

4A\_570/2011<sup>1</sup>

Judgment of July 23, 2012

First Civil Law Court

Federal Judge Klett (Mrs), Presiding  
Federal Judge Corboz,  
Federal Judge Kolly,  
Clerk of the Court: Carruzzo

State X.\_\_\_\_\_,  
Represented by Mr. Matthias Scherer and Mr. Pierre-Olivier Allaz,  
Petitioner,

v.

Y.\_\_\_\_\_, AG (in Liquidation),  
Represented by Mr. Philipp Habegger and Mr. Micha Bühler,  
Respondent,

Facts:

A.

A.a On September 21<sup>st</sup>, 2005 Y.\_\_\_\_\_, AG (hereafter: the Respondent) a German law company in liquidation, represented by its receiver started arbitration proceedings (hereafter: the BIT arbitration) against State X.\_\_\_\_\_ (hereafter: the Petitioner). It argued various violations of an investment treaty with the Federal Republic of Germany, which reduced the value of its share in a public company of [name of state omitted] named Z.\_\_\_\_\_ to which the Petitioner had granted a concession for constructing and operating a segment of a toll highway in 1989.

In December 2005 the Respondent started arbitration proceedings against Z.\_\_\_\_\_ with a view to obtaining the payment of some invoices concerning the construction work of the section of the highway it had carried out.

A.b On December 3, 2006 the Respondent, S.\_\_\_\_\_ and his son T.\_\_\_\_\_ (hereafter referred to collectively as: S.\_\_\_\_\_) entered into a contract governed by Swiss law, the principle purpose of which was the sale of its 9.87% share in Z.\_\_\_\_\_ by the Respondent to the formers, who were already 30% shareholders of the company and members of its board of directors (hereafter: the 2006 Contract). The purchase price of the shares, set at 10 million Euros was payable in three installments, on January 15, March 31<sup>st</sup> and December 30, 2007. According to Art. 4 of chapter A of the aforesaid contract, upon the second installment being paid, the Respondent and S.\_\_\_\_\_ would regularly consult with each other as to the BIT arbitration. However, the ultimate decision to put an end to the

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<sup>1</sup> Translator's note: Quote as State X.\_\_\_\_\_ v. Y.\_\_\_\_\_, 4A\_570/2011. The original of the decision is in French. The text is available on the website of the Federal Tribunal [www.bger.ch](http://www.bger.ch)

arbitration would befall S.\_\_\_\_\_. In chapter B of the same contract the Respondent undertook to withdraw its request for arbitration against Z.\_\_\_\_\_ against payment of a lump sum of 6 million Euros which it did on March 22, 2007.

A.c In July 12, 2007 the Respondent and S.\_\_\_\_\_ entered into a new contract, backdated to December 3, 2006 (hereafter: the 2007 contract) the contents of which corresponded in large part to those of the 2006 Contract. In Art. 4 of chapter A of the new contract, they undertook to do all they could to lead the government of [name of country omitted] to negotiate with the Respondent an amicable solution to its dispute with the Petitioner (1<sup>st</sup> §). Should this fail to be achieved by March 31<sup>st</sup>, 2008, the parties would meet again and consult with a view to deciding to continue the BIT arbitration or not (2<sup>nd</sup> §). At its Art. 17 the 2007 Contract contained a confidentiality clause which was not in the 2006 Contract.

Still on July 12, 2007 the Respondent and S.\_\_\_\_\_ signed a "SIDE LETTER to the Agreement dated 03 Dec 2006<sup>2</sup>" (hereafter: the Side Letter) meant to remain strictly confidential. The Respondent agreed to put an end to the BIT arbitration upon request by S.\_\_\_\_\_ should the parties fail to agree as to the continuation of the BIT arbitration after March 31<sup>st</sup>, 2008 as stated at Art. 4 (2<sup>nd</sup> §) of the 2007 Contract.

A.d On May 20, 2008 the Respondent transferred its share in Z.\_\_\_\_\_ to S.\_\_\_\_\_ in conformity with the 2006 and 2007 Contracts.

A.e In a letter of September 17, 2008 S.\_\_\_\_\_ specifically asked the Respondent to terminate the BIT arbitration by September 30, 2008.

