

## Arbitration - Switzerland

### Court Grants First Revision of Arbitral Award

February 15 2007

**Facts**  
**Legal Principles**  
**Decision**

On August 29 2006 the Supreme Court granted revision of an international arbitral award for the first time.<sup>(1)</sup> The court's acceptance of the revision action resulted in the annulment of the award and a direction to the arbitral tribunal to issue a new award taking into account the newly discovered facts or evidence which the Supreme Court had identified as likely to change the original award. The Private International Law Act makes no provision for revision; instead, this remedy was created by the Supreme Court in a decision of March 11 1992.<sup>(2)</sup>

#### Facts

The case concerned a call-option agreement in respect of 25.1% of the shares of a major Russian mobile phone operator. The agreement provided for International Chamber of Commerce arbitration in Geneva.

The purchaser exercised the call option, but the seller had already transferred the shares to third parties. The purchaser then initiated an arbitration under the agreement, seeking the shares and damages in lieu. The seller's defence was that the call-option agreement was void as it was contrary to public policy. It also alleged that the purchase of the shares was part of a money-laundering scheme. In particular, the seller alleged that the economic beneficiary behind the purchaser company was a former Russian government minister who was suspected of having abused his power to enrich himself and was laundering the funds by purchasing telecommunications interests.

To demonstrate that money laundering was taking place, the seller presented to the arbitral tribunal (i) a written statement from a former employee of the purchaser, and (ii) the elaborate corporate structure behind the purchaser. The purchaser's evidence comprised statements from a Danish lawyer alleging that he was the economic beneficiary of the purchaser, not the former Russian minister, as well as due diligence reports from a number of law firms.

The arbitral tribunal found the evidence of money laundering to be insufficient and held the Danish lawyer to be the actual economic beneficiary of the purchaser.

The seller brought an action for the annulment of the award before the Supreme Court, claiming a violation of public policy. By a decision of December 14 2004<sup>(3)</sup> the Supreme Court dismissed this challenge, holding that the arbitral tribunal had considered and rejected the allegations of money laundering.

On April 12 2006, almost two years after the award, the seller brought an action for revision before the Supreme Court. The seller relied on an affidavit of January 13 2006 from a representative of the purchaser, which had been submitted in legal proceedings before the English Privy Council. In reference to three documents, the affidavit stated that the highest executive body of the purchaser no longer maintained that the Danish lawyer was the sole economic beneficiary. The three documents all pre-dated the award and had been seen not by the applicant itself, but rather only by its lawyers in connection with a related arbitration in Zurich. Thus, the applicant could submit only the affidavit and not the three documents referenced therein.

#### Legal Principles

The Private International Law Act, which sets out the remedies against international

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arbitral awards, contains no express provisions on the revision of arbitral awards. The Supreme Court has, however, recognized the possibility of such an action by analogy to Article 137 of the Judicial Organization Act, which deals with actions for the revision of Supreme Court judgments. On January 1 2007 this statute was replaced by the Supreme Court Act. With respect to the revision of Supreme Court judgments, the general rules have remained the same; thus, the rules on the revision of arbitral awards were unaffected by the new statute.

Actions for revision must be introduced before the Supreme Court within 90 days of the applicant learning of grounds for the action. If the Supreme Court accepts the application, it will annul the arbitral award and remit the matter to the same arbitral tribunal or, if that is impossible, to a newly constituted tribunal for a new decision.

The grounds for revision of an arbitral award are where: (i) the applicant learns of important new facts or discovers cogent evidence that it was unable to submit in the original arbitration proceedings; or (ii) it is established in criminal or other formal proceedings that the arbitral award was influenced, to the detriment of the applicant, by a crime or misdemeanour, even if no conviction results.

## Decision

The first ground for revision was invoked in this case. The court reaffirmed its well-established practice in regard to this ground - namely that the new facts and evidence must be new (ie, they could not have been submitted by the applicant in the arbitration proceedings, despite the applicant taking sufficient care to identify the relevant facts and adduce the evidence) and material (ie, they must change the factual basis of the contested award with the result that, upon "an appropriate legal assessment", they would possibly or probably lead to an award with a different result). The judgment is ambiguous in regard to whether a different award must be possible or probable.

In the present case the Supreme Court found that the affidavit and the documents referenced therein were new, as the applicant could, with reasonable diligence, only have become aware of them after the arbitral proceedings. The court also held that this new evidence was capable of establishing facts that the applicant had alleged in the arbitration proceedings but was unable to prove (ie, that the economic beneficiary of the purchaser was not the Danish lawyer), and therefore the allegations of money laundering were rendered more plausible.

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## Endnotes

- (1) Decision of the Swiss Supreme Court of August 29 2006, 4P.102/2006/ruo, currently available in German from the Swiss Supreme Court website at [www.bger.ch](http://www.bger.ch).
- (2) ATF/BGE 118 II 199, note by P-Y Tschanz in (1993) rev arb 115.
- (3) Swiss Supreme Court decision 4P.208/2004/lma, currently available in German on the Swiss Supreme Court website at [www.bger.ch](http://www.bger.ch).

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