ARBITRATION INSTITUTE
OF THE STOCKHOLM CHAMBER OF COMMERCE

Stockholm International Arbitration Review

2009:2

JURIS

OBTAINING REVISION OF "SWISS" INTERNATIONAL ARBITRAL AWARDS: WHENCE AFTER *THALÈS*?

*Dr. Charles Poncet**

On July 12, 1990, Frontier AG ("Frontier"), a Swiss company based in Bern, entered into a fiduciary agreement with Alfred Sirven, then a director of the French oil group Elf Aquitaine ("Elf"). Frontier, one of many Swiss fiduciary companies, was thereby empowered to act in its own name but really on Sirven's behalf and Frontier would henceforth follow his instructions against a fee. A few days later, the French group Thales—at the time Thomson CSF—undertook to pay Frontier a commission of 1% on the sale price of certain frigates to the Republic of China ("ROC"). Frontier was to assist and facilitate the conclusion of the sale and in 1991 it assigned its claim to a Portuguese company, Brunner Sociedade Civil de Administraçao Limitada ("Brunner"). Six F-3000 frigates were indeed contracted for by the ROC for a price of USD 2,512,585,152. The French government, initially opposed, eventually relented and the transaction went ahead. Frontier and Brunner[1] thus demanded payment of the commission (amounting to 160 million French francs, *i.e.* about 35 million USD at the time). Thales (Thomson) demurred. Frontier and Brunner filed a request for arbitration with the ICC, based on a clause in the 1990 agreement between Thales (Thomson) and Frontier providing for arbitration in Geneva under French law.

Thales (Thomson) argued that the 1990 undertaking was void because its real purpose had been to pay off a third party who would intervene to persuade the French government to authorize the transaction, thus making the contract illicit under French law and contrary to public policy. Frontier/Brunner denied the charge and stated that the purpose of the agreement was to retain the services of a certain Edmond Kwan, a consultant to Elf in the People's Republic of China ("PRC"), who used his network of connections there to remove the opposition of the PRC to the sale of warships to the ROC.

Presided over by a well-regarded Spanish jurist and former government minister, Jose P. Perez-Llorca, assisted by two party appointed arbitrators (François Brunschwig, a Geneva lawyer and Jean-Denis Bredin of the Paris

* The author is a partner in the Geneva law firm ZPG. The assistance of Nora Krausz in the research for this article is gratefully acknowledged.

[1] The latter had been assigned the claim, but both acted as claimants in the arbitration proceedings.

Stockholm International Arbitration Review 2009:2, 39-53,

Bar), the ICC arbitral tribunal heard witnesses in Geneva in March 1994, Edmond Kwan and Alfred Sirven among them. In its subsequent award, issued in July 1996, the arbitral tribunal found that the evidence established "beyond any possible dispute the reality of the services expected from Mr. Kwan and performed by him". Sirven's testimony, Kwan's and a 1995 letter from Thomson's chairman in 1993, Loïk Le Floch Prigent, showed that there had been no remuneration for any favors sought from the French government or indeed that of the ROC. Thales (Thomson) was thus ordered to pay USD 25,125,851 and FF 12,691,040 with interest because the evidence presented persuaded the arbitral tribunal that the 1990 contract between Thales (Thomson) and Frontier was genuine and legitimate.

However, it was not. A long and complex subsequent criminal investigation in France and in Switzerland showed that in reality, Sirven had been hired to find a way to persuade Roland Dumas, at the time the French minister of foreign affairs, to withdraw his opposition to the sale of the frigates. Sirven had both Kwan and an alluring lady, Christine Deviers-Joncour, on the payroll of the Swiss subsidiary of Elf. She was close to Roland Dumas and claimed that she could cause him to change his mind, which she did. Kwan was then told by SIRVEN to appear as the beneficiary of the 1% commission, which was in reality to be divided between Sirven and Deviers-Joncour, with Kwan receiving USD 2 million for his services. The evidence presented to the arbitral tribunal in 1994 was revealed as being false and carefully orchestrated to deceive the arbitrators into believing that Kwan had been performing *bona fide* services in the PRC. Both he and Sirven lied to the arbitrators in their testimony.

Sirven died in 2005 and on October 1st, 2008 the French *juge d'instruction* in charge of the investigation held that the charges against Kwan, Deviers-Joncour and some other relatively minor characters were not sufficient to justify a trial when the mastermind of the fraud could no longer be prosecuted because he had passed away. No one was tried or sentenced as a consequence of the criminal investigation.

In the meantime, Thales (Thomson) had unsuccessfully challenged the 1996 award in front of Switzerland's Supreme Court, the Federal Tribunal.[2] In 1999, the Paris Court of Appeals had stayed the enforcement of the 1996 award at Thales' request.

On December 17, 2008 Thales relied on the October 1st, 2008 decision of the French magistrate and on the results of the criminal investigation to apply to the Federal Tribunal for revision of the award, because the decision of the arbitral tribunal had been influenced by criminal activities.

---

[2] Judgment 4P.240/1996 (January 28, 1997) 1998 ASA Bulletin 118 (in French).

