CONTROL OF ARBITRAL AWARDS AND THE RELEVANCE OF NEWLY DISCOVERED FACTS

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The question has emerged whether facts that become known belatedly may or may not justify a recourse against arbitral awards. The focus of this article is on the question whether newly discovered facts could and should be heeded at a moment when the two generally accepted avenues of court control (setting aside and opposition to recognition and enforcement) are not accessible anymore. Attention has been devoted to several procedural settings (outside those of annulment and recognition) which may yield a third recourse within which newly discovered facts may become relevant. Such settings are reconsideration or revocation in case of fraud, collateral attack on the award, and revision. Such third recourses have not (yet) gained wide acceptance. The most important third recourse is revision, and Swiss practice appears to be the most important practice with regard to revision. After an analysis of various arguments and of practical experience, the conclusion is reached that the dangers opened by a third recourse might outweigh its benefits.

Keywords: newly discovered facts, court control of arbitral awards, collateral attack on the award finality, revision

I. INTRODUCTORY OBSERVATIONS REGARDING FACTS AND THE SCOPE OF COURT CONTROL OF ARBITRAL AWARDS

In one of his excellent articles devoted to international commercial arbitration, Professor Sajko focuses on recognition and enforcement of annulled awards. Pointing out various scholarly approaches, he raises the question

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whether doctrinal interpretations would have an effect on Croatian jurisprudence. Professor Sajko observes that "[t]his depends on the jurisprudence itself - *'la doctrine propose, mais la jurisprudence dispose'*"[1]. The question I would like to raise in this paper is what could the doctrine propose, and how can jurisprudence dispose with the unknown (or, more precisely, unknown at the right moment). Speaking of the unknown, I am, of course, referring to **facts** that are not known at the time of the decision making, and I shall stay within the context of court control of arbitral awards - which is the context of the article of Professor Sajko cited above.

Let me mention first that the scope of judicial review of arbitral awards typically does not extend to fact-finding. Redfern and Hunter explain that while there is a general interest tied to proper interpretation of legal rules, there can be "[*n*]*o such general interest in the findings of fact of a particular tribunal in a particular case. They may be wrong, even badly wrong, but that is likely to be of interest only to the parties. Accordingly, almost all states with developed laws of arbitration refuse to allow appeals from arbitral tribunals on issues of fact*"[2].

Numerous court decisions in comparative practice have taken a position against a de novo review of facts. This position received a convincing explanation in a decision of the Swiss Supreme Court (Vekoma v. Maran) dealing with a challenge submitted against an ICC award rendered in Switzerland. The challenge was focusing on jurisdiction, and the Supreme Court held:

> "*A decision pertaining to jurisdiction in international commercial arbitration may be reinvestigated freely by the Bundesgericht from a legal point of view, while with respect to facts review is only possible within the limits of substantial objections which claim that factual findings result from non-observance of procedural guarantees set by law […], or they are incompatible with procedural ordre public*"[3].

In other words, the court cannot just displace the fact-finding of the arbitrators by way of substituting a fact-finding of its own. An exception is only permitted if the fact-finding mechanism (of the arbitrators) was tainted by

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1 K. Sajko, Recognition and Enforcement of Foreign Annulled Awards - *A Dilemma*, 7 Croatian Arbitration Yearbook, 71 (2000) at p. 72.

2 A. Redfern and M. Hunter with N. Blakaby and C. Partasides, Law and Practice of International Commercial Arbitration, 4th Edition, Sweet & Maxwell 2004, 505.

3 Transport en Handelsmaatschappij "Vekoma" B.V. (Netherlands) v. Maran Coal Corp (U.S.A.) Bundesgericht 1995 - English translation in Várady-Barcelo-Von Mehren, International Commercial Arbitration - A Transnational Perspective, 4th Edition, West Publ. 2009, 796 - at pp. 798-799.