The Respondent refused to comply and S.\_\_\_\_\_ started arbitration proceedings with the International Chamber of Commerce on October 15, 2008 in order to compel it (hereafter: the ICC arbitration). On April 23<sup>rd</sup>, 2010 it changed its request for performance into a submission for damages when in the ICC arbitration the Respondent put on record the award that had been issued in the BIT arbitration in the meantime (see A.f hereunder).

The Arbitral tribunal issued its award on April 18, 2011. Recognizing that the Respondent had breached its duty to terminate the BIT arbitration, it nonetheless rejected the monetary claims raised by S.\_\_\_\_\_ in this respect because S.\_\_\_\_\_ had not succeeded in establishing that the parties to the 2006 and 2007 Contracts had agreed to include in the purchase price of the shares of Z.\_\_\_\_\_ an amount constituting a counterpart to the right given to S.\_\_\_\_\_ to demand that the Respondent withdraw its claim in the BIT arbitration.

A.f After hearing the case in the BIT arbitration the *ad hoc* Arbitral tribunal composed of three members issued an award on July 1<sup>st</sup>, 2009 ordering the Petitioner to pay € 29.21 million with interest to the Respondent.

To the extent that they involve the issues of substantive law address by the arbitrators, the reasons of the award issued at that time are not pertinent to the requirements of this case. There is accordingly no need to state them here.

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<sup>2</sup> Translator's note: In English in the original text.

B.

On September 14, 2011 the Petitioner seized the Federal Tribunal of a Request for revision with a view to obtaining the annulment of the award of July 1<sup>st</sup>, 2009 and an order sending the case back to the Arbitral tribunal for new hearings followed by a new decision as to the consequences of the exercise by S. \_\_\_\_\_ on September 17, 2008 of its right to invite the Petitioner to withdraw the BIT arbitration.

By presidential decision of November 23<sup>rd</sup>, 2011 the Petitioner was asked to pay an amount of CHF 150'000 to the Purser of the Federal Tribunal by December 15, 2011, as a guarantee of the costs which could be awarded to the Respondent. It complied timely.

By letter of its Chairman of January 26, 2012 the Arbitral tribunal stated that it would not participate in the revision proceedings.

In its Answer of January 30, 2012 the Respondent submitted that the Request for revision was inadmissible and alternatively that it should be rejected.

The Petitioner filed a reply on March 8, 2012 maintaining the submissions of the request for revision. Moreover it sought a personal appearance of the four individuals who made the written statements submitted as exhibits 7, 7*bis*, 30 and 32 should the Respondent challenge their contents.

In its rejoinder of April 23<sup>rd</sup>, 2012 the Respondent repeated the submissions in its Answer.

On June 27, 2012 the Respondent sent a copy of a judgment by which the Kammergericht of Berlin upheld its request for enforcement of the July 1<sup>st</sup>, 2009 award and added an explanatory letter.

On July 12, 2012 the Petitioner informed the Federal Tribunal, with exhibits, that it had appealed the judgment of the Kammergericht of Berlin to the Bundesgerichtshof with a request for a stay of enforcement.

Reasons:

1.

According to Art. 54 (1) LTF<sup>3</sup> the Federal Tribunal issues its decision in an official language<sup>4</sup>, as a rule in the language of the decision under appeal. When the decision was issued in another language (here English), the Federal Tribunal resorts to the official language chosen by the parties. In front of the Arbitral tribunal they used English while in their briefs to the Federal Tribunal they used French (the Petitioner) or German (the Respondent). In accordance with its practice the Federal Tribunal will consequently issue its decision in French.

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<sup>3</sup> Translator's note: LTF is the French abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173.110.

<sup>4</sup> Translator's note: The official languages of Switzerland are German, French and Italian.

2.

The seat of the arbitration was in Geneva. At least one of the parties (in this case both) did not have its domicile in Switzerland at the decisive time. The provisions of chapter 12 PILA<sup>5</sup> are accordingly applicable (Art. 176 (1) PILA).

The Private International Law (PILA; RS 291) contains no provision as to the revision of arbitral awards within the meaning of Art. 176 ff PILA. The case law of the Federal Tribunal has filled this lacuna. The grounds for revision of an award were those stated at Art. 137 OJ<sup>6</sup>. They now fall within Art.123 LTF. The Federal Tribunal is the judicial body having jurisdiction to address a petition for revision of any international arbitral award, whether final, partial or interlocutory. If it upholds a request for revision, the Federal Tribunal does not decide the case on the merits but sends the matter back to the arbitral tribunal that issued the award or to a new tribunal to be constituted (ATF 134 III 286 at 2 and the cases quoted).

