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Decision 4A_386/2015 (ATF 142 III 521)
Swiss Supreme Court, 1st Civil Law Chamber

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Decision 4A_386/2015 (ATF 142 III 521)

Swiss Supreme Court, 1st Civil Law Chamber

(Tribunal Federal, Ire Cour de droit civil)
7 September 2016
X. S.p.A. *v.* Y. B.V.

SUMÁRIO: I – Julgado; II – Comentário.

The Supreme Court's decision in ATF 142 III 521 is of particular interest for three principal reasons. First and foremost, it extensively analyzes the question of whether the subsequent discovery of a ground for the challenge of an arbitrator can be invoked as a ground for the revision of an international arbitral award rendered in Switzerland. Leaving this question open, the Supreme Court defers the matter to the Swiss Parliament to be dealt with within the framework of the ongoing reform of Chapter 12 of the Swiss International Arbitration Act ("PILA"), which governs international arbitrations with a seat in Switzerland. Today, the Supreme Court's decision is once again topical with the recent publication by the Swiss Department of Justice of the Draft Bill on the reform of Chapter 12 PILA and its Explanatory Report, and the observations filed by various interested stakeholders during the consultation period, which ended on 31 May 2017.

Second, the Supreme Court's decision is interesting in that it affords great importance to the Guidelines of the International Bar Association ("IBA") on Conflicts of Interest in International Arbitration, recognizing such Guidelines as a useful tool and contribution to the harmonization and uniformization of applicable standards in international arbitration.

Third, when determining whether a conflict of interest existed, the Supreme Court focused on the legal and economic reality of the alleged relationship, rather than on the perception created by statements or publicity.

I – JULGADO (EXCERTOS)

FREE TRANSLATION FROM FRENCH ORIGINAL

"2.1 Any law of procedure provides for a moment when judicial decisions are final, whether they were issued by private tribunals or state courts. There always is a moment when the substantive truth, in as much as it can be established, must give way to the judicial truth, albeit imperfect, under pain of

putting in danger legal security. There are however extreme situations where the sense of justice and equity commands that a final decision must not prevail, because it is founded on flawed reasons. It is precisely the role of revision to remedy such situation.

[The Swiss Private International Law Act ('PILA')] does not contain any provision regarding revision. However, the Supreme Court has issued several decisions to fill this gap. The grounds for revision initially were those set forth in Article 137 of the Judicial Organization Act ('JOA'), which was later repealed by Article 131(1) of the Supreme Court Act ('SCA'). These grounds are now found in Article 123 SCA. The Supreme Court is the competent authority to hear requests for the revision of all international arbitral awards, be they final, partial or interim awards. If it accepts a request for revision, it does not pronounce itself on the merits of the dispute, but refers the matter back to the arbitral tribunal that issued the award or a newly constituted arbitral tribunal."

[...]

"2.3.4. The parties to a dispute are free to exclude the jurisdiction of ordinary judicial authorities with respect to certain differences related to the performance of a contract. In entering into an arbitration agreement, they voluntarily waive their rights under the European Convention of Human Rights ('ECHR'). Such a waiver is not contrary to this treaty, provided that it was entered into freely, validly and unambiguously. The waiver of certain rights under the ECHR must be accompanied by a minimum of guarantees, corresponding to its severity. A person who, by entering into an arbitration agreement, waives in advance his or her constitutional and treaty right of access to a court established by the law can reasonably expect that the members of the arbitral tribunal or the sole arbitrator offer sufficient guarantees of independence and impartiality. Therefore, he or she must be able to act where these expectations were not met, if he/she did not have the possibility to remedy this situation *pendente lite*. It is only under this condition that one may consider him or her bound by a decision that cannot be challenged on the merits, except on the very limited ground of public policy within the meaning of Article 190(2)(e) PILA. The right of recourse provided in Article 77 SCA together with Article 191 PILA allows a party to request the annulment of an arbitral award where the sole arbitrator was incorrectly appointed or where the arbitral tribunal was incorrectly constituted (Article 190(2)(a) PILA). However, because the admissibility of this remedy depends on the respect of a thirty-day time limit following the notification of the complete award, it is of no use to a party who discovered the ground for challenge of the arbitrator pursuant to Article 190(2)(a) PILA only after the expiration of that time limit. Certainly, the party who lost before a sole arbitrator or arbitral tribunal that did not satisfy the requirements of independence and impartiality and who only discovered this circumstance after the expiration of