non-observance of due process. At the same time, legal conclusions based on facts established by the arbitrators may, indeed, be reinvestigated, assuming that these conclusions are relevant from the perspective of the limited grounds for challenge enumerated in the relevant legislative act. Hence - in the light of the standards set by the New York Convention and the UNCITRAL Model Law - legal conclusions regarding jurisdiction may be reinvestigated, but legal conclusions regarding the merits may not (unless a violation of public policy were at stake). It is important to mention that in the Vekoma v. Maran case the issue was also raised whether the question which had to be decided was actually a question of law, or a question of fact. The problem arose from a somewhat idiosyncratic arbitration clause which stated that the dispute should be referred to arbitration "within thirty days after it was agreed that the difference or dispute cannot be resolved by negotiation"[4]. The buyer (Maran) did initiate talks for settlement, but it was contested whether the seller rejected this initiative (and if it did, when rejection took place). In other words, the question arose whether arbitration was or was not initiated "within thirty days after it was agreed that the difference or dispute cannot be resolved by negotiations". Both parties referred to the same pieces of correspondence, but they drew different conclusions. The Federal Tribunal (Supreme Court of Switzerland) reached a different conclusion from that reached by the arbitrators. The arbitrators held that arbitration was initiated within 30 days "after it was agreed that the dispute cannot be resolved by negotiations". The Supreme Court held that the time limit of 30 days was infringed, and hence annulled the award for lack of jurisdiction. In the light of the position taken by the Swiss Supreme Court regarding law and facts, it was important whether the issue (whether 30 days did or did not lapse) would be qualified as an issue of law or fact. The Supreme Court held that this was an issue of legal conclusion - and therefore it was perceived as being within the scope of possible court control of arbitral awards.

In the Vekoma v. Maran case the Swiss Supreme Court did not consider any new pieces of evidence. Both the arbitrators and the Supreme Court relied on the same items of correspondence, but they drew different conclusions. The question arises what should a court do if a truly pertinent piece of evidence emerges as a newly discovered fact after the award was rendered. (Such a newly

[4] See about problems which may arise from such clauses, T. Várady, The Courtesy Trap - Arbitration "if no amicable settlement can be reached", 14 Journal of International Arbitration, 5-12, 1997.

discovered fact would, of course, be really important if it would call into doubt the validity of the award. A new fact lending added support to the award would not change the existing situation.) At this point, I would like to make a distinction between two types of situation. In the first one, the newly discovered fact emerges at a moment when there is still time to start setting aside proceedings, or there is still an opportunity to oppose recognition and enforcement. In other words, when there is still time to submit the new fact within the setting of one of the two widely recognized variants of court control. The second type of situation is that in which a new fact would emerge at a point when setting aside proceedings were already completed (or the time limit for initiating setting aside had run), and there are no recognition proceedings pending. As far as the first type of situation is concerned, I would only like to make some very brief remarks within these introductory pages, and I would like to devote more attention in this paper to the second type of situation.

Relevant new facts may appear after the award was rendered, but before a challenge of the award took place. In this situation, the standard set by the Swiss Supreme Court appears to be reasonable and fitting. The Swiss Supreme Court speaks of "review of facts", which notion could encompass consideration of newly discovered facts. These could be considered if they relate to one of the possible grounds for challenge, and if the improper (or incomplete) fact-finding by the arbitrators result from non-observance of procedural guarantees or violation of public policy.[5]

The question arises whether newly discovered facts could and should be heeded at a moment when the two generally accepted avenues of court control (setting aside and opposition to recognition and enforcement) are not accessible. Suppose an award denied jurisdiction due to absence of a written arbitration agreement. Should this award remain in force, if the arbitration agreement - which the claimant was unable to submit during the arbitral proceedings - emerges after the award was rendered, and after the time limit for seeking setting aside expired? Or, should an award tainted by fraud or bribery survive if such fraud or bribery was only discovered at a moment when it is too late to seek setting aside?

[5] The Swiss Supreme Court speaks of procedural ordre public, but this is in the context of a challenge on the basis of jurisdiction. Taking into consideration all possible bases of challenge, public policy should not be restricted to procedural public policy.

II. THE CHALLENGE OF THE UNKNOWN (THAT BECOMES KNOWN BELATEDLY) AND THE ISSUE OF A THIRD RECOURSE

There have been - and there will be - cases in which the truth about important facts remains unknown until after a final and binding decision has been rendered. The truth about these facts may surface later, when ordinary remedies are not available anymore. Different attitudes have been taken regarding such situations. Let me cite a position which could be qualified as an extreme one. The New York Times devoted a half page to the story of a Texas judge (Ms Sharon Keller) who rejected new trial for Roy Criner convicted for rape and murder. Mr. Criner was awaiting death penalty when a DNA test showed that he was not the perpetrator. Judge Keller nevertheless rejected new trial, and explained her position in a TV interview: "*We can't give new trials to everyone who establishes, after conviction, that they might be innocent. […]We would have no finality in the criminal justice system, and finality is important*"[6].

