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The Swiss Supreme Court Refits the Frigates

ICC Award Set Aside After More than Thirteen Years

Antonio Rigozzi and Elisabeth Leimbacher★

In its decision 4A_596/2008 of October 6, 2009, the Swiss Supreme Court vacated and ordered the revision of an ICC Final Arbitral Award rendered on July 31, 1996 in the so-called "frigate-to-Taiwan" case. The Swiss Supreme Court considered that the findings in the French "ordonnance de non lieu" of October 1, 2008 — namely that Mr. Sirven committed a "fraud on the judgment" by submitting a false testimony in the ICC arbitration — were conclusive enough to order the revision of the Award.

Article 123(1) of the Swiss Supreme Court Act (Loi sur le Tribunal Fédéral) allows for the revision of an award when criminal proceedings establish that the award was influenced, to the detriment of the petitioner, by a crime or a felony. This decision, which is the first one in which the Swiss Supreme Court sets aside an award on this legal basis, further clarifies the meaning of Article 123(1) in many respects and calls for some clarifications. Finally, this decision seems to bring this political saga to an end, as it is not anticipated that a new arbitration will be initiated.

I. Introduction

Like ghostly vessels, the frigates of Taiwan have recently resurfaced on Lake Leman. In its landmark decision 4A_596/2008 of October 6, 2009[1] the Swiss Supreme Court vacated and ordered the revision of an ICC Final Arbitral Award rendered on July 31, 1996 in the now famous "frigate-to-Taiwan" case. For those who, understandably, would not recall the ins and outs of this fifteen-year-old (political and) legal saga, a summary of the sensitive factual context of the case seems necessary to better comprehend the Swiss Supreme Court's recent decision. This decision calls for some remarks pertaining to the revision proceedings themselves, as well as a few observations about its effects on the next procedural steps.

II. Facts[2]

The "most mysterious case" of the "frigates-to-Taiwan" displays all the features of a Balzac-class novel: bribes and kickbacks, corrupt influence peddling, national security

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[1] Decision 4A_596/2008, Oct. 6, 2009, *available at* <http://jumpcgi.bger.ch/cgi-bin/JumpCGI?id=06.10.2009_4A_596/2008>.

[2] The present summary of the facts and previous proceedings is based on the published decision of the Swiss Supreme Court. The names of the most relevant characters were added for the benefit of the reader, as they have been widely disclosed in the press (*Le secret-défense scelle l'affaire des frégates de Taïwan*, Le Point, Oct. 1, 2008; *Frégates de Taïwan: non-lieu dans une affaire d'Etat bloquée par le secret défense*, La Dépêche, Oct. 1, 2008), in the translation of

secrets, high profile state officials, untimely deaths, and, of course, a captivating seductress. The story starts in the late 1980s, when Taiwan, in the context of its new military defense strategy (the "Kwang-hua 2" project), approached the French government to purchase six Lafayette-class frigate warships from Thomson-CSF (now Thalès). The transaction was supported by the French state,[3] until mainland China expressed strong objections to the deal. Seeking to prevent tensions with China, the French government, at the request of its then Foreign Minister, Roland Dumas, withdrew its authorization for the transaction.

In order to overcome this obstacle, on July 19, 1990, Thomson-CSF signed a letter-agreement with the now defunct company Frontier AG Bern (the "Agreement"), under which Frontier AG would assist Thomson-CSF in completing the transaction, in exchange for 1% of the frigates' sale price, to be paid in the event the deal would go through. The exact nature of the services expected from Frontier AG under the Agreement lies at the core of what would later constitute a dispute brought before an arbitral tribunal. The Agreement contained a provision according to which any disputes should be resolved by ICC arbitration in Geneva, with French law as the law applicable to the merits. Behind the veil of Frontier AG, the real signatory of the Agreement was actually Mr. Alfred Sirven, at that time a high-ranking manager of the French oil company Elf-Aquitaine. Pursuant to a fiduciary agreement that was signed prior to the Agreement with Thomson-CSF, Frontier AG had authorized Mr. Sirven to give direct instructions to the company, and reciprocally, Mr. Sirven had allowed Frontier AG to act on his behalf. The chain was extended by the insertion (for tax reasons) of a third link, namely Brunner Sociedade Civil de administraçao Limitada ("Brunner"), a Portuguese company, to which Frontier AG's rights and obligations were later assigned.