3.

In support of its request for revision the Petitioner invokes the discovery after the fact of some new pertinent facts and conclusive evidence that the Respondent would have deliberately hidden from it during the arbitral proceedings. This refers to the unconditional right to require from the Respondent that it withdraw the BIT arbitration, which the Respondent had granted to S.\_\_\_\_\_ in the 2006 Contract and in the Side Letter, whilst seeking to hide their existence by way of the "simulated" Contract of 2007; a right which its beneficiary had indeed exercised in September 2008 after acquiring the Respondent's shares in Z.\_\_\_\_\_ and which was upheld in the ICC arbitration.

According to the Petitioner, the discovery of these new facts and evidence would have taken place on July 17, 2011 in the following circumstances. At the beginning of 2011 S.\_\_\_\_\_ wished to acquire the shares of Z.\_\_\_\_\_ belonging to the Petitioner with a view to becoming the majority shareholder of that company and to list it on the stock exchange of [name of country] omitted. The Attorney general of that country who had recommended that the purchase offer be rejected, agreed to meet with the offerer at his request. During that meeting, which took place on June 14, 2011, S.\_\_\_\_\_ informed his counterpart of the existence and contents of the 2006 Contract, of the reasons for which the parties to that contract had subsequently removed from it the clause concerning the right of S.\_\_\_\_\_ to demand from the Respondent that it withdraw the arbitration, of the exercise of this right on September 17, 2008 and of the subsequent proceedings in the ICC arbitration. The Attorney general then requested S.\_\_\_\_\_ to produce the evidence that could prove its allegations. Thus on June 17, 2011, counsel for S.\_\_\_\_\_ turned over to a senior officer of the Attorney general's office a number of documents containing the exhibits on which the Petitioner bases its request for revision. To support its allegations the Petitioner sent to the Federal Tribunal the written statements signed by the Attorney general (exhibit 7), by the aforesaid senior officer (exhibit 7*bis*), by S.\_\_\_\_\_ (exhibit 30) and by the latter's counsel (exhibit 32). To the extent necessary it seeks a hearing of these four individuals so they can confirm their respective statements.

According to the Petitioner the facts it invoked would be pertinent. Indeed, had they known about them timely, the Arbitrators would have dismissed the Respondent's submissions for several reasons. They

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<sup>5</sup> Translator's note: PILA is the most commonly used English abbreviation for the Federal Statute on International Private Law of December 18, 1987, RS 291.

<sup>6</sup> Translator's note: OJ is the French abbreviation for the previous statute organizing federal Courts.

would have doubtlessly found that the Petitioner was the beneficiary of a full third party stipulation within the meaning of Art. 112 (2) CO<sup>7</sup>, empowering the Petitioner personally to request performance of the undertaking to withdraw the arbitration request, which the Respondent had undertaken towards S.\_\_\_\_\_ in the Side Letter. They could also have found that by way of this agreement, the Respondent had assigned its claim for damages against the Petitioner to S.\_\_\_\_\_ with certain conditions precedent – in particular the request by the assignee to the assignor to withdraw the arbitration request – and they could have concluded that the conditions precedent had been accomplished at the end of September 2008 at the latest, the assignor was no longer the owner of the claim in dispute and hence was acting improperly (*nemo audiatur propriam turpitudinem allegans*) by maintaining its claim in this respect in order to attempt enrichment at the costs of the Petitioner.

4.