Indeed, finality is a critically important element of any legal system - but there should be limits, even to finality. Considerations of rationality cannot be more important than human life. Finality simply cannot justify the execution of an innocent person.

But if it is easy to disagree with Judge Keller, it is way less easy to draw dividing lines within the realm of international commercial arbitration, where the losers do suffer, but are not threatened by death penalty, and do not go to prison; and where early finality is one of the major distinctive characteristics of the system.

Decision-makers are not always aware of all relevant facts. Sometimes, facts are withheld by one of the parties on purpose; there are also cases in which some facts are simply not known to any party at the time when a final decision is reached. But what is unknown at the relevant time may become known later. A recurring tantalizing question is how to deal with belated information. Norms on court proceedings - including those referring to civil cases - will typically provide a remedy, a way of coping with the unknown (unknown, that is, at the right moment). New information may prompt **revision**, an extraordinary remedy that permits the taking into account of newly discovered facts subject to a number of conditions. Revision is a concept which is broadly accepted in

[6] G. Kovach, A Texas Judge, Accused of Misconduct, Draws Mixed Opinions on her Fairness, New York Times, March 8, 2009, p. 16.

comparative law (assuming decision-making by courts). A representative formulation of revision as a transnational concept may be found in the Statute of the International Court of Justice (I.C.J.), which states in Article 61(1):

> *"An application for revision of a judgment may be made only when it is based upon the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgment was given, unknown to the Court and also to the party claiming revision, always provided that such ignorance was not due to negligence."*

Before the I.C.J., an application for revision may be submitted within six months from the discovery of the new fact, but not later than ten years from the date of the judgment (Articles 61(3) and 61 (4) of the Statute).

The question is whether such a recourse is justified in the domain of arbitration. One of the most intrinsic features of arbitration is the absence of any appellate level.[7] The award rendered by the arbitrators is final. Limited court control may result in setting aside or refusal of recognition, but there are no extraordinary remedies which would bring about the reopening of the case in the light of newly discovered facts. The question is whether the specific features and structure of arbitration are compatible with a third recourse, an extraordinary remedy based on shifting boundaries between the known and the unknown.

In most legal systems revision has not been extended to arbitration proceedings. Yet, there are some exceptions. In a few countries a limited ground was designed for recourses similar to revision; and in one country that has played an important role in the development of international commercial arbitration (Switzerland), revision has recently been recognized as a legitimate remedy against arbitral awards.

a) Instruments of control similar to revision

i) Reconsideration or revocation in case of fraud

Before the enactment of the 1981 New Code of Civil Procedure, arbitral awards were subject in France to a multitude of recourses, including revision.

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[7] Parties may, of course, design an appellate level, but this is almost never done, and institutional rules (with the notable exception of the ICSID Rules) normally do not provide for a second arbitral instance.

One of the critically important achievements of the 1981 reform was the reduction of possible recourses to those two that are nowadays accepted in modern arbitration acts: a motion for setting aside, and opposition to recognition and enforcement. Prior to 1981, revision was essentially restricted to instances of fraud, and this remedy was available notwithstanding whether evidence of fraud became known before or after the expiration of the time limit for initiation of setting aside. As noted by Fouchard, Gaillard and Goldman, the abolition of this recourse proved to be controversial.[8] Some commentators pointed out that the practical relevance of this recourse was small, but nevertheless, the majority view was that of regret that this option was discontinued by the 1981 reform.[9] The *Cour de cassation* opened the door, however, to a limited (and somewhat unclear) version of revision. In *Fougerolle v. Procofrance,* the *Cour de cassation* rejected a claim for revision, yet it held in a dictum that:

> *"[i]l résulte des principes généraux du droit en matiére de fraude que, nonobstant l'exclusion du recours en révision par l'article 1507 du noveau Code de procedure civile, la rétractation d'une sentence rendue en France en matière d'arbitrage international doit être exceptionellement admise en cas de fraude lorsque le tribunal arbitral demeure constitué après le prononcé de la sentence (ou peut à noveau être réuni)"*[10].