the thirty-day time limit may invoke this procedural irregularity in enforcement proceedings, namely on the basis of Article V(2)(b) of the New York Convention. However, this would presuppose that the party in question discovered this irregularity prior to the closing of the enforcement proceedings and that the enforcement court would consider this irregularity contrary to the public policy of the enforcement state. In any event, even in case of a refusal to enforce the award, such award would continue to exist and prevent the initiation of new arbitration proceedings. It also would not provide adequate remedy where no enforcement proceedings are required, such as in cases where a disciplinary sanction was imposed on an athlete. The same applies in cases where the place of arbitration is in Switzerland and the New York Convention therefore would not apply, subject to the exception in Article 192(2) PILA. In this case, the enforcement of an arbitral award rendered in Switzerland would be governed by Articles 335 et seq. CCP, respectively by the Swiss Debt Enforcement and Bankruptcy Law, the provisions of which do not allow a losing party to object to the enforcement of an award on the basis of a missed ground for challenge of an arbitrator. Therefore, in light of the foregoing, relying on enforcement proceedings as a remedy does not provide an adequate solution. As a result, the revision of the arbitral award appears to be the only efficient remedy in such a situation.

On a more general level, it is worth recalling that the federal legislator affords great importance to the respect of the guarantee of an independent and impartial tribunal, as provided in Article 30(1) of the Constitution and Article 6(1) ECHR, which constitutes one of the pillars of every state based on the rule of law. This is confirmed by the fact that the legislator does not tolerate the situation where a ground for challenge that was discovered after the closing of federal proceedings would remain without consequence. To the contrary, in such a case, the legislator rendered applicable the provisions on the revision of decisions rendered by the Supreme Court. What is more, the legislator has generalized this approach by extending it to all aspects of civil procedure. In effect, Article 51(3) CCP provides that, if a ground for challenge has only been discovered after the closing of the procedure, the provisions regarding revision shall apply. It is true that the provisions of the CCP concerning revision (Articles 383 et seq.) do not specifically take into account the specific ground provided in Article 51(3) CCP. The same may be said about the provisions governing domestic arbitration (Article. 353 et seq. CCP), which do not contain an express provision comparable to Article 51(3) CCP. Likewise, the grounds for revision in Article 396 CCP do not make an express reference to the general circumstance indicated above. However, one may reasonably raise the question whether this situation is the result of a simple inadvertence. In fact, in the Message on the Suisse Code of Civil Procedure, the Federal Counsel emphasized, with respect to draft Article 49(3) (now Article 51(3) CCP), that the ground for challenge

discovered after the entry into force of the decision constitutes a ground for revision. However, when the Federal Counsel thereafter discusses the grounds of revision, it states that the draft bill is essentially limited to the usual grounds for revision (i.e. the existence of a criminal act that influenced the decision and the subsequent discovery of relevant facts or evidence), given that procedural irregularities must be invoked by the ordinary means of recourse (appeal and recourse). The author of the Message thus appears to have forgotten the ground for revision expressly provided in draft Article 49(3) of the draft bill, concerning the discovery of a ground for challenge after the expiration of the time limit to challenge the decision by ordinary means of recourse. Alternatively, it may have been assumed, without express mention, that this ground of revision is covered by Article 326(1)(a) of the draft bill (now Article 328 CCP). Be that as it may, it is important to state that, for the federal legislator, the subsequent discovery of a ground for challenge was of such importance so as to justify a specific ground for revision.

Concerning domestic arbitral awards, the Message states that the grounds justifying the revision of such awards are the same as those that may be invoked before state courts. In effect, the grounds for revision in Article 396 CCP are based on those set forth in Article 328 CCP. They even include the revision for violations of the ECHR, which is disputable, given that arbitral awards as such do not fall within the ambit of the ECHR. However, it still shows the importance afforded by the legislator, even in arbitration, to the respect of the guarantees provided in the ECHR. The similarity between state court decisions and domestic arbitral awards with respect to grounds for revision constitutes *a priori* a valid reason to justify the application of Article 51(3) CCP to both types of decisions. There is no reason why the same solution should not apply in international arbitration. Given that the respect of the fundamental guarantee of the independence and impartiality of the members of the arbitral tribunal is at issue, it would not be justified to reject the complaint of a party regarding the violation of this guarantee based on the fact that the other party did not have its domicile or habitual place of residence in Switzerland at the time of the conclusion of the arbitration agreement. Even though it is true that the solutions applicable to domestic arbitration are not always identical to those applied in international arbitration (and *vice versa*), it is not conceivable to apply different solutions for these types of arbitration with respect to a guarantee that is as fundamental as the one at issue here."

