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Federal Tribunal Revises Award Influenced by Fraud

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Summary
In a decision of 6 October 2009 (4A.596/2008), the Swiss Federal Tribunal granted revision of a final international arbitral award that was influenced by fraud. This is the first time since the entry into force of the Federal Statute on the Federal Tribunal in 2007, and only the second time since the entry into force of the Private International Law Act in 1989, that the Swiss Federal Tribunal has revised an international arbitral award. It is also the first revision based on the criminal offense prong of Art.123 FSFT. The particular facts of this case place it near the end of the spectrum, which suggests it has not lowered the bar on revision claims under Art.123 FSFT.

Facts
The case arose out of the "frigates-to-Taiwan" scandal that roiled French and Taiwanese politics in the 1990s and that has received considerable attention in the news media. Based on the information that has become public, it is possible to fill in some of the factual details that are anonymyzed in the Federal Tribunal`s decision.
In the late 1980s, Taiwan was working on a new coastal defense plan that included a fleet of small modern frigates. Following a visit by a high-ranking Taiwanese delegation in 1989, Taiwan decided to purchase from France six Lafayette-class frigates. After France initially authorized the sale, in January of 1990, based on objections by mainland China, and on instructions of then-foreign minister Roland Dumas, France withdrew its permission. International negotiations ensued.
On 12 July 1990, "F" [based on the details provided in the decision, "F" in all likelihood refers to Alfred Sirven, then a high-ranking manager at the French company Elf-Aquitaine] signed a fiduciary agreement with company Y, giving Y the right to act on Sirven`s behalf and authorizing Sirven to directly instruct Y. On July 19, 1990, a letter-agreement was signed between Thomson-CSF (now Thales), the manufacturer of the Lafayette frigates, and company Y ("the Contract"). Under the Contract, Y was to assist in Thales`s efforts to complete the sale of the frigates to Taiwan. Should the sale be consummated, Y would receive a commission of 1% on the frigates` sales value. The Contract was subject to French law and provided for ICC arbitration in Geneva. Article 10 of the Contract provided that it was concluded intuitu personae and could not be transferred to a third party without Thales`s prior written consent.
On 20 June 1991, Y purported to transfer its rights and obligations under the Contract to company Z.
During the course of 1991, the French Government reversed course, and on 31 August

1991, Thales signed a contract with the Taiwanese Government for the construction and sale of six Lafayette-class frigates for a total value of approximately $2.5 billion. Article 18 of this agreement specifically prohibited the use of any intermediary or the payment of any commission.

In November 1991, Z contacted Thales, asking for a portion of its commission due under the Contract. Thales refused. On 2 September 1992, Y and Z filed a Request for Arbitration, demanding payment of 160 million French Francs based on their services in connection with consummating the frigate transaction. Y and Z claimed that the purpose of the Contract was to recruit the services of L, who would use his network of contacts in mainland China to overcome Chinese opposition to the frigate deal. Thales claimed illegality under French law and international ordre public, arguing that L`s true role was to buy the services of a third person who had succeeded in obtaining the French Government`s authorization for the sale of the frigates. Following a number of witness hearings and receipt of written witness statements by a colourful cast of characters, on 31 July 1996, the arbitral tribunal issued an award ("the Award"). The tribunal found no illegality, determining that L had performed valuable services under the Contract in helping alleviate Chinese concerns over the sale of the frigates. The Contract had a legitimate purpose, Y (by way of engaging L) had performed under it, and therefore Y was entitled to commission payments in the amount of some $25 million plus some 12.7 million French Francs. The tribunal held that the transfer of contractual rights and obligations by Y to Z had been ineffective, dismissing Z`s claims. The tribunal admitted that a contract for corrupt influence peddling ("trafic d`influence") of the French Government would be illegal both under French law and pursuant to principles of international ordre public, but, referring in particular to the witness statements of F, L, and others, found no evidence of corrupt influence peddling via-a-vis the governments of France, Taiwan, or China.

On 4 September 1996, a French state court rendered an enforcement order ("ordonnance d`exequatur") of the arbitral award. Thales appealed that decision. Thales also brought setting aside proceedings against the arbitral award in Switzerland. The Swiss Federal Tribunal dismissed the appeal, finding no violation of the right to be heard (Swiss Private International Law Act ("PILA") Art.190(1)(d)) or incompatibility with the ordre public (PILA Art.190(1)(e)).

Subsequently, Thales filed a complaint claiming fraud and conspiracy with the French Prosecutor`s Office, which launched a criminal investigation ("the Investigation"). In the course of the inquiry, Sirven died in 2005. On 7 September 1999, a French Court of Appeals stayed its decision on the appeal Thales had filed against the enforcement order of the Award pending the outcome of the Investigation.