In 1991, by a somewhat fortunate combination of circumstances, the French government dropped its opposition to the deal and authorized the exportation of the frigates to Taiwan. The "Bravo contract" sealing the sale of the frigates between Thomson-CSF and the Taiwanese government was signed on August 31, 1991 for a total value of approximately U.S.$2.5 billion. However, this happy ending turned out to be rather ephemeral, as no more than one year later, on September 2, 1992, Frontier AG and Brunner initiated arbitral proceedings, claiming that Thomson-CSF had failed to pay them the commissions allegedly due under the Agreement. One of the critical issues to be determined by the arbitral tribunal, composed of Jose Pedro Perez-Llorca, former Foreign Minister of Spain, Me François Brunschwig, former president ("bâtonnier") of the Geneva Bar and Me Jean-Denis Bredin, a prominent French lawyer, was the object of the Agreement. The precise nature of the services therein envisaged was key to knowing whether the arbitral tribunal was facing a case of illicit corrupt influence peddling ("trafic d'influence")

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the decision published on Mr. Charles Poncet's website, *available at* <www.praetor.ch/docs/6%20octobre%202009%204A%20596%202008.pdf>, and in the first commentary published on the Internet (*see* Laurent Hirsch, *Révision d'une sentence arbitrale 12 ans après*, JUSLETTER, Jan. 4, 2010 (No. 8)).

[3] The French state held a significant minority stake in Thomson-CSF.

in France, or one of (licit) lobbying in China. Payments of illegal commissions are obviously contrary to French law and international public policy and an arbitral tribunal must deny any claim based on an illicit contract. On the claimants' side (Frontier AG and Brunner), it was argued that the Agreement was licit, as its purpose was to overcome the reluctance of the Chinese government vis-à-vis the deal through the services of Mr. Kwan, a well-connected Elf-Aquitaine consultant in China. The ultimate target of the services to be rendered under the Agreement was thus the Chinese government, and the beneficiaries of the Thomson-CSF commissions were Frontier AG (for hiring Mr. Kwan's services) and Mr. Kwan (for using his network of connections with Chinese officials). For its part, the respondent Thomson-CSF contended that Mr. Kwan's intervention's real purpose was to pay a third party who was able to neutralize the French veto on the transaction.

Relying to a significant extent[4] on the witness testimony of Mr. Sirven, Mr. Kwan and others, the arbitral tribunal found, in its award rendered on July 31, 1996 (the "Award"), that the purpose of the Agreement was legitimate and ordered Thomson-CSF to pay Frontier AG (i.e., Mr. Sirven and Mr. Kwan) the contractually agreed percentage of 1% of the frigates' price (i.e., U.S.$25 million plus some FFR12.7 million) for their services.[5]

III. The Swiss Supreme Court's Decision in a Nutshell

This political imbroglio has taken (yet another) remarkable twist with the decision recently handed down by the Swiss Supreme Court. On October 6, 2009, the five judges of the Swiss Supreme Court's First Civil Chamber granted a request for revision of the decade-plus-old Award.[6] This decision came as something of a surprise, as the Swiss Supreme Court had already dismissed an appeal against the same Award in 1997.[7] One could wonder what may have led the Swiss judges to order the revision of the Award, since they had found no reason to quash it twelve years ago, when it was brought before them in a first challenge.[8]

It was in fact an order rendered by a French examining magistrate ("juge d'instruction"[9]) on October 1, 2008 that "put the cat amongst the pigeons."[10] Following an eleven-year-long criminal inquiry initiated by Thomson-CSF in 1997, pending which Mr. Sirven died, Mr. Van Ruymbeke, a well-known senior examining magistrate

[4] *See infra* note 35.

[5] *See* the summary of the Award contained in Decision 4A_596/2008, *supra* note 1, para. 4.2.1.