[...]

"3.1.1. An arbitrator, just like a judge, must present sufficient guarantees of independence and impartiality. A failure to respect this rule would lead to the irregular constitution of the arbitral tribunal within the meaning of Article 190(2)(a) PILA for international arbitrations and Article 393 (a) CCP for

domestic arbitrations. In order to decide whether an arbitrator presents such sufficient guarantees, one must refer to the constitutional principles developed for state courts, always keeping in mind however the specificities of arbitration – especially international arbitration – when examining the circumstances of the specific case.

The guarantee of an independent and impartial tribunal within the meaning of Article 30(1) Constitution allows challenging a judge the situation or behavior of whom gives rise to doubts regarding his or her impartiality. It seeks to avoid that circumstances external to the case influence the judgment in favor or to the detriment of one of the parties. It does not require the disqualification only where an effective lack of independence or impartiality has been established, because internal dispositions can hardly be established. It is sufficient that the circumstances create the appearance of a lack of independence or impartiality and render questionable an independent and impartial judgement. However, only objective circumstances may be taken into consideration. Purely subjective impressions of one of the parties are not decisive.

The subjective impartiality – which is presumed until the contrary has been established – ensures that a party's case will be decided, regardless of the identity of that party. Objective impartiality, on the other hand, seeks to avoid the participation of the same judge in different capacities in the same case and to guarantee the independence of the judge from the parties.

3.1.2. To verify the independence of the sole arbitrator or members of the arbitral tribunal, the parties may also refer to the IBA guidelines on conflicts of interest in international arbitration. These guidelines certainly do not have the force of law. However, they constitute a useful tool and contribute to the harmonization and uniformity of the standards applied in international arbitration; they should have an important influence on the practice of arbitral institutions and tribunals. These guidelines provide for general principles. They also contain an enumeration, in the form of non-exhaustive lists, of specific circumstances: a red list, an orange list, a green list. It goes without saying that, notwithstanding the existence of such lists, the circumstances of each specific case remain decisive to decide the question of a conflict of interest."

[...]

"3.3.1.1 It is a fact that law firms acting in international arbitration are becoming bigger and bigger. In fact, big law firms with offices in different countries, employ large numbers of partners who each are responsible for a certain number of clients and/or cases belonging to the firm. The IBA has taken this reality into consideration when developing the general rule no. 6(a), which requires the arbitrator to take into consideration the activities of his or her law firm when verifying whether certain facts or circumstances constitute

potential conflicts of interest. However, the same general rule specifies that this assimilation between the arbitrator and his/her law firm does not necessarily give rise to a conflict of interest, the circumstances of the specific case (importance of the activities and their nature, moment when they were undertaken and the areas of specialization of the law firm) remain decisive.

It must be examined based on the evidence on the record, if the various law firms that belong to the network A. constitute or not one single entity. In other words, it must be examined whether it is correct to unite them under the term 'law firm A.', as used by X. and to agree with the latter that the offices A.-CH and A.-GER are but two constituent elements, among others, of one and the same law firm."

II – COMENTÁRIO

A) INTRODUCTION

Efficiency, finality and legal certainty are of paramount importance in international arbitration. International arbitration in Switzerland is no exception in that it is generally considered as a "one-stop" dispute settlement system. As a general rule, arbitral awards are final once notified to the parties and are not subject to appeal. They can be challenged only on the basis of the limited grounds for annulment listed in Article 190(2) of the Swiss Private international Law Act ("PILA"). Once the time limit for filing an annulment action against the award has elapsed[1], it can no longer be challenged and the parties will have to live with any possible mistakes in the award[2].

Revision is an exception to this general rule. It applies only in the most extraordinary circumstances, in the presence of narrowly defined grounds, namely where the award was influenced by a crime or felony to the detriment of one of the parties or where relevant facts or conclusive evidence have come to light on which the parties were unable to rely during the course of the arbitration proceedings.[3] If a request for revision is successful, the competent authority, i.e. the Swiss Supreme Court, annuls the award and remands the case to either the same or a new arbitral tribunal for a new award[4].

1 Pursuant to Article 100(1) of the Supreme Court Act ("SCA"), annulment requests must be filed within thirty days from the notification of the award.
2 KAUFMANN-KOHLER, Gabrielle/RIGOZZI, Antonio, *International Arbitration*, Oxford: Oxford University Press, 2015, para. 8.01.
3 KAUFMANN-KOHLER, Gabrielle/RIGOZZI, Antonio, *op. cit.* fn 2, para. 8.206 and para. 8.212.
4 KAUFMANN-KOHLER, Gabrielle/RIGOZZI, Antonio, *op. cit.* fn 2, para. 8.224.