4.1

Pursuant to Art. 123 (2) (a) LTF, revision may be sought in civil matters when the petitioner subsequently discovers some pertinent facts or conclusive evidence that he could not invoke in the previous proceedings, to the exclusion of any facts or evidence after the decision that is the object of the request for revision. Except on some points concerning revision for violation of the ECHR, the rules of the OJ<sup>8</sup> as to revision were adopted by the LTF. Yet some systematic and drafting changes were made. Thus, as opposed to Art. 137 (b) OJ, Art. 123 (2) (a) LTF no longer contains the improper wording “new facts”, but states that they must be pertinent facts discovered subsequently, to the exclusion of facts after the judgment. This being said, case law concerning “new facts” retains its significance on the merits. Accordingly revision may be justified only by facts which took place until the time when, in the previous proceedings, facts could still be asserted, but which were not known to the petitioner despite his diligence; moreover, the facts must be pertinent, namely apt to modify the factual findings basing the decision in dispute and to lead to a different solution pursuant to a correct legal assessment. It must be concluded that there is lack of diligence when the discovery of the new facts or evidence proceeds from research that could and should have been carried out in the previous proceedings. It is only with restraint that it should be admitted that it was impossible for a party to allege a specific fact in the previous proceedings, because revision on the basis of facts unknown at the time does not purport to remedy the petitioner’s omissions in the conduct of his case (judgment 4A\_763/2011 of April 30, 2012 at 3.1 and the cases quoted).

For the reasons stated at Art. 123 (2) (a) LTF, the request for revision must be filed with the Federal Tribunal within 90 days after the ground for revision is discovered, under penalty of forfeiture (Art. 124 (1) (d) LTF). This is an issue of admissibility and not one of merit, as opposed to determining whether the petitioner was late in discovering the ground for revision invoked. The discovery of the ground for revision implies that the petitioner has sufficiently sure knowledge of the new fact to be able to invoke it, even if he is not in a position to prove it with certainty; a mere assumption is not sufficient. More specifically with regard to new evidence, the petitioner must have a document establishing it or sufficient knowledge to introduce it. It behooves the petitioner to establish the circumstances necessary to verify compliance with the aforesaid time limit (judgment 4A\_222/2011<sup>9</sup> of August 22, 2011 at 2.1 and the cases quoted).

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<sup>7</sup> Translator’s note: CO is the French abbreviation for the Swiss Code of Obligations.

<sup>8</sup> Translator’s note: OJ, for organisation judiciaire, is the French abbreviation for the previous Statute organizing Federal Courts, which was abolished by the LTF.

<sup>9</sup> Translator’s note: Full English translation at <http://www.praetor.ch/arbitrage/dismissal-of-an-untimely-request-for-the-revision-of-an-arbitral/>

Moreover, since revision is an alternative legal recourse as compared to the appeal based on Art. 190 (2) PILA (ATF 129 III 727 at 1 p. 729), it is not admissible to invoke one of the grounds contained in this provision if it was discovered before the time limit to appeal ran out (judgment 4A\_234/2008<sup>10</sup> of August 14, 2008 at 2.1).

#### 4.2

Applied to this case, these principles of case law render the petition at hand inadmissible.

The Petitioner claims to have discovered the new facts and evidence on June 17, 2011, which would justify granting its request for revision of the final award of July 1<sup>st</sup>, 2009. Assuming this to be so, this assertion would mean that the request for revision, sent to the Federal Tribunal on September 14, 2011, was timely submitted, namely within 90 days following the discovery of the ground for revision (Art. 124 (1) (d) LTF). The Petitioner produced four written statements in support and requested that their authors be heard if necessary (above at 3.1, 2<sup>nd</sup> § in fine). It is not necessary to adduce this evidence because the Respondent does not dispute that the written statements are consistent with what those who wrote them would testify. Whether or not such statements are persuasive evidence is a different issue. Indeed, they do not reflect reality and it will be shown hereunder that the Petitioner was aware of the allegedly new facts and evidence it invokes much earlier than it claims.

The Parties argued at length as to when precisely the Petitioner discovered that the Respondent had granted S. \_\_\_\_\_ the right to demand withdrawal from the BIT arbitration and as to when this right was actually exercised by its owner. However the only important point to decide the admissibility *ratione temporis* of the request for revision is whether or not the discovery took place earlier than 90 days before the request was filed. In the affirmative it must be found inadmissible, whether the discovery of the ground for revision took place 91 days, six months or two years before the *ad hoc* proceedings were initiated. This is indeed the case.