Following an 11-year inquiry, on 1 October 2008, a French Magistrate issued an order abandoning prosecution ("ordonnance de non-lieu") ("Order") and closed the Investigation, bringing no charges. However, the Order contained detailed findings revealing a sophisticated scheme of corruption orchestrated by Sirven. According to the Order, the true purpose of the Contract was to make corrupt payments to obtain a change in position of Roland Dumas toward the sale of the frigates to Taiwan. Y was to be used as a vehicle for such payments. Only after the Request for Arbitration was filed in 1992 did Sirven bring L into the picture, arranging the signing of an agreement that made L look like the beneficiary of the Thales commission payments. Based on that evidence, the Magistrate found that Sirven had committed a "fraud on the judgment" and had, using company Y, misled the arbitrators into issuing an award

requiring Thales to pay the commission.

Citing the Order, on 17 December 2008 Thales ("Claimant") filed a request for revision of the Award before the Swiss Federal Tribunal pursuant to Art. 123(1) of the Federal Statute on the Federal Tribunal ("FSFT") against Y ("Respondent 1) and Z ("Respondent 2").

Article 123(1) permits a petition for revision where "criminal proceedings establish that the decision was influenced to the detriment of the moving party by a felony or a crime, even if no conviction ensued. If criminal prosecution is not possible, proof may be brought in another manner."

Decision

In its 6 October 2009 decision, the Swiss Federal Tribunal granted Claimant`s request for revision with respect to Respondent 1.

Power of Revision

The Tribunal recited established precedent that the lack of an explicit provision in the PILA for revisions of international arbitral awards is a lacuna that the Federal Tribunal has the power to fill. (Cf. BGE 118 II 199, BGE 129 III 727). Those decisions were based on the old Federal Statute on the Organization of the Federal Judiciary ("OJ"), which was abrogated upon the entry into force of the FSFT on 1 January 2007. The Tribunal confirmed its case law in BGE 134 III 286 that revision is also available under the FSFT, and confirmed that its revision jurisprudence based on old article 137(a) OJ remains good law under the FSFT, in particular since Art. 123(1) FSFT is identical to Art. 137(a) OJ.

Admissibility

The Tribunal found that Thales`s request was timely. Thales acted within 90 days of "discovering" the grounds for revision (Art.124(1)(d) FSFT), i.e. the Order. Because Thales`s application for revision was based on Art.123(1), the statutory period of limitations of 10 years from the date of the arbitral award was inapplicable, per Art.124(2)(b) FSFT.

The Tribunal confirmed that the Award was final and capable of revision, and that Claimant as a party to the underlying arbitration had standing to seek revision.

The Tribunal restated doctrine that revision requests are admissible only if Claimant can show an interest worthy of judicial protection, i.e. a "specific and current" interest in the revision of the award and that the revision must be capable of changing the outcome of the award. Such an interest would not be found, for example, where a request for revision was brought against an extradition order that had already been executed. Here, Thales had a specific and current interest in the revision of the Award under which it was liable to pay millions to Respondent 1. However, Thales had no sufficient interest in revision of the Award as against Respondent 2, because the Award had dismissed Respondent 2`s claims against Thales. Therefore, Thales`s request for revision against Respondent 2 was inadmissible.

Substantive Conditions for Revision Based on a Criminal Offense (Art. 123(1) FSFT)

The criminal offense must be sufficiently serious – either a "crime" or "délit" (Art. 10 Swiss Penal Code), but not a "contravention" (Art. 103 Swiss Penal Code) or an "infraction" under the Cantonal penal code. It does not matter whether the crime was committed by a party to the arbitration or by a third party. The "key requirement" is that the criminal offense influenced "directly or indirectly" the outcome of the arbitration to the detriment of the Claimant. This influence must have been shown in a completed criminal proceeding (distinct from the decision for which revision is sought)

that further must have established that the "objective conditions" of a criminal offense were met. As specified in Art. 123(1) FSFT, the proceeding need not have resulted in a conviction. In those cases, it is left to the Federal Tribunal to determine if the criminal offense was committed. The Federal Tribunal held that the fact that the criminal proceeding occurred in France was irrelevant, provided it had observed certain minimal procedural guarantees, which clearly was the case here.

The French Magistrate, at the completion of a criminal investigation, had found that Sirven had committed a fraud on the judgment, and that there was no evidence contradicting these findings. The Federal Tribunal reasoned that because the only reason Sirven escaped a conviction was that he died during the course of the Investigation, the "objective conditions" of a crime were met. Swiss jurisprudence establishes that misleading a judge to obtain a decision causing pecuniary injury to an adverse party can constitute "fraud in the process" ("Prozessbetrug"), which is comprised in the definition of fraud under Art. 146 of the Swiss Penal Code. (Cf. BGE 122 IV 197). Fraud is a crime under 10.2 of the Swiss Penal Code.

This fraud had a direct influence on the Award. The arbitrators had based their decision to a significant extent on the false witness testimony of Sirven, L, and others about L`s alleged mission to try to alleviate China`s opposition to the frigate deal, The arbitrators had concluded that L provided valuable services under the Contract in getting China to relent, and that the Contract did not have as its object illicit payments to the French Government. The story about L`s work in China was a carefully orchestrated fabrication, and the true purpose of the Contract was to enable Sirven`s efforts – with the aid of and by giving directions to Respondent 1 – to make corrupt payments to French government officials. The Federal Tribunal reasoned that "it appeared that had the arbitrators known the real object of the Contract," they would have held that corrupt influence peddling had been committed on the French Government, which rendered the Contract null and void and made inadmissible any claims for renumeration pursuant to it.