As Fouchard et al. note, the *Cour de cassation* did not introduce a new recourse, but enabled the arbitrators themselves - at least where the arbitral tribunal could still be reconvened - to take into account newly surfaced evidence of which they were unaware as a result of fraud.[11]

(The newest amendments to the French Code of Civil Procedure of January 13, 2011 - effective from May 1, 2011 - deal with revision in Article 1502, which is applicable both to internal and to international arbitration. According to Article 1502, an application for revision can be made to the arbitral tribunal itself. It is added, however that "*Toutefois, si le tribunal arbitral ne peut à nouveau être réuni, le recours est porté devant la cour d'appel qui eût été compétente pur connaître des autres recours contre la sentence.*")

A clearly articulated exception can be found in the 1986 Arbitration Act of the Netherlands (Book IV of the Code of Civil Procedure, as amended through

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8 Ph. Fouchard, E. Gaillard, B. Goldman, Traité de l'arbitrage commercial international, Paris, Litec 1996, 932.

9 Fouchard et al. op. cit. 932.

10 Fougerolle v. Procofrance, Cour de cassation, 1re civ. 25 mai 1992, reported in Revue de l'arbitrage, 1993, 91.

11 Fouchard et al. op. cit. 933.

June 2004). A variant of revision is recognized by Article 1068 as one of the recourses against the arbitral award. According to Article 1068:

"Revocation of the award in case of fraud, forgery or new documents

1. *Revocation of the award can take place only on one or more of the following grounds:*
   (a) *the award is wholly or partially based on fraud which is discovered after the award is made and which is committed during the arbitral proceedings by or with the knowledge of the other party;*
   (b) *the award is wholly or partially based on documents which, after the award is made, are discovered to have been forged;*
   (c) *after the award is made, a party obtains documents which would have had an influence on the decision of the arbitral tribunal and which were withheld as a result of the acts of the other party.*
2. *An application for revocation shall be brought before the Court of Appeal which would have had jurisdiction to decide on an appeal relating to the application for setting aside mentioned in article 1064, in corresponding application of article 1064(3) or if this will result in a later date within three months after the fraud or forgery has become known or the party has obtained the new documents. If the party that has reason to apply for revocation dies within the term mentioned in the first sentence of this paragraph, article 341 shall apply accordingly. The proceedings are commenced with the issuance of a writ of summons in conformity with the requirements of article 111 and are conducted in the manner determined by Book One, Title Two. The provisions of article 1066 shall apply accordingly.*
3. *If the judge considers the ground(s) for revocation to be correct, he wholly or partially sets aside the arbitral award. The provisions of article 1067 shall apply accordingly."*

Hence - similarly as in the French case - the remedy does not cover the full scope of revision, but it is essentially limited to fraud. According to the standard concept of revision in court proceedings, the remedy is available whenever "ignorance was not due to negligence" (and the newly discovered fact is relevant). Fraud or bad faith of one of the parties make a stronger case, but do not represent an essential requirement. Under Article 1068 of the Dutch Act, revocation may be sought if the award is based on fraud or on forged documents. To these grounds a third one was added: if the newly discovered documents "were withheld as a result of the acts of the other party". This formulation may extend to behavior which does not reach the level of fraud, but still, the wording implies bad faith (or at least negligence) of the other party. Hence,

the preconditions are somewhat more stringent than those of the traditional concept of revision, which only require that ignorance was not due to negligence of the party claiming revision.

ii) Collateral attack on the award

Speaking of atypical recourses which are similar to revision, I would also like to mention a case which demonstrates a failed attempt. This attempt was qualified by the U.S. Court of Appeals, Fifth Circuit as "collateral attack on the final award". In Gulf Petro,[12] arbitration took place in Switzerland dealing with a dispute arising out of a joint venture agreement. On July 5, 2000, the arbitrators rendered a partial award finding that Petrec (a wholly owned subsidiary of Gulf Petro) had standing to pursue its claim, and that the Nigerian National Petroleum Corporation (NNPC) had some obligations. In January 2001, a hearing for determining the quantum of damages was held. At this hearing NNPC challenged jurisdiction based on Petrec's lack of standing, and providing a copy of a Texas certificate of incorporation showing that Petrec International Inc. was only incorporated in Texas on February 28, 2000, well after the execution of the joint venture agreement, and after the submission of the demand for arbitration. On October 9, 2001, the arbitrators rendered a final award holding that Petrec "lacked capacity to maintain its claims against NNPC." Petrec challenged the final award in Switzerland, but the Swiss court denied setting aside in April 2002. At this point, there was no remedy anymore. One of the possible recourses (a motion for setting aside) was relied upon, but the attempt failed. The other possible recourse (opposition to recognition and enforcement) was out of the question, since the winner in the arbitration proceedings had no interest in seeking recognition of the award denying jurisdiction - NNPC was satisfied that no obligation was imposed on it.