To date, Chapter 12 PILA[5], which governs international arbitrations with a seat in Switzerland, does not contain any provision on the revision of international arbitral awards, even though the Swiss Code of Civil Procedure ("CCP") contains such a provision with respect to domestic arbitral awards (Articles 396-399 CCP). This being said, beginning with its landmark *Perrodo* decision in 1992, the Supreme Court has continuously held that international arbitral awards (be they final, partial or preliminary) may be the subject of a revision[6].

The Supreme Court's decision in ATF 142 III 521 (the "Decision") deals with a request for revision of an international arbitral award rendered in Switzerland. It is of particular interest in that it examines, but ultimately leaves open, the question of whether the subsequent discovery of a ground for the challenge of an arbitrator can be invoked as a further ground for the revision of an international arbitral award.

Rendered on 7 September 2016, today the Decision is once again topical with the recent publication by the Swiss Department of Justice of the Draft Bill on the reform of Chapter 12 PILA and its Explanatory Report[7], and the observations filed by various interested stakeholders during the consultation period, which ended on 31 May 2017[8]. As will be seen in further detail below, the Draft Bill on the reform of Chapter 12 PILA examines the very issue that was at the heart of the Decision.

Part B briefly describes the Decision and its relevance. Part C then addresses the incorporation of the remedy of revision in the Draft Bill on the reform of Chapter 12 PILA.

B) THE DECISION

The Decision resolved a request for revision filed against an arbitral award rendered in an ICC arbitration initiated in 2011 before a sole arbitrator.

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5 An English translation of the PILA, including its Chapter 12, is available under http://www.andreasbucher-law.ch/images/stories/pil_act_1987_as_from_1_1_2017.pdf.

6 KAUFMANN-KOHLER, Gabrielle/RIGOZZI, Antonio, *op. cit.* fn 2, para. 8.207 and para. 8.209; SWISS DEPARTMENT OF JUSTICE, *Erläuternder Bericht zurÄnderung des Bundesgesetzes über das Internationale Privatrecht (Internationale Schiedsgerichtsbarkeit)*, 11 January 2017, available under https://www.bj.admin.ch/dam/data/bj/aktuell/news/2017/2017-01-11/vn-ber-d.pdf, p. 28. See also ATF 142 III 521, para. 2.1; ATF 134 III 286, para. 2; ATF 129 III 727, para. 1; ATF 118 II 199, paras. 2 and 3.

7 The Draft Bill and Explanatory Report are available under https://www.bj.admin.ch/dam/data/bj/aktuell/news/2017/2017-01-11/vorentw-d.pdf and https://www.bj.admin.ch/dam/data/bj/aktuell/news/2017/2017-01-11/vn-ber-d.pdf.

8 Organizations such as the Swiss Arbitration Association (ASA), the Swiss Chambers' Arbitration Institution (SCAI), judges at the Supreme Court, various law firms, ICC Switzerland, Economiesuisse, universities, academics, as well as some political parties and several Swiss cantons have filed observations. They can all be found here (https://www.admin.ch/ch/f/gg/pc/ind2017.html). An English translation of ASA's observations, which were filed in German, can be found on the ASA website (http://www.arbitration-ch.org/en/publications/asa-position-papers/index.html).

The underlying dispute arose out of a contract between an Italian company ("X.") and a Dutch company ("Y.") for the construction of a boat lift in Livorno, Italy. Y. argued that X. should be held liable for the collapse of the lift's platform during testing and requested damages. X. denied all liability and requested the sole arbitrator to deny the claim in its entirety. In an award rendered on 23 April 2015 (the "Award"), the sole arbitrator ruled in favor of Y. and ordered X. to pay the amount of EUR 2,272,500, plus interest.

On 4 August 2015, after the time limit to request the annulment of the Award had expired, X. filed a request for revision with the Swiss Supreme Court, arguing that it had recently learned of facts that called into question the independence of the sole arbitrator. X. noted that the sole arbitrator was a lawyer in the Swiss law firm "A-CH", but had failed to disclose that the German law firm "A-GER" had previously advised a company (company Z.) that belonged to the same group of companies as Y[9]. X. had learned of the link between law firm A. and a company related to the claimant through a press release posted by law firm A-GER in December 2014, but it alleged that it had only become aware of this press release in July 2015, that is, after the issuance of the Award. According to X., the link between law firm A. and a member of the same group of companies as the claimant would have been a ground for annulment of the Award had X. been aware of it before the expiration of the time limit to file an annulment action. As that time limit had expired, X. argued that it constituted a ground for revision of the Award. On this basis, X. requested the Supreme Court to annul the Award, disqualify the sole arbitrator and resubmit the dispute before a new ICC tribunal, or, alternatively, to annul the Award and then transmit the case file to the ICC Court of Arbitration, to allow that court to disqualify the sole arbitrator and constitute a new tribunal to reconsider the dispute.