On October 6, 2009, the Swiss Federal Tribunal granted the request and annulled the award.[3] This was only the second time[4] that the Federal Tribunal has accepted a request seeking revision of an international award issued in Switzerland and the first time it did so because the award had been secured by fraud or other criminal means.

The *Thales* judgment of the Federal Tribunal is unlikely to result in a new arbitral award as the efforts to seek enforcement of the 1996 award are bound to fail now that the award has been conclusively shown to be contrary to public policy and to have been obtained by a particularly repugnant scheme of lies and forgeries. So too the opinion is not exceptionally interesting from a scholarly point of view: the Federal Tribunal recounted the fraud in details and the conclusion was unsurprising in view of Swiss law. Yet the *Thales* decision has caused considerable interest in the international arbitration community and is generally regarded as a confirmation that Swiss courts will not look kindly at fraud to secure an international award in an arbitration held in Switzerland.[5]

I. The Concept of Revision

Revision is an extraordinary legal remedy through which an enforceable judgment may be annulled under certain specific, limited, circumstances. It is generally considered as more germane to civil law systems than to their common law counterparts.[6] Revision is to be clearly distinguished from ordinary annulment proceedings. Whilst the latter make it possible to seek the annulment of an award by appealing it to the Federal Tribunal on certain grounds, revision is an extraordinary legal remedy, which under certain circumstances, makes it possible to reopen the proceedings in front of the Federal Tribunal and, if successful, will cause the matter to be sent

---

[3] Judgment 4A_596/2008 (October 6, 2009), in French. An English translation is available at www.praetor.ch.

[4] Judgment 4P.102/2006 (August 29, 2006) 2007 ASA Bulletin 550 (in German). That case will be discussed hereunder at note 41.In a previous decision, the Federal Tribunal had rejected an appeal against the same award. See Judgment 4P.208/2004 (December 14, 2004).

[5] See Laurent Hirsch Révision d'une sentence arbitrale 12 ans après, Jusletter January 4, 2010 1-15, also Antonio Rigozzi and Elisabeth Leimbacher The Swiss Supreme Court Refits the Frigates 27 J.Int.Arb. 3 307-316 (2010).

[6] Laurent Hirsch's article quoted above at note 5 contains an excellent summary of the Swedish, Dutch, Belgian, Spanish, French, English, German and Italian approaches to revision. Also see Jean-François Poudret / Sébastien Besson Droit comparé de l'arbitrage international 834-839 (2002); Yves Derains La revision des sentences dans l'arbitrage international, *Liber Amicorum Karl-Heinz Böckstiegel* 165-176 (2001); Antonio Rigozzi / Michael Schöll Die Revision von Schiedssprüchen nach dem 12. Kapitel des IPRG 5-8 (2002). Also see with regard to Sport Arbitration Antonio Rigozzi Challenging Awards of the Court of Arbitration for Sport I Journal of International Dispute Settlement 217-265 at 255 ff.

back to the arbitral tribunal—or even to a new arbitral tribunal—even though the time limit to initiate annulment proceedings may have expired several years ago.

The Swiss law on revision of international arbitral awards is judge made and it was created in 1992.[7] The Federal Tribunal had been seized of a request for revision of a May 1991 award, which had been upheld in the normal setting aside process (the Federal Tribunal having rejected an appeal on September 30, 1991). The petitioner was now claiming that a witness had a personal interest in the outcome of the case and, relying on the statutory law then applicable to federal judicial proceedings in Switzerland,[8] it sought revision although PILA[9] is silent on the issue. The Court found that PILA contained a lacuna, as it had not been the intent of the legislature to make revision impossible as to arbitral awards.[10] The Court noted that legal writing was practically unanimous in favoring revision and proceeded to justify it in principle as follows:

> It must be possible to question the authority of a judgment when the factual findings appear false without any fault of the parties and when knowing the exact facts would have led to a different legal assessment. Yet the security of legal relations must also be taken into account; the possibility to attack an enforceable decision must be limited in time. In the final analysis, a decision based on erroneous or incomplete facts although the responsibility of the parties may not be invoked at all, gravely violates the sense of justice and is arbitrary within the meaning of art. 4 Cst.[11] (....)...if an award relies on factual findings distorted by criminal behavior or inaccurately found and in disregard of the real situation without fault, the absence of any reassessment would consecrate a clear violation of the fundamental principles of procedure.[12]

---

[7] ATF 118 II 199 (March 11, 1992), in French. It is worth noticing, that whilst establishing the principle of revision of international arbitral awards, the Federal Tribunal *rejected* the petition for revision in the case.

[8] The *Loi fédérale d'organisation judiciaire* ("OJ") of December 16, 1943 which has now been substituted by the *Loi sur le Tribunal fédéral* ("LTF") of June 17, 2005 (RS 173.110) in force since January 1st, 2007.

[9] PILA is the most frequently used English abbreviation for the Swiss Federal Statute on Private International Law of December 18, 1987 (RS 291).