[6] Decision 4A_596/2008, *supra* note 1. The Supreme Court was seized of a public law appeal within the meaning of art. 191 of the Swiss Private International Law Act of Dec. 18, 1987 (PILA).

[7] Decision 4P.240/1996, Jan. 28, 1997, *reported in* ASA Bull. 118 (1998).

[8] Technically, as noted by Hirsch, *supra* note 2, the reason is that in setting aside proceedings the Supreme Court renders its decision only on the basis of the facts as previously established by the arbitrators (SCA, art. 107(2)), whereas revision proceedings are precisely meant to review the factual underpinning of the award or the circumstances that led to the award (*see* Antonio Rigozzi & Michael Schöll, Die Revision von Schiedssprüchen nach dem 12. Kapitel des IPRG 5 (2002)).

[9] In France, the Juge d'instruction is a magistrate in charge of investigating criminal cases.

[10] Ordonnance de non-lieu, Cabinet de M. Renaud Van Ruymbeke, Premier juge d'instruction au TGI de Paris, Oct. 1, 2008, *available at* <www.mediapart.fr/files/fregates-20081003-v2.pdf>.

("Premier juge d'instruction") at the Paris Tribunal of First Instance ("Tribunal de Grande Instance"), issued an order of dismissal, abandoning the prosecution of the case ("ordonnance de non lieu").[11] However, while closing the investigation for national security reasons (most of the information was classified), the order nevertheless put in place a time bomb by revealing that the object of the Agreement between Thomson-CSF and Frontier AG was indeed an illegal commission scheme. Mr. Van Ruymbeke's order held in substance that the transaction underlying the Agreement envisaged making use of the charms of Ms. Christine Deviers-Joncour, a public relations representative of Elf-Aquitaine who was at that time engaged in a relationship with the French Foreign Minister, Roland Dumas, to "soften" the latter's stance on the deal so as to overcome the French veto against the transaction.[12] As a matter of fact, the work to be performed by Mr. Kwan was a pure fabrication orchestrated by Mr. Sirven to mislead the arbitral tribunal about the true nature of the services contemplated by the Agreement. Mr. Kwan was never in the picture at the time the "Bravo" contract was signed. It was only after the start of the arbitral proceedings that he was brought "on board," by means of a fictitious agreement arranged by Mr. Sirven, whereby Mr. Kwan falsely appeared as the true beneficiary of the commissions. As a *coup de grâce*, the French magistrate has concluded that Mr. Sirven committed a "fraud on the judgment" ("escroquerie au procès") by submitting a false testimony in the ICC arbitration.

The Swiss Supreme Court considered that the findings in the French order conclusively established that a criminal offence had been committed under Swiss law, allowing for the revision of the ICC Award. The Swiss Supreme Court consequently set aside the Award and remanded the case to arbitration for a new decision, considering that the arbitrators had been deceived by the untrue testimonies.

IV. Revision in Swiss Arbitration Law[13]

The present decision is only the second one in which the Swiss Supreme Court has set aside an arbitral award on the basis of the existence of a ground for revision.[14] In Swiss

[11] Under French law, an "ordonnance de non lieu" is a decision in which the examining magistrate determines that a criminal investigation has not yielded sufficient evidence for the case to proceed to trial.

[12] Decision 4A_596/2008, *supra* note 1, para. 4.2.2.

[13] For a comparative overview of revision proceedings in other countries, *see* Yves Derains, *La révision des sentences dans l'arbitrage international, in* Law of International Business and Dispute Settlement in the 21st Century, Liber Amicorum Karl-Heinz Böckstiegel 165 (2001).

[14] The first instance was Decision 4P.102/2006, Aug. 29, 2006, ASA Bull. 550 (2007). The dispute concerned the sale of a stake in a Russian telecommunications company. The seller refused to execute the sale on the grounds that the transaction intended by the parties would be illegal, alleging that it was part of a money-laundering scheme. In support of its contentions, the seller stated in particular that the economic beneficiary of the buyer was in fact a senior Russian bureaucrat. In the arbitration that ensued, the tribunal found that the seller could not prove its allegations and held that the economic beneficiary of the buyer would be a Danish lawyer, which excluded the accusation of money laundering. In January 2006, after an appeal against the award had been rejected by the Supreme Court, the seller discovered the existence of an affidavit (produced in connection with another legal proceedings) by one of the directors of the buyer, who stated under oath that he could no longer maintain his earlier assertions to the effect that the Danish lawyer was the only economic beneficiary of the purchaser. The Supreme Court granted the request for revision based on the new evidence contained in the affidavit.