The Supreme Court denied the request for revision. After addressing at length the admissibility of the request, it ultimately decided that the request failed on the merits, finding that the circumstances invoked by X. did not constitute a ground for disqualification of the sole arbitrator.

The Decision is noteworthy for three reasons. First, in determining whether there was a ground for disqualification of the sole arbitrator, the Supreme Court emphasized the importance of the International Bar Association's Guidelines on Conflicts of Interest in International Arbitration (the "IBA Guidelines on Conflicts of Interest") (1). Second, in assessing whether a conflict of interest had existed, the Court focused on the legal and economic reality underlying the alleged relationship, rather than the appearance created by statements or publicity (2).

9 Before the Supreme Court, X.'s argument appeared to be that both law firms were part of one and the same law firm "A.".

Third and most importantly, the Court discussed at length the admissibility of post-award conflicts of interest as a ground for the revision of an arbitral award – a situation that at that date had only been addressed jurisprudentially – and recommended to the legislator that the issue be addressed in the reform of Chapter 12 PILA (3).

1 Relevance of the IBA Guidelines on Conflicts of Interest

In determining whether there was a ground for disqualification of the sole arbitrator, the Supreme Court attributed significant importance to the role of the IBA Guidelines on Conflicts of Interest. While the Supreme Court noted that whether an arbitrator had provided sufficient guarantees of independence and impartiality should be resolved in accordance with constitutional principles developed for state courts, it clarified that, when examining the circumstances of the specific case, the specificities of international arbitration should be borne in mind.

In this context, the Supreme Court noted that parties may seek guidance from the IBA Guidelines on Conflicts of Interest, which provide general principles to determine whether conflicts of interest exist, as well as non-exhaustive lists of circumstances which might or might not give rise to justifiable doubts as to the arbitrators' independence or impartiality. While recognizing that the Guidelines do not have force of law, the Court emphasized that they "constitute a useful tool and contribute to the harmonization and uniformity of the standards applied in international arbitration", and "should have an important influence on the practice of arbitral institutions and tribunals"[10].

The Supreme Court stressed that the circumstances of each specific case remained decisive to decide whether a conflict of interest exists.

2 Emphasis on the legal and economic reality of the relationship

In applying the principles set out in the IBA Guidelines, the Supreme Court focused on the economic reality of the relationship alleged as giving rise to the conflict of interest, rather than on the perception that certain statements regarding that relationship could create.

In its request, X. had argued that five of the situations envisaged in the IBA Guidelines' red or orange lists that might give rise to doubts regarding the arbitrator's independence had materialized. Specifically, X. argued that, because of the ties between A-CH and A-GER, (i) the arbitrator or his law firm regularly advised a party or one of its affiliates and drew important income from

10 Decision, para. 3.1.2 (free translation).

that advice (Article 1.4 of the Non-Waivable Red List); (ii) the law firm of the arbitrator currently maintained an important commercial relationship with one of the parties or its affiliates (Article 2.3.6 of the Waivable Red List); (iii) over the past three years, the arbitrator's law firm had acted for or against one of the parties or its affiliates in a case unrelated to the case in dispute and without the arbitrator participating (Article 3.1.4 of the Orange List); (iv) the arbitrator's law firm currently provided services to one of the parties or its affiliates, without this being an important commercial relationship for the law firm and without the arbitrator participating (Article 3.2.1 of the Orange List), and (v) the arbitrator or his law firm regularly represented a party or its affiliate, without this being related to the case at issue (Article 3.2.3 of the Orange List). Thus, according to X., the sole arbitrator should have resigned, or at the very least should have disclosed this circumstance with the parties.

The Supreme Court rejected this argument. For the Court, the key issue was whether law firms A-CH and A-GER were part of the same entity, i.e., as branches of a single law firm A. After assessing the specific circumstances of the case, it concluded that law firm A. was not an integrated law firm, but rather a network of legally and economically independent law firms. Law firms A-CH and A-GER were not part of a single entity, and except for exceptional cases of collaboration, did not share their fees. The Supreme Court thus concluded that, because law firm A-CH and law firm A-GER could not be deemed to form part of an integrated law firm, none of the hypotheses invoked by X. under the IBA Guidelines was relevant. In other words, neither the arbitrator nor his law firm could be deemed to have engaged in any of the activities invoked by X.

