

Revision of arbitral award granted for discovery of new evidence

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Facts

Decision

Comment

In a recently published decision, the Supreme Court admitted a request for revision of an arbitral award based on the subsequent discovery of new evidence in relation to bribery.⁽¹⁾

Facts

The dispute arose out of a consultancy agreement between C and B, whereby B was to provide information and advice to C in relation to the procurement of a project in state V against payment of a commission. The parties undertook to comply with the applicable anti-corruption law, failing which B would lose its entitlement to commission. The parties also undertook to refer any dispute to an International Chamber of Commerce arbitral tribunal in Geneva. The agreement was governed by Swiss law.

Further to the conclusion of a number of agreements between C and a state company of V, as well as C's refusal to pay the entirety of the commission to B, the latter started arbitration proceedings to obtain payment. In the proceedings, C argued that B had not provided any services and that it had lost its entitlement to commission because it had bribed officials in V. The arbitral tribunal found that C had not proven its bribery allegations and issued a final award in favour of B.

Subsequently, A (C's legal successor) applied for revision of the award before the Supreme Court based on the discovery of new evidence.

Decision

The Supreme Court recalled that the revision of arbitral awards can be sought based on Article 123ff of the Federal Tribunal Statute applied by analogy,⁽²⁾ and that:

- only facts or evidence existing but unknown to the applicant, despite all due care at the time of the main proceedings, can justify a revision;
- the newly discovered facts must be relevant (ie, they must be sufficient to modify the factual basis of the disputed award and lead to a different outcome if they are properly weighed);
- the newly discovered evidence must serve to prove either newly discovered facts or facts that were already known in the main proceedings but remained unproven; and
- the newly discovered evidence was likely to lead to a different decision if the tribunal had been aware of it in the main proceedings, provided that such evidence is necessary not only to assess the facts but also to establish them.

In the case at hand, a newly discovered banking document established that B's beneficial owner was in fact a former employee of C who was responsible for projects in V.⁽³⁾ According to the Supreme Court, this document proved that B was not an independent third party, but rather a vehicle to transfer bribes in order to procure contracts with state companies of V, as A had argued in the arbitration proceedings.⁽⁴⁾ The arbitral tribunal had found that the consultancy agreement would

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have been null if the bribery allegations had been proven and that the identity of B's beneficial owner was relevant in this respect. However, A had been unable to prove its bribery allegations due to B's refusal to produce the relevant banking documents.⁽⁵⁾ The Supreme Court considered that the newly discovered document was sufficient to establish this identity and that since this document was already available when the award was issued – although C could not rely on it – the conditions for a revision of the award were met.⁽⁶⁾ Therefore, the Supreme Court granted A's request for revision, annulled the award and remanded the case back to the original arbitral tribunal for a new decision.⁽⁷⁾

Comment

This is one of the rare cases in which the Supreme Court upheld a request for revision of an arbitral award. The application was brought by the respondent in the arbitration who had been confronted with the claimant's refusal to produce a document notwithstanding a production order by the arbitral tribunal. The newly discovered document actually appeared to be precisely the document that had been ordered to be produced. The arbitral tribunal might thus have considered drawing adverse inferences from the claimant's refusal to produce the document. However, the summary of the arbitration proceedings set forth in the Supreme Court's decision does not indicate whether the arbitral tribunal did so, let alone what its reasoning was in this respect. It is hoped that this award will be published in the future, since the issue of what an arbitral tribunal can do when faced with a party's refusal to produce a document is of significant interest.

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Endnotes

- (1) Supreme Court, 4A_412/2016, November 21 2016 (in German).
- (2) Ground 2.2.
- (3) Grounds 3 and 3.2.
- (4) Ground 3.2.
- (5) *Id.*
- (6) *Id.*
- (7) Ground 4.

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