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The rare admittance of nova by the Swiss Federal Supreme Court – Decisions of 14 March 2008 (4A_42/2008) and 8 April 2009 (4A_69/2009)

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In the same arbitration proceedings, the Swiss Federal Supreme Court had to decide twice -albeit based on different grounds – whether facts discovered after the issue of an award (so called "nova") may entail the amendment of the rendered award. In these decisions the Swiss Federal Supreme Court had the opportunity to restate its rigorous jurisprudence with regard to the admittance of nova.

In the case at hand, a Swiss company and a Taiwanese company entered into a consultancy agreement with regard to the conclusion of an agreement between the Swiss company and a third company. As the Swiss company subsequently refused to compensate the Taiwanese company for the consultancy services rendered, the Taiwanese company introduced arbitration proceedings before the Zurich Chamber of Commerce against the Swiss company for payment of the outstanding consultancy fees. The Sole Arbitrator appointed in the respective proceedings decided in an interim award of 23 February 2007 that the consultancy agreement had been validly and effectively concluded. By final award of 19 December 2008 the Sole Arbitrator ordered the Swiss Company to pay to the Taiwanese company an amount of CHF 14'168'385.30 (approx. USD 13'300'000).

According to the Swiss company, it discovered in the last months of 2007, thus after the interim award but before the final award, new evidence which made it possible to demonstrate that the consultancy agreement was in fact an undertaking to commit bribery and therefore null and void. Based on this new evidence, the Swiss company attempted to challenge the Sole Arbitrator's decisions by two distinct remedies:

On the one hand, the Swiss company filed on 28 January 2008 a request for revision of the interim award of 23 February 2007 to the Swiss Federal Supreme Court, arguing that the new evidence is substantial to prove that the parties intended by the consultancy agreement to commit bribery. The Swiss Federal Supreme Court confirmed by decision of 14 March 2008 (4A_42/2008) its longstanding jurisprudence of admitting to rule on requests for revision of an arbitral award, although the Swiss law does not contain any express provisions permitting the revision of an arbitral award. The Swiss Federal Supreme Court however dismissed the request on the merits holding that the Swiss company had found the new evidence in its own archive and that therefore it had not been objectively impossible to the Swiss company to produce this evidence prior to the issue of the interim award.

On the other hand, after issuance of the final award on 19 December 2008, the Swiss company challenged the final award with an appeal of 2 February 2009 to the Swiss Federal Supreme Court

mainly based on an alleged violation of substantive public policy (Article 190(2) lit. e of the Private International Law Act [PILA]). The Swiss company argued that the underlying consultancy agreement, as proven by the new evidence, turned out to be an unlawful undertaking for bribery. In the Swiss company's view the Swiss Federal Supreme Court had a duty to examine ex officio an alleged voidness of a contract and could thus not disregard the new evidence. The Swiss Federal Supreme Court dismissed again the request of the Swiss company by its decision of 8 April 2009 (4A_69/2009). The Swiss Federal Supreme Court ruled that as a matter of principle it bases its decision on the facts determined by the arbitral tribunal. The case law of the Swiss Federal Supreme Court does only allow for an exception to this rule, in that the Court will review the facts determined by the tribunal if permissible grounds for appeal pursuant to Article 190 PILA are pleaded against these facts (for instance violation of the right to be heard) or if, in exceptional circumstances, nova are admissible. According to Article 99 of the Federal Supreme Court Act (FSCA), nova may only be raised before the Swiss Federal Supreme Court if they were triggered by the decision of the court of lower instance. The Swiss Federal Supreme Court held that there was no reason to deviate from the wording of Article 99 FSCA on the admissibility of new evidence in the context of an alleged voidness of a legal relationship between private entities. It found that as the validity of the consultancy agreement was already contested before the Sole Arbitrator the new evidence was not triggered by the Sole Arbitrator's interim award. For this reason the Swiss Federal Supreme Court considered itself bound to the Sole Arbitrator's establishment that the consultancy agreement between the parties was not an undertaking to commit bribery.

By these two decisions the Swiss Federal Supreme Court reminded the practitioners of the fact that nova are very rarely taken into account by the Swiss Federal Supreme Court to annul an arbitral award. Parties are therefore well advised to spare no effort in producing all evidence before the arbitral award is issued and not to await the result of the award rendered in order to produce subsequently new evidence before the Swiss Federal Supreme Court once the party is not satisfied with the decision of the arbitral tribunal.

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