Notably, in reaching this conclusion the Supreme Court focused on the real legal and economic ties between the law firms involved, placing great emphasis on the fact that they were financially independent entities that (as a rule) did not share their fees. By contrast, the Supreme Court placed less importance on the appearance that could have been created by the relevant law firms' websites and statements. In particular, the Court did not seem swayed by the fact that, in the press release invoked by X., law firm A-GER referred to the network of law firms in terms that could have been interpreted to refer to a single entity. Indeed, under the title "the law firm", the press release referred to law firm A. in the singular, to "its" clients and to "our" lawyers[11]. Despite this arguably misleading language, the Supreme Court appears to have considered that what was relevant for purposes of determining whether there was a conflict

11 Under the title "the law firm", the press release stated as follows: "A. provides to its clients specialized legal and financial advice. Our 3000 lawyers are educated in project management and work all over the world in teams that are specialized in the economic sector in order to achieve the objectives of our clients. Our lawyers work in 60 offices all over the world and provide advice adapted to the practice of our clients, who face difficult economic situations and ever changing legal environments" (Decision, para. 3.3.1.1 (free translation)).

of interest were the real legal and economic ties between the law firms, and not the appearance that public statements could have created.

3 Admissibility of the ground for revision and invitation to Parliament

As seen above, X. did not file an annulment action against the sole arbitrator's Award of 23 April 2015 within the thirty-day time limit from the date of the notification of the Award (Article 100(1) SCA). However, it submitted a request for revision on the grounds that on 8 July 2015, i.e. after the expiration of that time limit, it discovered a conflict of interest that would have justified the disqualification of the sole arbitrator, as well as the annulment of the award, had it been discovered during the course of the arbitration proceedings.

The Supreme Court questioned the admissibility of this ground for revision, namely whether the subsequent discovery of a ground for challenge of the sole arbitrator can be validly relied upon in support of a request for revision. It noted that in its previous case law, the question had been raised (but left open) whether a ground that may justify the annulment of an award pursuant to Article 190(2) PILA can form the basis of a request for revision. The Supreme Court thus posed the question whether the remedy of revision should be available in situations where the ground for challenge of an arbitrator is discovered only after the expiration of the deadline to file an annulment action. Following a thorough analysis, the Supreme Court concluded that Swiss law in its current state does not provide an answer to this question and the issue is controversial among legal scholars. The Supreme Court observed that comparative law was unhelpful in this regard.

The Supreme Court emphasized that the parties have a fundamental right under the Swiss Constitution (Article 30(1)) and the European Convention of Human Rights (Article 6(1)) to have their dispute heard and decided by a court that meets the fundamental guarantees of independence and impartiality. Parties to an arbitration agreement, who thereby waive their right to submit their dispute to a state court, may legitimately expect the members of the arbitral tribunal or sole arbitrator to also meet such fundamental guarantees. For the Supreme Court, in case of the discovery of a ground for challenge after the expiration of the deadline to bring an annulment action, the revision of the arbitral award constitutes the only efficient remedy available to the parties. Furthermore, in the circumstances, Swiss law would appear to allow a party to file a request for revision against a domestic arbitral award, and there is no reason to treat international arbitral awards differently in this regard.

Based on the foregoing, the Supreme Court was thus minded to accept that the subsequent discovery of a ground for challenge of an arbitrator constituted an admissible ground for the revision of an international arbitral

award, provided that the applicant could not reasonably have discovered the ground for challenge already during the course of the arbitration.

However, because X.'s request for revision was in any event ill-founded in the circumstances underlying the Decision, the Supreme Court decided to leave the question open. Indeed, the Supreme Court noted that the Swiss Parliament was in a better position to resolve this question within the framework of its mandate to reform Chapter 12 PILA and to adopt a solution that is clear and coherent in light of other relevant Swiss law provisions. In effect, it can be said that the Supreme Court invited Parliament to legislate on the matter, and issued a recommendation as to how the question should be resolved.

C) THE REFORM OF CHAPTER 12 PILA

On 11 January 2017, the Swiss Department of Justice published the Draft Bill on the reform of Chapter 12 PILA and its Explanatory Report[12]. Thereafter, on 3 July 2017, it published the observations filed by various interested stakeholders during the consultation period[13].

