the charges and the Defendant, which refused to pay to Y._____ in liquidation the amounts due according to the arbitral award of July 31st, 1996, has a present and real interest to the annulment of the decision of the arbitrators to the extent that it ordered (the Petitioner[27]) to pay to the aforesaid Company an amount in excess of USD 25'000'000 and FF 12'000'000.- with interest at the legal rate of the law of state D._____. The matter is

[27] Translator's note: Added for the sake of clarity.

accordingly capable of revision as to the required specific interest to the extent that it is aimed at Respondent 1.

However, to the extent that the arbitral tribunal rejected the submissions made by Respondent 2 against the Defendant, the Petitioner no longer has an interest worthy of legal protection to the annulment of that part of the award.

Accordingly, the matter is not capable of revision as far as Respondent 2 is concerned.

3.6 Finally, the request for revision explicitly states the ground for revision on which it relies, namely Art. 123 (1) LTF and it develops some arguments in this respect in connection with the arbitral award, thus meeting the requirements for reasons at Art. 42 (LTF) for any proceedings in front of Federal Tribunal (Florence AUBRY GIRARDIN, in Commentaire de la LTF, op. cit., n° 23 and 24 at Art. 42 LTF).

4.
4.1 According to Art. 123 (1) LTF revision may be sought when a criminal investigation establishes that the decision was influenced to the petitioner's detriment by a crime, even if no sentence was issued. If a criminal prosecution is not possible, evidence (of the crime[28]) may be adduced in another way.

It does not matter that the criminal investigation was conducted abroad, to the extent that the minimum procedural guarantees of Art. 6 (2) and (3) ECHR[29] (RS 0.101) and 14 (2) to (7) UN Covenant[30] II (RS 0.103.2) were abided by.

Only the crimes and offenses within the meaning of the (Swiss[31]) criminal Code are decisive, to the exclusion of misdeameanors (Art. 133 CP[32]) and of the cantonal law offenses (ELIZABETH ESCHER, in Commentaire bâlois, Bundesgerichtsgesetz, Bâle 2008, n° 3 at Art. 123 LTF; FERRARI, op. cit., n° 8 at Art .123 LTF). Crimes and offences are defined at Art. 10 (CP) with a view to the gravity of the penalty: crimes are those subject to a jail term

[28] Translator's note: Added for the sake of clarity.
[29] Translator's note: European Convention of Human Rights of November 4, 1950.
[30] Translator's note: International Covenant on Civil and Political Rights of March 23, 1976.
[31] Translator's note: Added for the sake of clarity.
[32] Translator's note: CP is the French abbreviation for the Swiss criminal code.

exceeding three years (2); other offences are those subject to jail term not beyond three years or a fine (3).

It does not matter whether the criminal offence was committed by a party or by a third party (WILHELM BIRCHMEIER, Handbuch des Bundesgesetzes über die Organisation der Budesrechtspflege, n. I/1 let. a at Art. 137 OJ). The essential element is the nexus between the offense committed and the decision the revision of which is sought. In other words, no matter when it was committed, the offence must have had an effective direct or indirect influence on the decision to the Petitioner's detriment, thus causing him to suffer an unfavourable result (ATF 81 II 475 at 2a; POUDRET, op. cit., n° 1.1 at Art. 137 OJ; FERRARI, op. cit., n° 10 and 11 at Art. 123 LTF).

That the decision was influenced to the Petitioner's detriment by a crime or another offence must have been established by a decision putting an end to a criminal investigation distinct from that leading to the decision the revision of which is sought, such as a decision closing an investigation or a judgment. The decision issued by the criminal court must demonstrate that the objective requirements of a crime or another offence were met. However, it is not necessary that the criminal proceedings should have led to someone being sentenced, as is explicitly stated at Art. 123 (1) LTF. Revision is accordingly possible according to that provision if the author of the crime escaped sentencing, for instance because he died during the investigation (ESCHER, op. cit., n° 4 at Art. 123 LTF; FERRARI, op. cit., n° 12 at Art. 123 LTF; POUDRET, op. cit., n° 1.2 at Art. 137 OJ, p. 23). In such a case, the court seized of the request for revision freely determines if the alleged crime was indeed committed (ATF 92 II 68 at 1a; 81 II 475 at 2b p. 479).

4.2

4.2.1 In its award of July 31st, 1996, the arbitral tribunal, particularly on the basis of the evidence of the witnesses it heard twice, namely F._____ and L._____ held that when it entered the disputed agreement of July 19, 1990 with Y._____, the Defendant was trying to put an end to the hostility of state C._____ towards the sale of the frigates to state B._____, an island which state C._____ considers as a "rebel" province. Y._____ entrusted L._____ with that delicate mission as he was then the correspondent of group G._____ in the state C._____. L._____ performed to the

Defendant's satisfaction as the opposition of that state to the sale of six observation and surveillance ships to state B._____ was removed. From that the arbitrators deducted that L._____ had performed some real services and that the agreement of July 19, 1990 did not have as its purpose to pay for a favour solicited from the government of state D._____. Accordingly, the Defendant had to pay the percentage of 1 % computed on the price of the frigates to Y._____, which had entirely fulfilled the obligations undertaken towards the former.