Gulf Petro and Petrec tried to circumvent this situation, endeavoring to seek confirmation (in the U.S.) of the first partial award - the one which was later superseded by the final award. The district court (Northern District of Texas) dismissed the action for lack of subject matter jurisdiction, reasoning

[12] Gulf Petro Trading Company Inc.; Petrec International Inc; James Faulk, and others v. Nigerian National Petroleum Corporation, Bola Ajibola and others, 512 F 3d 742 (2008).

that "[*i*]*n seeking confirmation of the Partial Award, Petrec was effectively requesting that the Final Award be set aside or modified, actions that the court was precluded from taking…*"[13] After this action failed, Gulf Petro and Petrec attempted in 2005 another collateral attack, by bringing an action reminiscent of revision in the Eastern District of Texas. This time the plaintiffs alleged that the Final Award was procured by fraud, bribery, and corruption, naming as defendants not only NNPC, but also a number of other persons, including the three arbitrators. This action was also rejected for lack of jurisdiction. The district court concluded that "[*G*]*ulf Petro's entire complaint constituted a collateral attack on the Final Award that it lacked subject matter jurisdiction to entertain*"[14]. The same position was taken by the Fifth Circuit. Judge King stressed: "*Though cloaked in a variety of federal and state law claims, Gulf Petro's complaint amounts to no more than a collateral attack on the Final Award itself*"[15]. The Fifth Circuit concluded that Gulf Petro's claims were properly dismissed by the district court for lack of subject matter jurisdiction. Taking this position, the U.S. courts refused to open the gate for tactical maneuvers that may have seriously undermined the stability of arbitral decision making.

b) Revision as a possible third instrument of court control of arbitral awards

A distinct attitude was recently taken by the Swiss Federal Tribunal (the Supreme Court of Switzerland). Without an explicit foothold in Swiss legislation, and without a basis in the 1987 Swiss Private International Law Act (hereinafter "Swiss PIL Act") in particular, the Swiss Federal Tribunal created room for a third recourse against arbitral awards (in addition to setting aside and opposition to recognition and enforcement). This new option is **revision**, within its traditional meaning and scope. Revision was first recognized only as a possibility in a decision of 11 March 1992.[16] In a case in which company P. requested revision of an arbitral award, the Federal Tribunal took note of

[13] 512 F3d 742, at 745.

[14] 512 F3d 742, 745.

[15] 512 F3d 742, 750.

[16] Federal Tribunal, Decision No. 118 II 199 of 11 March 1992 - reported in Revue de l'Arbitrage [1993], 115.

the fact that the Swiss PIL Act restricted the number of possible recourses against arbitral awards, and does not mention revision as a possible recourse. Nevertheless, the Federal Tribunal found that "such silence of the legislator does not bind the Court," but represents a gap in the statute ("*Gesetzeslücke*," "*lacune de la loi*") which may be remedied by the court. The Federal Tribunal stressed that parties submitting their case to arbitration cannot be deemed to have accepted an award rendered under the influence of a crime, or by way of ignoring essential facts or decisive evidence.[17] After it admitted revision as a matter of principle, the Federal Tribunal nevertheless denied the request, holding that the circumstance relied upon by the party seeking revision did not meet the requirements of Swiss law. It was only in a more recent August 2006 case[18] that the Federal Tribunal actually granted a request for revision. The facts of this case fit perfectly into the general pattern of revision. During the arbitration proceedings, it was alleged that the purchase of shares was a part of a money laundering scheme. This allegation was considered relevant, but was not proven. An award was rendered on 16 August 2004.[19] The losing party sought annulment in line with Article 190 of the Swiss PIL Act, but the Federal Tribunal denied the challenge on 14 December 2004.[20] The request for revision relied on newly discovered evidence emerging from an affidavit of 13 January 2006 submitted to the English Privy Council. It is important to point out that the applicant sought revision of the **arbitral award**, and not of the court decision denying annulment. The newly discovered facts were facts which already existed prior to the rendering of the arbitral award, but were not known to the applicant, and such ignorance was not due to negligence. The newly discovered facts were also of a decisive nature.[21] These circumstances