Effect of Revision

Consistent with prior jurisprudence, the Federal Tribunal noted that it only examines whether the conditions for revision are met, and that it does not retry the case. Having found that the conditions for revision were met, the Federal Tribunal rendered a judicium rescindens annulling the Award, and remanded the case to "either the arbitral tribunal that is constituted or to a new arbitral tribunal to be constituted in accordance with the rules of the ICC."

Analysis

While breaking little new doctrinal ground, the decision of 6 October 2009 provides an extensive restatement of the law of revision of an arbitral award in Switzerland – a legal mechanism relatively unknown in other national arbitration laws. Together with its 14 March 2008 decision (BGE 134 III 286), the Tribunal has now confirmed that revision remains available and that its revision jurisprudence remains good law under the FSFT, particularly since new Arts. 123(1) and 123(2)(a) are identical to old Art. 137(a) and 137(b) OJ.

This is the first time since the entry into force of the Federal Statute on the Federal Tribunal in 2007, and only the second time since the entry into force of the Private International Law Act in 1989, that the Swiss Federal Tribunal has revised an international arbitral award. (See also Christoph Müller, Das Schweizerische Bundesgericht revidiert zum ersten Mal einen internationalen Schiedsspruch: eine

Analyse im Lichte des neuen Bundesgesetzes, SchiedsVZ 2007, 64-70.) It is also the first revision based on the criminal offense prong of Art. 123(1) FSFT. In its first post-FSFT decision of 14 March 2008 rejecting a claim of fraud based on newly discovered evidence, the Federal Tribunal determined that the evidence had resided in applicant`s archive and would have been available to applicant based on a diligent search. Here, the French criminal proceeding had resulted in an order finding massive fraud directed at the arbitral proceeding, which directly involved a party to the arbitration, and which immediately and significantly influenced the outcome of the proceeding. Even if no criminal conviction resulted, these particular circumstances place the case near the end of the spectrum, which suggests it has not lowered the bar on revision claims under Art.123(1) FSFT.

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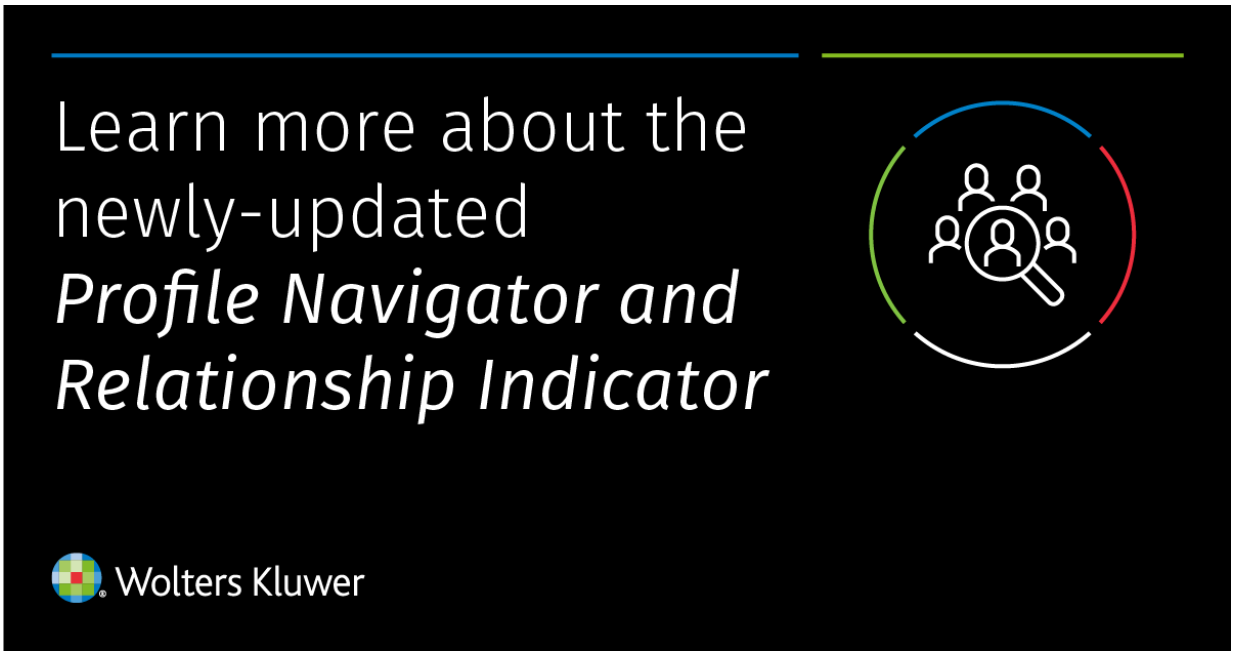

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