Swiss Supreme Court grants request for revision of arbitral award due to newly obtained evidence

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In *decision 4A_412/2016*, the Swiss Supreme Court considered a petition for revision of an international arbitral award due to newly obtained evidence.

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Speedread

In a German-language decision of 21 November 2016, which was published on 9 December 2016, the Swiss Supreme Court upheld a request for revision of an international arbitral award due to newly obtained evidence in the context of bribery. This is only the third time that the Supreme Court has upheld such a request.

In the arbitration proceedings, the respondent had argued that the agreement on which the claimant relied for its payment claim was null and void because its only purpose was to transfer bribes. However, the respondent did not succeed in proving this allegation because the claimant withheld relevant banking documents, even though the arbitral tribunal had ordered their production. Five years later, the respondent's legal successor obtained a relevant banking document in the course of criminal proceedings and filed an application for revision relying on that newly obtained evidence.

The Supreme Court found that the document, which existed at the time the arbitral award was rendered, would have allowed the respondent to prove its allegations of bribery in the arbitration proceedings and, on the basis of the arbitral tribunal's own reasoning, would have changed the outcome of those proceedings. (*Decision 4A_412/2016.*)

Background

There are no express provisions on revision of awards in Chapter 12 of the Private International Law Act (PILA). However, in accordance with the long standing practice of the Supreme Court, Articles 123(2)(a) and 124(1)(d) of the Federal Supreme Court Act (FSCA) apply by analogy to the revision of international arbitral awards.

Pursuant to Article 123(2)(a) of the FSCA:

> "[…] revision may be requested if the applicant subsequently learned of new material facts or discovered conclusive evidence which the applicant was unable to submit in the initial proceedings, to the exclusion of such facts and evidence which only arose after the decision."

According to this provision, a party may request revision of a Supreme Court decision if it subsequently learns of new material facts or discovers conclusive evidence which it was unable to submit in the initial proceedings. However, revision is excluded if these facts or evidence only arose after the decision.

Facts

In March 2005, company C (respondent) entered into a consultancy agreement (Agreement) with company B (claimant), governed by Swiss law. Under the Agreement, the claimant was obliged to provide information and advice to the respondent regarding the procurement of a large project in country V in return for payment of a commission fee in the amount of 2% of the transaction price. The Agreement further provided that the relevant anti-corruption laws must be complied with and that, in the event of a breach of these laws, the commission fee would be cancelled. In February 2006, the parties agreed to extend the Agreement to 31 December 2007.

From July 2005 to October 2007, the respondent entered into eleven contracts regarding the delivery of diesel engines with state-owned entity E, which was responsible for the import of power supply plants in country V and had close links with company D in country V. The total volume of these contracts amounted to over EUR100 million. Until June 2007, the respondent paid commission fees in the amount of approximately EUR1.6 million to the claimant but refused to pay outstanding fees amounting to around EUR1.2 million.

On 26 January 2009, the claimant initiated arbitration proceedings against the respondent under the *International Chamber of Commerce (ICC) Arbitration Rules (www.practicallaw.com/6-502-7911)* , the place of arbitration being Geneva, seeking, amongst other things, payment of the outstanding fees. In the arbitration proceedings, the respondent argued that the claimant had not rendered any services and that because the claimant had bribed officials in country V, the respondent was no longer obliged to pay commission fees under the

Agreement. In this context, the respondent contended that the claimant is an entity that was established with the sole purpose of transferring bribes. To prove its allegations and, in particular, to demonstrate who the beneficial owner of the claimant was, the respondent requested the production of documents regarding the opening of a bank account for the claimant in bank Z. While the arbitral tribunal granted the respondent's document production request, the claimant did not comply with the tribunal's order.

On 15 February 2011, the tribunal rendered its final award, granting the claimant's claims in part. While the tribunal remarked that the Agreement would be null and void under Swiss law if the respondent could prove the allegations of bribery, it ultimately held that the respondent had not succeeded in proving these allegations.

Five years later in the course of criminal proceedings in Germany against one of the respondent's former employees, the respondent's legal successor (petitioner) obtained the banking records, whose production the respondent had previously sought in the arbitration proceedings. One of these documents revealed the identity of the beneficial owner of the claimant.

On 1 July 2016, the petitioner filed a request for revision of the award with the Supreme Court, relying on this newly obtained document.

Decision

The Supreme Court granted the request for revision, annulling the award and remanding the case back to the original arbitral tribunal for reconsideration of the bribery allegations in light of the newly obtained evidence.

Applying Article 123(2)(a) of the FSCA by analogy, the Supreme Court remarked that "new evidence" only includes evidence that could not have been reasonably obtained during the arbitration proceedings. In addition, it is necessary that the new evidence would have affected the outcome of the arbitral tribunal's award if it had been known at the time.

Against this background, the Supreme Court stated that the newly discovered document revealed that the beneficial owner of the claimant was in fact a former employee of the respondent who had been responsible for the projects in country V. In the Supreme Court's view, it was evident that the claimant was not an independent third party providing services in accordance with the Agreement, but rather a vehicle to transfer bribes. The Supreme Court noted that the tribunal had explicitly stated in its award that the Agreement would be null and void if the respondent's bribery allegations were proven. The Supreme Court further held that the newly discovered document proved the identity of the claimant's beneficial owner, which the tribunal had considered to be material to proving the allegations of bribery. The Supreme Court found that the document existed already at the time when the award was rendered and that the respondent could not have produced it in the arbitration proceedings as the claimant had withheld the document.

Comment

In Switzerland, successful applications for the revision of international arbitral awards are extremely rare. The first time, the Supreme Court upheld an application for revision was in 2006 (*Decision 4P.102/2006*). Until the present decision, the Supreme Court had only granted one other application for revision in 2009 (*Decision 4A_596/2008*, discussed in *Legal update, Federal Tribunal revises international arbitral award influenced by fraud (www.practicallaw.com/8-500-6663)*).

The petitioner relied on evidence it obtained five years after the tribunal had rendered its final award. This confirms that revision is a remedy that can be invoked even if a long time has passed between the time of the award and the time the new facts or evidence are discovered.

The case also shows that an arbitral tribunal's measures to sanction non-compliance with a document production order are limited. Unlike a state court, it cannot impose coercive measures. The only sanction available to arbitral tribunals is to draw adverse inferences from non-compliance with its order (see Article 9.5 of the *International Bar Association Rules on the Taking of Evidence in International Arbitration 2010 (www.practicallaw.com/4-502-4254)*). However, due to the drastic consequences of this sanction, in practice, it is only rarely applied by arbitral tribunals.

Lastly, this case might also serve as a reminder that parties should consider reverting to international legal assistance in civil matters where a document appears crucial to the case, even if this incurs substantial delays.

Case

Decision 4A_412/2016 (www.practicallaw.com/w-005-0797) (Swiss Supreme Court).

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