[17] "Et malgré cette restriction au niveau des possibilités de recours, la partie qui accepte de se soumettre à un arbitrage ne s'accommodera pas pour autant d'une sentence influencée par un crime ou un délit ou rendue dans l'ignorance de faits essentielles ou de preuves décisives." (118.II.199), Revue de l'arbitrage 1993 No.1, p. 116.

[18] Decision of the Federal Tribunal of 29 August 2006, 4P.102/2006/ruo.

[19] Other awards were also rendered between the same parties, but it is the award of 16 August 2004, which gave rise to revision.

[20] Federal Tribunal 4P. 208/2004.

[21] The Federal Tribunal explained this requirement by stating "Die neuen Tatsachen müssen erheblich sein, dass heisst sie müssen geeignet sein die tatsächliche Grundlage des angefochtenen Urteils zu verändern, so dass sie bei zutreffender rechtlicher Würdigung zu einer anderen Entscheidung führen können." (4P. 102/2006/ruo).

satisfied the requirements of Article 137 of the Judicial Organization Act[22] which deals with revision of Supreme Court Judgments, and which was applied here by analogy. Revision was granted, and the case was sent back to the arbitrators for a new decision.

After the doors were unlocked, the Swiss Supreme Court exercised caution in admitting requests for revision. A case decided between a party from Switzerland and a party from Taiwan yielded a sequence of awards (and a sequence of court decisions). These sequences confronted the decision makers with some unconventional options. Revision against an interim award preceded a request for setting aside (of the final award). The arguments on which the request for revision and the (later) request for setting aside were based, were essentially the same. An interim award rendered on February 23, 2007 established that the consultancy agreement concluded between the Swiss and the Taiwanese firms was valid. In January 2008 - after the time limit for initiating setting aside lapsed - the Swiss party sought revision, alleging that the consultancy agreement was in fact an undertaking to commit bribery. This allegation was substantiated by new documents found in the archives of the party seeking revision. The Supreme Court had doubts as to whether the newly presented documents were of a decisive nature ("*erheblich*"). It also questioned whether the documents were admissible as "newly discovered facts," and it found that they were not, since the documents were in the archives of the party seeking revision. The request for revision was denied by a decision of 14 March 2008.[23] After revision of the interim award was denied, the arbitrators rendered a final award on December 19, 2008, obliging the Swiss party to pay a sum of about 14 million Sfr. On February 2, 2009, the Swiss party sought setting aside of the final award (within the time limit allowed). It submitted again the allegation that the actual subject matter of the consultancy agreement was bribery - and it relied again on documents discovered after the interim award was rendered. The interesting question arose whether the documents and allegations could have a treatment within the setting aside proceedings that were different from the treatment accorded within the process of revision. The Federal Tribunal held that as a matter of principle: "*Im Bereich der internationalen Schiedsgerichtsbarkeit*

[22] Replaced on 1 January 2007 by the Supreme Court Act - which retained the norms of the Judicial Organization Act regarding revision.

[23] X. AG v. Y. AG, I. zivilrechtliche Abteilung des Schweizerischen Bundesgerichts, 14.III.2008, 26 ASA Bulletin [2008], 765-770.

kann es die Sachverhaltsfestellungen des Schiedsgerichts weder auf Rüge hin überprüfen (...) noch von Amtes wegen berichtigen oder ergänzen (...)"[24]. The Claimant attempted to rely on an exception with a foothold in Article 99 of the Supreme Court Act, which gives an opportunity for the introduction of *"Nova"* in case the submission of new factual allegations was first prompted by the decision of the earlier instance (*Vorinstanz)*; in the given case, the decision of the *Vorinstanz* was the arbitral award. The Federal tribunal held, however, that in the given case the nature and the validity of the consultancy agreement were already contested and debated during the arbitral proceedings proper. Hence, the first opportunity was not triggered by the award; an opportunity to submit factual allegations regarding the nature and the validity of the consultancy agreement already existed before the award was rendered. The Federal Tribunal denied the motion to submit new factual allegations, and rejected the request for setting aside.