After reviewing the detailed explanations given by the Parties in their various briefs, this Court reaches the conclusion that it is at the end of April 2009 at the latest that the Petitioner discovered the ground advanced in support of its request for revision. The exhibits to the request authorize no other conclusion. More precisely, they show that in a letter from counsel [name omitted] sent to the Chairman of the Arbitral tribunal on April 23, 2009, the Petitioner stated that it had been informed by S. \_\_\_\_\_ that the latter had initiated arbitral proceedings against the Respondent for breach of the 2007 Contract attached to the aforesaid letter (the ICC arbitration); that it had requested the Arbitral tribunal to order the Respondent to put an end to the BIT arbitration and that he was available to give explanations to the Arbitral tribunal as long as his position in the ICC arbitration would not be jeopardized; the Petitioner added in the same letter that it considered the introduction and the continuation of the BIT arbitration by the Respondent in breach of the aforesaid contract (Petitioner's exhibit nr 24) as contrary to the rules of good faith. Invited by the Chairman of the Arbitral tribunal to take a position on this letter, counsel for the Respondent confirmed the existence and the object of the ICC arbitration on April 27, 2009; moreover it disputed the charge that it would have introduced and continued the arbitration in bad faith (Petitioner's exhibit nr 25). In a letter sent to the Chairman of the Arbitral tribunal by its representatives on May 1<sup>st</sup>, 2009, the Petitioner repeated its grievance because the Respondent would have sold its share of

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<sup>10</sup> Translator's note: Full English translation at <http://www.praetor.ch/arbitrage/renunciation-to-appeal-revision-of-award-within-time-limit-to-ap/>

Z.\_\_\_\_\_ to S.\_\_\_\_\_ after agreeing with the latter that a certain amount would be paid as a counterpart to its withdrawing the BIT arbitration; it added that in its view the information concerning the ICC arbitration was important and pertinent to the BIT arbitration, so that it should be taken into consideration (Petitioner's exhibit nr 26). As to the Arbitral tribunal, it specifically referred to these various letters in its final award (p.18 to 21, nr 1.73 to 1.84). Furthermore it states the five grounds on which it was convinced not to take into account the aforesaid Petitioner's letters and to continue the proceedings (p. 21 to 23, nr 1.85, (a) to (e), and 1.86).

Contrary to what the Petitioner claims, one does not see why the fact that allegedly it would not have known of the Side Letter before the award was issued on July 1<sup>st</sup>, 2009, would be of any pertinence considering that it has been established, as was just pointed out, that the Petitioner knew at the latest at the end of April 2009 that S.\_\_\_\_\_ had initiated arbitral proceedings against the Respondent, arguing in particular that the latter would have breached the commitment it had made to withdraw the BIT arbitration if requested to do so, in other words by invoking the very obligation the Respondent had undertaken in the Side Letter.

Neither does it appear that the Petitioner would not have been in a position to timely adduce evidence as to the contents and the scope of the agreement concluded by the Respondent and S.\_\_\_\_\_ as to the BIT arbitration, particularly by asking that the latter be heard as a witness, as the Arbitral tribunal emphasized in its award (p. 22, nr 1.85, (d)). If necessary the assistance of the competent judicial body could be sought (see Art. 184 (2) PILA) or a breach of the right to adduce evidence could be argued in a Civil law appeal to the Federal Tribunal based on Art. 190 (2) (d) PILA if the Arbitral tribunal had simply ignored or rejected the *ad hoc* request without serious reasons in its final award.

Under such conditions the request for revision at hand is inadmissible. Indeed, either it was submitted late in breach of Art. 124 (1) (d) LTF or it is based on facts and evidence that were not discovered "afterwards" within the meaning of Art. 123 (2) (a) LTF.

5.

The Petitioner loses and will accordingly pay the costs of the federal proceedings (Art. 66 (1) LTF) and compensate the Respondent for the federal proceedings (Art. 68 (1) and (2) LTF). The amount allocated in this respect shall be taken from the security given by the Petitioner.

Therefore the Federal Tribunal pronounces:

1.

The matter is not capable of revision.

2.

The judicial costs set at CHF 85'000 shall be borne by the Petitioner.

3.

The Petitioner shall pay to the Respondent an amount of CHF 150'000 as costs; this amount shall be taken from the security deposited with the Purser of the Federal Tribunal.

4.

This judgment shall be notified to the Representatives of the Parties and to the Chairman of the Arbitral tribunal.

Lausanne July 23, 2012.

In the name of the First Civil law Court of the Swiss Federal Tribunal.

The Presiding Judge:

The Clerk:

Klett (Mrs.)

Carruzzo