legal terminology, *révision* (*Revision* in German or *revisione* in Italian) constitutes an extraordinary legal remedy which allows for the revocation of an award, whose substance has already become *res judicata*, for very specific and limited reasons.[15] In international arbitration, the only grounds for revision that can be relied upon are those set out for the revision of the Supreme Court's decisions in Article 123 of the Swiss Supreme Court Act (SCA, Loi sur le Tribunal Fédéral),[16] which is applicable by analogy to arbitral awards.[17] Article 123 SCA provides for two possible cases of revision: first, where the decision "has been influenced to the petitioner's detriment by a crime or a felony" (Article 123(1) SCA); secondly, where "the petitioner discovers, after the decision is rendered, relevant facts or conclusive evidence which he could not rely upon during the previous proceedings" (Article 123(2)(a) SCA).

Since 1992, when the Supreme Court first held that the remedy of revision was available against awards in international arbitration,[18] several applications for revision have been filed based on alleged new facts and/or evidence (Article 123(2)(a) SCA), only one of which has been successful. The present case is the second one concerning an award allegedly obtained through a criminal offence (Article 123(1) SCA).[19] At first sight, this would make it the most successful way to set aside an arbitral award in Switzerland. The fact that an arbitral award can be reviewed after more than thirteen years can also appear as a disturbing possibility in the eyes of the arbitration community. This can happen because the time limit to file a request for revision based on Article 123(1) SCA is ninety days from the discovery of the ground for revision (Article 124(1)(d)), i.e., from the time when the petitioner knows of the enforceable criminal sentence or, as the case may be, when he becomes apprised of the existence of the crime and the evidence proving it[20] and, more importantly, because the general time limit of ten years provided for by Article 124(2) SCA does not apply to requests for revision based on criminal offences under Article 123(1) SCA. It is thus worth pointing out the main features of the revision process under Article 123(1) SCA in order to avoid the misconception that Article 123(1) SCA may somehow constitute an easy way to challenge arbitration awards in Switzerland.

Pursuant to Article 123(1) SCA, an application for revision may be filed only when criminal proceedings establish that the award was influenced, to the detriment of the

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[15] Rigozzi & Schöll, *supra* note 8, at 1–5.

[16] Loi du 17 juin 2005 sur le Tribunal fédéral (RS 173.110), which entered into force on Jan. 1, 2007 (SCA).

[17] The Supreme Court's case law was developed under the procedural system of the now repealed Federal Judicial Organization Act (FJOA), according to which the parties were entitled to rely on the grounds for revision set out in FJOA, art. 137, and FJOA, arts. 140–143 were applicable to the proceedings *mutatis mutandis*. The principles set out in these decisions still apply as part of the procedural system contained in the new SCA (*see* Decision 4A_528/2007, Apr. 4, 2008, Swiss Int'l Arb. L. Rep. 227, 234 (2008), *citing* ATF 134 III 45, 47).

[18] PILA does not contain any express provisions relating to the revision of arbitral awards. The Supreme Court, considering that this was a legislative lacuna that needed to be filled, has declared that federal law provides the parties to an international arbitration with the exceptional remedy of revision, whereby jurisdiction lies with the Supreme Court itself (ATF 118 II 199).

[19] The first one, which was based on the use of allegedly false documents and fraud against the arbitrator, was brought together with (and as fallback position to) a request based on SCA, art. 123(2)(a); unsurprisingly, it was dismissed (Decision 4A_234/2008, Aug. 14, 2008, ASA Bull. 512 (2009)).