In another case dealing with a request for revision, decided on April 4, 2008, the Swiss Supreme Court again denied the request, holding that the "newly discovered facts" could have been ascertained before the award was rendered.[25] In this case, the party seeking revision alleged that the legal representative of the opposing party and one of the arbitrators were members of the same organization. The Supreme Court found that this information was available on the internet before the award of the CAS (Court of Arbitration for Sport) was rendered, hence it could not be qualified as a newly discovered fact. If the facts were unknown to the party seeking revision, this was due to that party's own negligence.

The difficult question prompted by allowing revision is whether this yields a pro-arbitration result. It is certainly in the interest of any decision-making process to maintain instruments which are capable of eliminating grave errors. In two of the Swiss cases referred to above, the newly emerging fact showed (or purported to show) bribery which tainted the relationship of the parties. One could also imagine that what was unknown and becomes (belatedly) known, was bribery involving one of the arbitrators themselves. The argument could be made that in egregious cases - like, for example, bribery - the basic integrity

[24] X. AG (Switzerland) v. Y. (Taiwan) Bundesgericht, Urteil vom 8. April 2009, I. zivilrechtliche Abteilung (4A.69/2009).

[25] Club X v. Y S/A Brazil, I. zivilrechtliche Abteilung des Schweizerischen Bundesgerichts, 4.IV.2008 - 4A_528/2007.

of the arbitration process requires some remedy. At the same time, the point can be made that revision is not the only conceivable instrument of rectification in extreme situations. First of all, if bribery gets discovered, this may be a ground for setting aside under the shelter of public policy. Of course, a motion for setting aside is tied to a time limit which starts running from the day of rendering the award (rather than from the day of discovery of a new relevant fact). But it is also true that revision is typically conditioned by two time limits: a shorter one counted from the date of discovery of the relevant fact, and a longer one counted from the date of the rendering of the decision. Hence, even revision will not give unconditional priority to the belatedly discovered truth; it just allows somewhat more time for the unknown to become known. Staying with the example of bribery, let me add that even after time limits have expired, sanctions against a corrupt arbitrator (or against a corrupt party) may be imposed in appropriate court proceedings; and the party against whom the corrupt award was rendered may possibly seek relief in a tort action. (One has to add that this would not be a straight and simple way towards remedy.)

One also has to take into account that revision is also not just a simple way of giving relevance to some facts that were unknown when the award was rendered. Revision implies an interpretation of preconditions that may be complex, and the outcome of the recourse may be hard to predict. We have seen in the Swiss cases that problems might arise in assessing whether the newly discovered fact is or is not of a decisive nature, and whether late discovery was or was not due to negligence. Let me add that in addition to questioning whether the fact submitted is really a new one and a decisive one, sometimes it is seriously questioned whether what was submitted was actually a fact. In the Vekoma v Maran case[26], the Swiss Federal Tribunal came to the supposition that the issue at hand was an issue of legal assessment, rather than a question of fact. This qualification allowed the Federal Tribunal to proceed with its analysis, and to set aside the award. In the context of revision, the distinction between law and facts is again a matter of frequent controversy, but the qualifications reached yield an opposite conclusion. Within the context of revision, one has to characterize an issue as a question of fact (rather than as a question of legal assessment) in order to be able to proceed with the recourse. Courts deciding on requests of revision have often faced dilemmas such as, the question whether treaty membership or citizenship are facts or matters of legal quali-

[26] See fn. 3.

fication. In a case decided by the Supreme Court of the United States[27] the remedy was dependent on the question as to whether the finding of the lower court regarding a key issue was a finding of fact or a finding of law. It was held that the issue in question, namely whether "differential impact of a seniority system reflected an intent to discriminate on account of race," was a "question of fact"[28]. This may be a correct conclusion, but it is certainly not an obvious one. The problem is well captured in a 1924 decision of the French-German Mixed Tribunals, which stated:

"Attendu que la notion de fait ne doit pas être mise en opposition absolue avec celle de droit dont il n'est pas toujours facile de la distinguer, mais qu'elle doit s'entendre d'une façon plus large (…)" [29].