The Explanatory Report to the Draft Bill makes clear that, even thirty years after its adoption in 1989, Chapter 12 PILA remains an innovative arbitration law of high quality. Its main strengths include its clarity and conciseness, as well as the great importance afforded to party autonomy, allowing the parties to fashion their proceedings in accordance with their specific needs and within a framework that secures the respect of the rule of law[14]. Therefore, the reform of Chapter 12 PILA is limited to a "light revision", amending as little as possible and only to the extent necessary, with the goal of modernizing and strengthening Switzerland's position as a leading place for international arbitration. This goal is to be achieved by improving legal certainty and clarity, removing any unclear formulations, and rendering the arbitration law even more user-friendly, namely by incorporating the Supreme Court's established case law[15].

As explained above, Chapter 12 PILA in its current state does not contain an express provision regarding the revision of arbitral awards, even though the Supreme Court has continuously held that this remedy is available in international arbitration. In view of incorporating this established case law into the arbitration law, the Draft Bill now proposes the adoption of the following provisions (in free translation):

12 See *supra* fn 7.
13 See *supra* fn 8.
14 Explanatory Report, *op. cit.* fn 7, p. 2. See also ASA's observations, *op. cit.* fn 8, para. 3.
15 Explanatory Report, *op. cit.* fn 7, pp. 2-3; ASA's observations, *op. cit.* fn 8, para. 5.

Article 180 PILA (Draft Bill) – Challenge of arbitrators

1 An arbitrator may be challenged:

a. if he or she does not meet the requirements agreed by the parties;

b. if the arbitration rules agreed by the parties provide a ground for challenge; or

c. if circumstances exist that give rise to justifiable doubts as to his or her independence or impartiality.

2 A party may challenge an arbitrator whom it has appointed or in whose appointment it has participated only on grounds of which it became aware after such appointment, despite appropriate care. The ground for challenge must be notified to the arbitral tribunal and to the other party without delay.

2bis A member of the arbitral tribunal may be challenged:

a) by a written agreement of the parties;

b) upon the request by one of the parties, if he or she is unable to fullfil his or her mandate within a reasonable time and with the appropriate care.

3 Unless the parties have agreed otherwise, the party who intends to challenge a member of the arbitral tribunal may file a written and reasoned request within 30 days of the discovery of the ground for challenge with the court having jurisdiction at the seat of the arbitral tribunal. The court shall make a final decision.

4 *If a ground for challenge is discovered only after the closing of the arbitration proceedings, the provisions regarding revision shall apply*. (Emphasis added)

Article 190a PILA (Draft Bill) – Revision

1 A party may request the revision of an arbitral award if:

a. it subsequently discovers relevant facts or conclusive evidence on which it was unable to rely in the course of the arbitration proceedings; facts and evidence that only occurred after the arbitral award are excluded.

b. criminal proceedings have established that a crime or felony has influenced the arbitral award to the detriment of the requesting party; a conviction by the criminal court is not required; if it is

> impossible to conduct criminal proceedings, proof may be provided otherwise.
>
> 2 An application for revision must be filed within 90 days of discovery of the ground for revision. After expiry of a ten-year period from the entry into force of the arbitral award, revision can no longer be applied for.
>
> 3 If none of the parties has its domicile, its habitual residence, a place of business or seat in Switzerland, they may, by an express statement in the arbitration agreement or in a subsequent agreement in writing, exclude the revision of arbitral awards pursuant to paragraph 1(a).

The Explanatory Report to the Draft Bill makes clear that the adoption of the new Article 180(4) PILA (Draft Bill) is suggested based on (and in accordance with) the Supreme Court's recommendation in ATF 142 III 521[16].

Most of the various stakeholders that have filed observations on the Draft Bill during the consultation period have reacted favorably to the proposed amendment. However, many of them have made suggestions to improve the new revision provisions in the Draft Bill. For instance, with respect to the question at issue here, namely whether the subsequent discovery of a ground for the challenge of an arbitrator can be invoked as a ground for the revision of an international arbitral award, the Swiss Arbitration Association ("ASA") submitted that the relationship between actions for annulment and requests for revision must be clarified. In particular, the Bill should clarify that if the ground for challenge of the arbitrator is discovered after the closing of the arbitration proceedings but prior to the expiration of the deadline to file an action for annulment, the party intending to rely on such ground for challenge must file an annulment action against the arbitral award based on Article 190(2)(a) PILA. The remedy of the revision of the arbitral award is only available if the ground for challenge of the arbitrator is discovered after the expiration of the deadline to bring an annulment action. Therefore, ASA suggests clarifying Article 180(4) PILA (Draft Bill) as follows:

> If a ground for challenge only comes to light *after expiry of the time limit for challenging the arbitral award,* the provisions concerning revision shall apply.[17]

Furthermore, ASA, as well as the Supreme Court judges themselves, have opined that the mere reference in Article 180(4) PILA (Draft Bill) to the revision

16 Explanatory Report, *op. cit.* fn 7, pp. 24-25.

17 ASA's observations, *op. cit.* fn 8, para. 56. In this sense see also the observations by (i) Ordre des avocats de Genève, *op. cit.* fn 8, p. 6; (ii) Professor Andreas Bucher, *op. cit.* fn 8, pp. 9 and 13; (iii) University of Geneva, *op. cit.* fn 8, pp. 10 and 13-14; (iv) University of Luzern, Zentrum für Konflikt und Verfahren CCR, *op. cit.* fn 8, para. 75.

provisions in Article 190a PILA (Draft Bill) is insufficient. In effect, the ground for revision based on the subsequent discovery of a ground for challenge of an arbitrator does not fall under Article 190a(1)(a) PILA (Draft Bill)[18]. It may be covered by Article 190a(1)(b) PILA, but only to the extent that it relates to a crime or felony on the part of the arbitrator concerned. To remedy this shortcoming, ASA has called for the inclusion in Article 190(a) PILA (Draft Bill) of the following additional ground for revision:

> A party can apply for the revision of a decision if [...] it subsequently discovers a manifest ground for challenge of a member of the arbitral tribunal that it was unable to raise in the course of the proceedings, despite the appropriate care.[19]

According to ASA, the reference to "appropriate care" is consistent with the Supreme Court's established case law concerning the subsequent discovery of relevant facts or evidence. Moreover, the reference to "manifest" grounds for challenge of an arbitrator is necessary to "prevent abuse" and "ensure that only serious cases of lack of independence or impartiality can be brought"[20].

Several more recommendations have been made to improve other aspects of the Draft Bill's proposed provisions on the revision of international arbitral awards. However, the present Article is limited to the specific ground for revision dealt with by the Supreme Court in its decision ATF 142 III 521 of 7 September 2006. Accordingly, a broader analysis of the questions raised by the revision of international arbitral awards rendered in Switzerland and the Draft Bill's proposed provisions would go beyond the scope of this contribution. Suffice it to refer to the Draft Bill's Explanatory Report, as well as to the observations filed during the consultation period[21].

D) CONCLUDING REMARKS

In addition to the Supreme Court's nod to the IBA Guidelines on Conflicts of Interest and its reasoning on the merits, the Decision constitutes a particularly interesting (and rare) illustration of how case law can trigger and influence the development and creation of statutory law. The Supreme Court conducted a thorough review of Swiss arbitration law and practice, as well as scholarship, and even proceeded to a comparative law analysis of the issue before it. On

18 ASA's observations, *op. cit.* fn 8, para. 57; Supreme Court's observations, *op. cit.* fn 8, p. 4.

19 ASA's observations, *op. cit.* fn 8, para. 57. For observations in favor of the creation of an additional, separate ground for revision in relation to the subsequent discovery of a ground for challenge of an arbitrator, see, e.g., (i) Professor Andreas Bucher, *op. cit.* fn 8, p. 13; (ii) Ordre des avocats fribourgeois, *op. cit.* fn 8, pp. 8 and 11; (iii) Schweizer Anwaltsverband (SAV/FSA), *op. cit.* fn 8, p. 6; (iv) University of Bern, *op. cit.* fn 8, *ad* Article 190a VE-IPRG; (v) University of Luzern, Zentrum für Konflikt und Verfahren CCR, *op. cit.* fn 8, para. 57; and (vi) University of St. Gallen, *op. cit.* fn 8, para. 33.

20 ASA's observations, *op. cit.* fn 8, para. 57. In this sense see also the observation by the University of Lausanne, *op. cit.* fn 8, p. 8.

21 See *supra* fn 7 and 8.

this basis, it extended a "thinly veiled" recommendation to Parliament that the discovery of a ground for challenge of an arbitrator after the expiry of the time limit to file an annulment action against the award should constitute an admissible ground for revision. Parliament accepted this recommendation and proposed the adoption of new statutory provisions in Chapter 12 PILA, in line with the Supreme Court's analysis. It will be interesting to see the final results of this legislative process of cross-fertilization involving myriad actors, including the Supreme Court, Parliament, academics and practitioners, various organizations and associations, political parties and cantons, among others.

Watch this space!

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