[20] Decision 4A_ 596/2008, *supra* note 1, para. 3.3.

petitioner, by a crime (*crime/Verbrechen*) or a felony (*délit/Vergehen*),[21] even if the proceedings did not result in a conviction. The terms *crime* and *délit* are to be understood in a technical sense: according to Article 10 of the Swiss Penal Code (SPC, Code pénal Suisse), "offences liable to a sentence of imprisonment for more than three years" qualify as *crimes*, and "offences liable to a sentence of imprisonment for less than three years" qualify as *délits*.[22] In practice, the revision of an arbitral award can be envisaged for the following two main groups of offences. The first group comprises corruption (Articles 322*ter* and 322*quater* SPC) as well as the offering and/or accepting of undue advantages (Articles 322*quinquies* and 322*sexies* SPC). In this respect, reference should be made to the importance of transparency in the remuneration of the arbitrators. The second group of offences concerns the procedural conduct of the parties, and comprises forgery of documents and certificates (Articles 251–255 SPC), in particular the production of forged evidence, false declarations by a party (Articles 306–309 SPC) and false statements by witnesses/experts or forged translations of documents (Articles 307–309 SPC). Such actions can also constitute, or be committed as part of, what is commonly known as a "procedural fraud" (in German, *Prozessbetrug*; in French, *escroquerie au process*), which has recently been held by the Supreme Court to constitute a specific case of fraud within the meaning of Article 146 SPC.[23]

Moreover, according to the Supreme Court, the ground for revision based on the fact that the award was influenced by a criminal offence requires that two cumulative conditions be met.

First, as is apparent from the use of the verb "establish" in the text of Article 123(1) SCA, the criminal proceedings should in principle[24] have come to their term before an application for revision can be made. Thus, revision is excluded as long as the proceedings are pending, meaning that it is not sufficient to lodge a criminal complaint in order to be able to file an application for revision of an award.[25] As a matter of principle, this condition excludes the possibility of revision when the criminal proceedings end with an acquittal or a dismissal of the case. Only exceptionally will the constitutive elements of a criminal offence be deemed to be established if the criminal case is dismissed, namely when the dismissal is based on the fact that prosecution is not (or is no longer) possible, whether by operation of the statute of limitations or due to the mental incapacity or death of the offender. In such cases, the Supreme Court will determine autonomously whether the alleged criminal offence was indeed committed. This is precisely what happened in the case at hand, since the French magistrate issued an order abandoning prosecution ("ordonnance de non-lieu") against Mr. Sirven on the ground that the latter

[21] *Verba valent usu*: we use here the translation provided by the Swiss-American Chamber of Commerce (Swiss Penal Code, Selected Provisions Relevant to Business, English Translation of Official Text, 2004).

[22] All other criminal offences qualify as "contraventions" and can thus not lead to the revision of a decision under the SCA.

[23] ATF 122 IV 197, para. 2.

[24] SCA, art. 123(1) makes express allowance for the cases in which criminal proceedings are not possible, by providing that in such cases "the proof [of a crime or a felony] can be established in another manner."

[25] Rigozzi & Schöll, *supra* note 8, at 33.

had passed away. The Supreme Court was thus free to determine, based on the French judge's findings, whether Mr. Sirven had committed the alleged criminal offence. In the present case, it considered that the French judge had "conducted his investigation in a meticulous way" and that there was "no element that could call into question his finding" that the late Mr. Sirven committed a "procedural fraud."[26] One can anticipate that, in other cases of this kind, the party opposing revision will vigorously contest the findings of the criminal investigation, as it would do if the case were to be heard by a criminal jury.

Secondly, the criminal offence in question must also have had a bearing on the outcome of the arbitration, to the detriment of the petitioner. The link between the criminal offence and the arbitrators' decision may be direct or indirect, but its bearing on the decision must be material.[27] This will not be the case, for instance, when the offence concerns facts or circumstances which the arbitrators have deemed not to be relevant to their decision, or when they have only taken such facts and circumstances into consideration under a subsidiary[28] or alternative reasoning. This will also not be the case when any false declarations rendered during the proceedings concerned points not essential for the purposes of the decision or when the tainted evidence is not of decisive importance. Where, like in the present case, the arbitrators do not file any observations before the Supreme Court even though they have been invited to do so,[29] the Court will have no choice but to hypothetically assess the influence of the criminal offence on the outcome of the award. In the present case, the Swiss Supreme Court found that the influence of the procedural fraud could be deemed to be sufficiently material in light of the fact that the Award was based on the following reasoning:[30]