The point is that revision is a quite complex instrument. It is not just a simple vehicle of transmission of newly discovered facts to the original decision-makers; it may also become a playground for intricate arguments focusing on its own prerequisites.

III. CONCLUDING REMARKS REGARDING THE OPTION OF A THIRD RECOURSE

The reasons why some facts remain unknown are multifaceted. The focus of this paper is, of course, on **legal** reasons that may keep a fact beyond the reach of the decision-makers. The characteristics and the interests of international commercial arbitration are putting some manifestations of the unknown into a specific light; some arguments are gaining added strength, while other arguments are losing relevance.

Revision is an instrument that allows the decision-maker to change positions in line with the changing borders between the known and the unknown. This is, of course, appealing, although the need for finality inspires arguments in the opposite direction. Within the setting of international commercial arbitration, some specific points of view emerge. The introduction of a third recourse (in addition to a motion for setting aside and opposition to recognition) opens

[27] Pullman-Standard v. Louis Swint and Willie Johnson etc., 456 U.S. 273, 102 S.Ct.1781.

[28] 456 U.S. 273, at p. 274.

[29] Heim et Chamant c. Etat allemand, R.D.T.A.M. III, 50, at p. 55.

difficult questions. It is not easy to make a choice between the juxtaposed considerations. If we accept revision as an option, we shall have an additional instrument for securing a just final outcome. At the same time, certain comparative advantages of arbitration - like the finality of the awards - will be impaired. Also, being subject to an extraordinary recourse normally available only against court decisions rendered in the forum State, arbitral awards will become a part of the judicial system of the country of their origin in a more pronounced way - which may very well generate controversies. The question also arises as to what would be the impact of revision on consistency on an international scale. Could a successful revision have an impact on recognition already granted in a foreign country? The answer is probably negative, unless the country in which recognition was granted would allow another revision (this time against the court decision granting recognition). Let me add that the UNCITRAL Model Law does not contemplate revision as a possible recourse against arbitral awards (neither the 1985 text, nor the 2006 Amendments). The dangers opened by a third recourse might outweigh its benefits.

Sažetak

Tibor Várady*

KONTROLA PRAVORIJEKA I VAŽNOST NOVOOTKRIVENIH ČINJENICA

Uvijek je bilo i bit će slučajeva u kojima istina o nekim važnim činjenicama ostaje nepoznata i nakon donošenja konačne odluke. Događa se da se istina otkrije, ali tek kada više ne postoji mogućnost oslanjanja na redovite pravne lijekove. Prema ovom problemu zauzeta su različita stajališta. Uvođenje trećeg pravnog sredstva (pored poništaja i protivljenja priznanju arbitražnog pravorijeka) otvara složena pitanja. Izbor između suprotstavljenih opcija nije jednostavan. Treće pravno sredstvo uobličavano je u vidu ponovnog razmatranja nakon otkrića prijevare, kolateralnog osporavanja pravorijeka te revizije. Među tim opcijama najvažnija je revizija - a švicarska praksa donijela je jednu

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pažljivu (i opreznu) razradu ove opcije. Ako se prihvati revizija, dobivamo dodatni instrument za osiguravanje pravednog ishoda. Istodobno, neke komparativne prednosti arbitražnog rješavanja sporova - prije svega konačnost pravorijeka - bit će ugrožene. Nadalje, ako se protiv arbitražnog pravorijeka mogu podnijeti pravni lijekovi koji su inače dostupni samo kod osporavanja sudskih odluka države foruma, arbitražni pravorijek postaje na naglašeniji način dio pravnog sistema države podrijetla - što može izazvati sporove. Postavlja se pitanje kakav je utjecaj revizije na konzistentnost na međunarodnom planu. Može li uspješna revizija arbitražnog pravorijeka dovesti u pitanje priznanje o kojem je već odlučeno u određenoj zemlji. Vjerojatno ne, osim ako se u zemlji u kojem je pravorijek priznat dopusti još jedna revizija (ovom prilikom protiv odluke o priznanju). Važno je napomenuti i to da UNCITRAL-ov model-zakon ne svrstava reviziju među moguća pravna sredstva protiv arbitražnog pravorijeka. Rizici koje otvara treće pravno sredstvo vjerojatno su veći od koristi.

Ključne riječi: nove činjenice, sudski nadzor pravorijeka, sporedno osporavanje konačnosti pravorijeka, revizija