4.2.2 In his decision of October 1st, 2008, the examining magistrate, after an investigation which lasted longer than eleven years, held the following factual and legal elements as to the part played by F._____ in the sale of the frigates to state B._____.

The July 19, 1990 contract between X._____[33] (then A._____[34]) and Y._____ sought to obtain a change in Mr E._____'s position, at the time the Minister of foreign affairs of state D._____[35], as he had refused to authorise the sales of the frigates to state B._____ in order not to offend state C._____. X._____ had thus decided to retain the services which F._____ could deliver as he held a privileged position within group G._____ at the time. The latter was indeed making some opaque payments by way of fictitious salaries paid by its Swiss subsidiary, particularly to L._____ and to Mrs T._____. Yet she had claimed in front of some of the Petitioner's key executives on April 27, 1990 that she was in a position to obtain E._____'s support to the conclusion of the arms deal in question.

F._____ was trying to find a company which could act on a fiduciary basis for the transactions contemplated; to that extent, he sought H._____, whom he had known for a long time. Thus a fiduciary agreement was entered into on July 12, 1990 by F._____ and Y._____, represented by H._____, the former being henceforth in a position to give direct instructions to Company Y._____. Y._____'s compensation was set at 0,5 % of the amounts received.

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[33] Translator's note: This means THALES.
[34] Translator's note: This means THOMSON CFS.
[35] Translator's note: This means Roland DUMAS, then the French minister of foreign affairs.

A week later, namely on July 19, 1990, H._____, in the name of Y._____, signed the July 19, 1990 agreement with the Petitioner, at F._____'s request and that provided for the payment of a net commission of 1 % on the total sales price of the war ships.

Due to the privileged relationship she had with Mr E._____ Mrs T._____ succeeded in obtaining in the first half of 1991 that the minister approve the sale of the frigates to state B._____ by the Defendant.

It was held that the lack of any real services in state C._____ was confirmed by the fact that L._____ was not the real beneficiary of the commission which Y._____ was to receive.

At F._____'s request and for tax reasons, H._____ organised the assignments of the rights of Y._____ to Z._____ on June 20, 1991.

On July 4, 1991, namely about one month before the so called RR._____ contract was executed, F._____ and Z._____ entered into an agreement providing for a division by half of the 1 % commission which the Petitioner was to pay to Y._____ pursuant to the July 1990 agreement: half would go to an Irish company, the beneficial owner of which was F._____ and the other half was to be paid into a bank account belonging to Mrs T._____.

F._____ introduced L._____ to H._____ in the beginning of 1992, namely after the so called RR._____ contract was executed.

On October 6, 1992, hence more than a month after the arbitral proceedings were initiated, Z._____ and a company named EE._____, represented by L._____ signed at F._____'s request a contract in which L._____ would appear as the beneficiary of the aforesaid 1 % commission. On that basis, H._____ was in a position to state in front of the arbitrators that L._____ was the beneficiary of the aforesaid commission. F._____ even took the precaution to have that contract signed by the representative of group G._____ in the country of C._____ as a witness.

On October 15, 1996, Z._____ received a letter on L._____'s letterhead and from company EE._____ authorising F._____ among others to change the beneficiaries of the 1 % commission. It was found that company EE._____, controlled by L._____, was merely "a screen".

On August 1st, 1997, L._____ claimed the amount of USD 2'000'000.- for his services to F._____.

As the Defendant explicitly refused on December 4, 1991 to pay the commission as per the July 19, 1990 agreement, the Claimants submitted the dispute against the Defendant to the arbitral proceedings anticipated by the agreement in a request of September 2, 1992.

The examining magistrate pointed out that resorting to a network within state C._____ appeared as a subterfuge to hide from the arbitrators the "undisclosable" purpose of the July 19, 1990 contract, namely "a piece of influence peddling resulting in an illicit and immoral cause". L._____ appeared during the arbitration proceedings only when his name was waved as proof of the existence of a real network within state C._____ purporting to have intervened to remove the objections of state C._____ to the sale of the frigates to sate B._____.

The same magistrate finally found that F._____ committed a fraud to obtain a decision as, through Y._____, who was acting on his behalf and on his instructions he "deceived the arbitrators with a sham and by resorting to fraudulent manoeuvres aimed at having Company X._____ ordered to pay some undue commissions".

4.2.3 It cannot be denied in this case that the criminal investigation meticulously conducted in state D._____ was carried out in compliance with the procedural guarantees arising from the treaties. That point is not the object of any discussion.