(i) "In its award of July 31, 1996, the arbitral tribunal, inter alia on the basis of the evidence of the witnesses it heard twice, namely Mr. Sirven and Mr. Kwan, held that when it entered the disputed Agreement of July 19, 1990 with Frontier AG, [Thomson-CSF, now Thales] was trying to put an end to the hostility of China towards the sale of the frigates to Taiwan, an island which the Government of Beijing considers as a 'rebel' province."[31]

(ii) "From that the arbitrators deduced that Mr. Kwan had performed some real services and that the Agreement of July 19, 1990 did not have as its purpose to pay for a favour solicited from the French government."[32]

(iii) "Accordingly, [Thomson-CSF, now Thales] had to pay the percentage of 1% computed on the price of the frigates to Frontier AG which had entirely fulfilled the obligations undertaken towards the former."[33]

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[26] Decision 4A_596/2008, *supra* note 1, para. 4.2.3.
[27] Rigozzi & Schöll, *supra* note 8, at 38 and the references therein.
[28] Decision 4A_234/2008, *supra* note 19, para. 3.2, at 518–19.
[29] Decision 4A_596/2008, *supra* note 1, para. C.
[30] The following paragraphs are taken from Poncet's translation, *supra* note 2.
[31] Decision 4A_596/2008, *supra* note 1, para. 4.2.1 *ab initio*.
[32] *Id.*, para. 4.2.1 *in medio*.
[33] *Id.*, para. 4.2.1 *in fine*.

(iv) In the text of their Award, the arbitrators also "pointed out that a contract for the payment of influence peddling would be void according to French law (paragraph 63 of the Award) governing the Agreement."[34]

(v) "It appears accordingly that had the arbitrators known the real purpose of the aforesaid agreement—namely to [allow Mr. Sirven] to cause Mr. Roland Dumas to change his position, particularly through Mrs. T, as Mr. Roland Dumas was then against the conclusion of the contract for the sale of the frigates with Taiwan—they would have found that influence had been peddled with the French government, which would have caused the Contract of July 19, 1990 to be void and made a claim for any commission impossible."[35]

The fact that, according to the Supreme Court's own summary of the Award, the testimony of Mr. Sirven was only one of the reasons ("inter alia")[36] that led the arbitrators to conclude that the Agreement of July 19, 1990 was aimed at persuading the Chinese government to let the deal go ahead would have required the Supreme Court to rule out that the arbitrators could have come to the same conclusion without Mr. Sirven's (false) testimony. This reasoning is implicit in the decision of the Supreme Court. One can also reasonably think that the Supreme Court was reinforced in its assessment of the relevance of the procedural fraud by the fact that the arbitrators did not make use of the opportunity of filing observations, which would have allowed them to say that Mr. Sirven's evidence was not decisive in their mind.

Moreover, the decision of the Swiss Supreme Court confirms that Article 123(1) SCA should be interpreted as encompassing criminal proceedings taking place outside Switzerland, provided that the foreign investigation was conducted in compliance with the minimum procedural guarantees of Article 6(2) and (3) of the European Convention on Human Rights and Article 14(2)–(7) of the United Nations International Covenant on Civil and Political Rights of March 23, 1976.[37] In the case at hand, the Supreme Court held that it was unquestionable that "the investigation was carried out in compliance with the procedural guarantees arising from these treaties" and stressed that none of the parties

[34] *Id.*, para. 4.2.3.

[35] *Id.*, para. 4.2.3.