[10] Following authoritative legal writing in this respect. See Lalive / Poudret/Reymond Le droit de l'arbitrage interne et international en Suisse 443-444 N.5 ad art. 191 LDIP (1989).

[11] Article 4 of the Swiss Constitution in force at the time contained a due process clause prohibiting arbitrary decisions by state organs.

[12] ATF 118 II 199 at 202 (March 11, 1992), translated from the French original.

Having thus justified revision in principle, the Court went on to decide who should have jurisdiction. Whilst the basic rule is that revision should be sought from the court which issued the decision, an arbitral tribunal is generally *functus officio* once the award is issued. The Swiss Inter-cantonal Convention on Arbitration of August 27, 1969 ("SICA") gave jurisdiction to the Cantonal court at the seat of the arbitration. International arbitrations being matters of federal law unless the parties chose to submit to cantonal jurisdiction—a very rare occurrence indeed—it was logical for the Federal Tribunal to allocate jurisdiction for revision to itself.

Finally, grounds for revision could conveniently be borrowed from existing statutory law, at the time the 1943 Federal Statute Organizing Federal Courts ("OJ"). However the OJ contained grounds for revision which could *also* be grounds for ordinary setting aside proceedings. Thus, for instance, article 136 LOJ made revision possible when the decision went *infra* or *ultra petita* or if the court was not properly composed and this could already be cured on the basis of article 190(2) PILA. Thus, the Court took the view that only the grounds for revision, which could not be raised in ordinary setting aside proceedings, would be accepted. In other words, if the arbitral tribunal was not properly composed, this would have to be invoked in the setting aside proceedings and not in a subsequent attempt at obtaining revision. Whilst certainly logical, the distinction was not free of ambiguity.

II. Material Requirements for Revision of a "Swiss" International Award

As a consequence of the 1992 case, revision became possible for international awards issued by an arbitral tribunal having its seat in Switzerland and the rules heretofore applicable only to domestic arbitrations under SICA were extended to international cases by way of a reference to the OJ, which contained provisions on revision very similar to those of SICA.

Thus, art. 41 SICA provides for revision when (i) the award was influenced by a crime as determined in a criminal trial unless such a trial is impossible for reasons other than lack of evidence or (ii) when some important facts predating the award or some conclusive evidence were not presented because the petitioner could not introduce them in the proceedings. Revision must be sought within sixty days from the time the petitioner became aware of the ground for revision and in any event within five years after the award.

The regime applicable to domestic arbitrations will change as of January 1st, 2011 when the new Federal Code of Civil Procedure of December 19,

2008 ("CPC") comes into force. The new Code applies to domestic arbitrations whilst not formally abrogating SICA as the latter is an inter-cantonal convention which, constitutionally speaking, the federal legislature does not have the authority to abolish. As pointed out by authoritative legal writing on the CPC[13] however, it is expected that SICA will become inoperative as of the entry into force of the CPC, pending its formal abrogation by the Cantons.

Article 396 CPC makes revision of an internal award possible when (i) some pertinent facts or relevant evidence are discovered after the award has been issued and the petitioner could have relied on them in the arbitration; thus the facts or the evidence must have occurred before the award, as later facts could not have influenced the decision; (ii) a criminal investigation establishes that the award was influenced by a crime. The main way to prove the existence of a crime is of course to produce evidence of a conviction. However, if prosecution is impossible—as it was in the *Thalès* case—proof of the crime may be adduced by other means; (iii) the petitioner shows that a withdrawal of the claim, a consent award or a settlement were not valid. Finally, (iv) revision may also be sought if the European Court of Human Rights finds a violation of the ECHR[14] or of its Protocols which cannot be compensated or cured by any means other than a revision of the award. The request for revision must be filed within ninety days of and in any event ten years after the award.

As of 2007, the old OJ was replaced by the *Loi sur le Tribunal fédéral* of June 17, 2005 ("LTF"), which now contains the law[15] of revision applicable to international arbitral awards issued in arbitrations where the seat of the arbitration was in Switzerland. Whilst the LTF mainly took over the previous regime, it is worth pointing out its essential characteristics:

---

[13] See Christian Lüscher / David Hofmann Le Code de procédure civile at 3, Stämpfli Ed. (2009). Remarkably, the draft bill submitted by the Swiss government was moot on the issue of SICA's future status. See FF 2006 p. 6859, 6875 and 6999. The debates in the Swiss Parliament do not appear to have raised the issue either. See Stenographic Bulletin of Swiss Council of States 2007 641.

[14] European Convention on Human Rights of November 4, 1950 RS 0.101. As to whether the ECHR applies to arbitration proceedings at all, see Poudret / Besson *op.cit* 86-87. The authors hold the view that the Convention is not applicable to arbitration, given that an arbitral tribunal is not a state organ and accordingly may not cause the state to be liable under the ECHR. Be this as it may, a violation of the ECHR would in any event have to be contained in the judgment of the Federal Tribunal deciding an appeal against the award, as the latter cannot be challenged in itself because Article 35 (1) of the Convention requires the prior exhaustion of internal remedies.

[15] See Articles 121 to 128 LTF.