Nothing would justify doubting the findings of the examining magistrate with regard to the behaviour of the late F._____ in the framework of the sale of the frigates to state B._____. It was thus found that F._____ instructed X._____ directly, a company controlled by H._____, with whom the former was bound by a fiduciary agreement since

July 12, 1990. Pursuant to that contract, H._____, on behalf of Y._____, executed the disputed agreement of July 19, 1990 with the Defendant.

It is clear from 4.2.2 above that F._____ organised a scheme of influence peddling to the detriment of the authorities of state D._____ and that he and Mrs T._____ were the beneficiaries of the commission as per the July 19, 1990 agreement, which was to pay for that illicit activity.

The staging carefully orchestrated by F._____, particularly when he brought forward L._____ to make believe that the latter played a decisive role in making the sale of the frigates possible, led the Arbitral tribunal to decide against the Defendant, Y._____'s opponent in the arbitral proceedings. It is by now recognised under Swiss law that deceiving a court to obtain a decision detrimental to the opposing party's monetary interests may constitute fraud in a case (Prozessbetrug[36]) falling within the definition of a fraud for the purposes of Art. 146 CP (ATF 122 IV 197 at 2).

In view of the evidence obtained in the criminal investigation conducted in state D._____, F._____ did indeed mislead the arbitrators to obtain the payment of the commission in dispute by the Petitioner to Y._____, a Company acting for F._____ on a fiduciary basis, the illegality of the July 19, 1990 agreement notwithstanding. As held by the examining magistrate, F._____ committed fraud to obtain a judgement. Fraud is a crime within the meaning of Art. 10 (2) CP.

The fact that such fraud to obtain a judgment was perpetrated had direct influence on the arbitrators' award. Indeed they pointed out that a contract for the payment of influence peddling would be void according to the law of state D._____ (par. 63 of the award), as that law governed the July 19, 1990 agreement. It appears accordingly that had the arbitrators known the real purpose of the aforesaid agreement – namely to cause E._____ to change his position, particularly through Mrs T._____, as (Mr E._____[37]) was then against the conclusion of the contract for the sale of the frigates with state B._____ - they would have found that influence had been peddled with the government of state D._____,

[36] Translator's note: In German in the original text. "*Prozess*" means trial and "*Betrug*" means fraud.
[37] Translator's note: Added for the sake of clarity.

which would have caused the July 19, 1990 agreement to be void and made a claim for any commission impossible.

Due to its being ordered by the arbitrators to pay some very high amounts, the Petitioner underwent damages as a consequence of the judgment fraud mentioned above.

The October 1st, 2008 decision, which closed the investigation, found that a criminal prosecution of F._____ was no longer possible as he had died during the investigation on February 12, 2005. As the author of the crime escaped a sentence only because he died during the investigation, the objective requirements of the crime involved were indeed met.

The requirements of Art. 123 (1) LTF for a revision of the arbitral award of July 31st, 1996 are entirely met. On the basis of the foregoing, the request for revision must be granted to the extent that it is aimed at Respondent 1, which requires the annulment of the aforesaid arbitral award.

According to case law (ATF 134 III 286 at 2 p. 287 already quoted and the cases quoted), the matter must be sent back to the arbitral tribunal that issued the decision or to a new arbitral tribunal to be constituted pursuant to the ICC Rules.

5.
The matter is not capable of revision as far as Respondent 2 is concerned whilst it is and the request against Opponent 1 has been entirely granted. In such a context, which sees the Petitioner essentially prevailing and failing only to the extent that its request was wrongly aimed at Respondent 2, the judicial costs, set at CHF 60'000.-, must be apportioned with nine tenths (i.e. CHF 54'000.-) borne by Respondent 1, the remaining tenth (i.e. CHF 6'000.-) being borne by the Petitioner (Art. 66 (1) LTF).

As to costs, once the claims are offset as indicated above, Respondent 1 shall pay to the Petitioner limited compensation set at CHF 64'000.- (Art. 68 (1) and (2) LTF).

Therefore the Federal Tribunal pronounces:

1. The matter is not capable of revision as to Respondent 2.

2. The request for revision against Respondent 1 is granted and the arbitral award of July 31st, 1996 is annulled.

3. The matter is sent back to the arbitral tribunal that issued the decision or to a new arbitral tribunal to be constituted pursuant to the ICC Rules.

4. The judicial costs, assessed at CHF 60'000.-, shall be borne by Respondent 1 up to CHF 54'000.- and by the Petitioner up to CHF 6'000.-.

5. The Respondent 1 shall pay to the Petitioner an amount of CHF 64'000.- as reduced costs for the federal judicial proceedings.

6. This judgment shall be notified to the representatives of the parties and to the ICC arbitral tribunal.

Lausanne, October 6, 2009

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

The presiding Judge (Mrs): The Clerk:

KLETT RAMELET