[36] *Id.*, para. 4.2.1: "Le tribunal arbitral, dans sa sentence du 31 juillet 1996, a considéré, sur la base *notamment* des dépositions de témoins qu'elle a entendus à deux reprises, à savoir F. [Mr. Sirven] et L. [Mr. Kwan], qu'en concluant la convention litigieuse du 19 juillet 1990 avec Y. [Frontier AG], la défenderesse a cherché à faire cesser l'hostilité de l'Etat C. [China] à la vente de frégates à l'Etat B. [Taiwan]" (emphasis added) (Unofficial translation: "In its award of July 31st, 1996, the arbitral tribunal, particularly on the basis of the evidence of the witnesses it heard twice, namely F. [Mr. Sirven] and L. [Mr. Kwan] held that when it entered the disputed agreement of July 19, 1990 with Y. [Frontier AG], the Defendant was trying to put an end to the hostility of state C. [China] towards the sale of the frigates to state B. [Taïwan]" […]). In its Decision 4P.240/1996 of Jan. 28, 1997, (*see supra* note 7, para. 2aa), the Supreme Court noted that "le témoignage Briand invoqué n'est d'ailleurs pas le seul élément sur lequel le Tribunal a pris appui pour confirmer que M. Kwan a accompli avec diligence les tâches dont on l'avait chargé. La sentence elle-même indique clairement, à son chiffre 59, ces autres preuves et témoignages." (Unofficial translation: "Briand's testimony is actually not the only element on the basis of which the Tribunal confirmed the fact that Mr. Kwan diligently carried out the tasks he had been assigned. The award itself clearly states, at number 59, these other evidence and witness statements").

[37] Decision 4A_596/2008, *supra* note 1, para. 4.1 *ab initio*.

called into question the integrity of the French proceedings.[38] While it was not at issue in the present case, the requirement of compliance with minimum procedural guarantees is very important, as it prevents a party from fabricating a criminal investigation in a "supportive jurisdiction" in order to have an arbitral award set aside.

Furthermore, it is implicit in the Supreme Court's decision that revision should be allowed only if the offence prosecuted in the foreign criminal proceedings qualifies, under Swiss law, as a *crime* or a *délit* within the meaning of Article 10 SPC. For instance, in the present case, the Supreme Court confirmed that although the offence of "escroquerie au procès" pursuant to Article 313-1 of the French Criminal Code (Code Pénal) does not exist as a separate offence under Swiss criminal law, it is comprised within the general definition of fraud according to Article 146 SPC, which is clearly a felony within the meaning of Article 10 SPC.[39] The condition that the foreign offence corresponds to a criminal offence according to Swiss law is generally known as "double incrimination" and one can find useful guidance in this respect in the case law regarding the refusal of extradition.[40]

V. What Happens Next?

In the exceptional cases where the Supreme Court finds that a request for revision is to be granted, it will not decide on the matter itself but vacate the award (the so-called *rescindant*) and remit the decision (the so-called *rescisoire*) to the arbitral tribunal that had originally decided on the matter or, if this should not be possible, to a newly constituted arbitral tribunal.[41] In the present case, as the arbitration was an ICC Arbitration, the Supreme Court ordered that "[t]he matter [be] sent back to the arbitral tribunal that issued the decision or to a new arbitral tribunal to be constituted pursuant to the ICC Rules."[42] As one the arbitrators has passed away, he would have to be replaced in accordance with Article 12 of the ICC Arbitration Rules.

In this instance, it is not anticipated that a new arbitration will be commenced.[43] However, should a new arbitration in fact take place, the newly constituted arbitral tribunal would have to draw up new terms of reference and conduct new proceedings. What would be the scope of such proceedings? The Award has been set aside. Does this mean that the new arbitral tribunal would have to restart the proceedings from scratch? We do not think so. Technically, the new tribunal would have to decide on the same

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[38] *Id.*, para. 4.2.3 *ab initio.*

[39] *Id.*, para. 4.2.3, *citing* ATF 122 IV 197; *see also* Decision 5C.124/2006, Nov. 21, 2006, para. C.b and the useful references therein, *available at* <http://jumpcgi.bger.ch/cgi-bin/JumpCGI?id=21.11.2006_5C.124/2006>.

[40] *See, e.g.*, Decision 1A.15/2007, Aug. 13, 2007, para. 2.4 and the useful references therein; *see also* Robert Zimmermann, La coopération judiciaire internationale en matière pénale 634 et seq. (2009).

[41] Decision 4A_528/2007, Apr. 4, 2008, Swiss Int'l Arb. L. Rep. 227, 233 (2008), *citing* Decision 4P.102/2006, Aug. 29, 2006, ASA Bull. 550, 554 (2007).

[42] Decision 4A_596/2008, *supra* note 1, operative part item 4.

[43] Thalès has no real interest since it has not paid the commissions due under the original award and will most likely focus on opposing the enforcement (of the award annulled in Switzerland). If the facts established by the French magistrate (and endorsed by the Swiss Supreme Court) are true, the claimants in the arbitration might well prefer simply to "forget about the commission" (see the similar assessment by Hirsch, *supra* note 2, at 30).

matter, but without taking into account Mr. Sirven's testimony. As a matter of principle, the arbitrators would not be bound by the Supreme Court's (hypothetical) reasoning as to the relevance of Mr. Sirven's testimony and would remain free to decide whether his (false) testimony was actually decisive for the outcome of the first Award. That said, the Supreme Court's analysis in the case at hand was not couched in purely hypothetical terms. Reading the decision, one gains the impression that the Supreme Court actually considered that (i) Mr. Sirven's (false) testimony was indeed decisive, and that (ii) taking into account the findings of the French magistrate, it was clear that "resorting to a network within China appeared as a subterfuge to hide from the arbitrators the 'undisclosable' purpose of the July 19, 1990 contract, namely a piece of influence peddling resulting in an illicit and immoral cause."[44] Under these circumstances, it would be very difficult for the new tribunal to depart from the findings of the French magistrate, as incorporated in the Supreme Court's decision, and to hold otherwise than declaring the contract null and void and dismissing the original claims against Thompson-CSF (now Thalès). It is thus anticipated that the Supreme Court's decision of October 6, 2009 *de facto* puts an end to the frigates-to-Taiwan saga. Looking forward, while one could regret that the Supreme Court has prevented a new examination of the evidence (including the "fresh" elements analysed by the Supreme Court) by the arbitrators,[45] one must keep in mind that the decision under scrutiny was the result of very exceptional circumstances (criminal proceedings conducted in France, which concluded that the disputed Agreement was in fact aimed at influencing the French government on a controversial sale of warships). After all, *fraus omnia corrumpit*. The main legacy of the decision at hand is thus that the Swiss Supreme Court will have no tolerance for deceptive actions to obtain fraudulent awards, which could tarnish the reputation of the Swiss arbitration community.

[44] Decision 4A_596/2008, *supra* note 1, para. 4.2.2, quoting from the original decision of the French magistrate.

[45] *See* the convincing arguments of Hirsch, *supra* note 2, paras. 23–24; "même si l'enquête a été menée avec minutie, même si elle a été diligentée dans le respect des garanties de procédure (applicables à cette procedure pénale) et même si aucun élément ne permet de mettre en doute les constatations de fait en découlant [as explicitly observed by the Supreme Court], cela ne peut pas assurer la certitude d'une vérité absolue et n'assure pas nécessairement le respect des garanties procédurales applicable à la procédure d'arbitrage." (Unofficial translation: "even if the investigation was conducted with care, even if it was conducted in respect of the procedural guaranties (that apply to this criminal proceedings) and even if there is no element questioning the resulting factual outcomes, still this does not mean there can be no doubt about the truth of the outcome and it does not necessarily mean that the procedural guarantees of the arbitral proceedings have been respected.")

Guide to Authors

The Editor will be pleased to consider contributions provided they are not, or have been, submitted for publications elsewhere. The following is a brief guide concerning the submission of articles which may be of assistance to authors.

1. Articles must be presented in their final form, in English. They should be double spaced with wide margins for ease of editing. Please provide the text in Microsoft Word or Word Perfect, and deliver to the General Editor at editorjoia@kluwerlaw.com
2. Special attention should be given to quotations, footnotes and references which should be accurate, complete and in accordance with the Journal style sheet, which is available online at www.kluwerlawonline.com/JournalofInternationalArbitration.
3. Tables should be self-explanatory and their content should not be repeated in the text. Do not tabulate unnecessarily. Keep column headings as brief as possible and avoid descriptive matter in narrow columns.
4. Please ensure a brief biographical note giving details of the professional/academic status of the author(s) is provided.
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