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Awards in Deutsche Telekom v. India Upheld in Switzerland

Swiss Federal Court Dismisses Request for Review as Inadmissible and Belated

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The Swiss Federal Court confirms its past jurisprudence on the review of decisions which were previously appealed, the admissibility of requests for review based on new evidence, and the degree of knowledge of new facts required to trigger the 90-day time limit for a request for review.

Background

[1] In the matter 4A_184/2022, the Swiss Federal Court was called upon to decide on the Republic of India's («**India**») request for review (in German, «Revision», article 190a PILA) of an interim and a final award in favor of Deutsche Telekom AG («**DT**») rendered by a Permanent Court of Arbitration («**PCA**») tribunal seated in Geneva.[1]

[2] DT's claim in the underlying investment arbitration was based on its indirect 20% stake in the Indian telecommunications company Devas Multimedia Private Limited («**Devas**»). Devas had entered into an agreement with the Indian state-owned entity Antrix Corporation Limited («**Antrix**») to lease the S-band electromagnetic spectrum capacity provided by two orbiting Indian satellites. However, the described telecommunications project never materialized and the agreement between Devas and Antrix was suddenly and unexpectedly terminated by Antrix in 2011. Subsequently, in 2013, DT initiated an arbitration against India before the PCA, claiming a violation of the India-Germany bilateral investment treaty («**India-Germany BIT**») and requesting damages in the amount of USD 270 million.

[3] DT prevailed in the arbitration: The PCA tribunal's interim award (dated 13 December 2017) affirmed the tribunal's jurisdiction and India's breach of the fair and equitable treatment standard pursuant to the India-Germany BIT. It found the termination of the agreement between Devas and Antrix to have been arbitrary and non-transparent. The final award (dated 27 May 2020) ordered India to pay damages in the amount of USD 93.3 million plus interest to DT.

[4] India unsuccessfully appealed against the interim award (see Swiss Federal Court decision 4A_65/2018). It did not appeal against the final award.

[5] Almost two years after the final award, on 2 May 2022, India filed a request for review of the interim as well as the final award, based on article 190a para. 1(a) PILA. This provision reads as follows:

> «[1] A party may request a review of an award if:
>
> > a. it has subsequently become aware of significant facts or uncovered decisive evidence which it could not have produced in the earlier proceedings despite exercising due diligence; the foregoing does not apply to facts or evidence that came into existence after the award was issued. (…)
>
> [2] The request for a review must be filed within 90 days of the grounds for review coming to light. (…)»

[6] In its request for review, India claimed that it had learned significant new facts and obtained evidence of the fraudulent and unlawful nature of DT's investment from a judgment of the Supreme Court of India on the winding-up of Devas (dated 17 January 2022).

Decision

[7] The Swiss Federal Court dismissed India's request for review of the interim and final award for the following reasons:

No Review of Arbitral Decisions which were Appealed and Substantively Reviewed by the Swiss Federal Court

[8] India's request for review was directed, *inter alia*, against the interim award. However, prior to its request for review, India had already appealed against the interim award (see Swiss Federal Court decision 4A_65/2018). In the context of this appeal, the Federal Court reviewed the interim award (and, in particular, the tribunal's finding of jurisdiction) freely with regard to the application of the law. In doing so, the Federal Court could have determined the question of jurisdiction independently and was not limited to annulling the interim award and relegating the case to the arbitral tribunal for its own determination. As a result, even though the appeal was rejected, the Federal Court's decision replaced the interim award and thus became subject to review in lieu of the interim award.

[9] Since India's request for review was directed against the interim award instead of the Federal Court decision, the Federal Court dismissed it for lack of a valid object of review, without addressing the question whether the newly discovered facts and evidence affected the tribunal's assessment of its jurisdiction (cons. 3.3.).

Subjective Knowledge of New Facts – not their Authoritative Determination – Triggers the Time Limit for a Request for Review

[10] India claimed that it gained knowledge of the fraudulent and unlawful founding and management of Devas (and hence of the illegality of DT's investments in India) through the Supreme Court of India's judgment on Devas's dissolution, dated 17 January 2022. In this sense, India relied on the Supreme Court judgment as «*decisive evidence*», and claimed that, based on the judgment, it had «*subsequently become aware of significant facts*» pursuant to article 190a para. 1 (a) PILA.

[11] However, prior to the Supreme Court of India, two quasi-judicial bodies had already dealt with (and affirmed) the allegations of fraud on 25 May and 8 September 2021. All three authorities found that the agreement between Devas and Antrix was concluded fraudulently and concealed from the Indian government. While the Indian Supreme Court's judgment of 17 January 2022 marked the end of the dissolution proceeding, it did not substantively add anything to the findings of the quasi-judicial bodies, but merely confirmed them.

[12] The Swiss Federal Court held that, in the context of article 190a para. 1 (a) PILA, the 90-day time limit for a request for review (article 190a para. 2 PILA) starts to run when the requesting party obtains *sufficiently certain knowledge* of the new fact to be able to rely on it, *even if it cannot provide certain proof* of it. Mere suspicions are not sufficient to set the time limit for the request for review in motion. A request for review based on decisive evidence must be filed within 90 days from obtaining a document or at least *sufficient knowledge* thereof to be able to request the taking of evidence (cons. 4.1.2.).

[13] In the present case, the Swiss Federal Court held that India must have known about the facts leading to the dissolution of Devas (i.e., its fraudulent and unlawful founding and management) prior to the issuance of the Indian Supreme Court's judgment. In particular, it found that the proceedings for Devas's winding-up could not have been initiated without the knowledge of state authorities (the Indian Companies Act requires an application by the Registrar of Companies or a person authorised by the central government, to this end), who were therefore aware of the facts underlying the winding-up at the time of the first quasi-judicial decision, i.e., on 25 May 2021.

[14] Moreover, India had failed to specify which significant facts it only became aware of based on the Indian Supreme Court judgment of 17 January 2022, and relied on the argument that only the Indian Supreme Court could make a final assessment of the events at issue. In this context, the Swiss Federal Court highlighted that the Indian Supreme Court's exclusive authority to finally determine the facts at issue does not affect the applicant's earlier knowledge of such facts. Since such *knowledge of the relevant facts, and not their authoritative determination* (let alone their definitive legal assessment) by a judicial authority sets the time limit for the filing of the request for review under article 190a para. 2 PILA in motion, the Swiss Supreme Court determined that India's request for review of the final award was belated and, hence, inadmissible.

«*Subsequently (…) uncovered decisive evidence*» Must Have Existed at the Time of the Award and Must Prove Facts Argued in the Arbitral Proceeding

[15] India further claimed in its request for review that the Indian Supreme Court's judgment constituted «*subsequently* (…) *uncovered decisive evidence*». This argument was dismissed by the Swiss Federal Court for two reasons: First, newly discovered evidence can only be used to prove facts which were already argued in the arbitral proceedings, but which could not be proven at the time. Second, the evidence needs to already have existed at the time of the arbitral award. If it only came into existence thereafter, as in the present case, the request for review is inadmissible from the outset (cons. 4.3., *in fine*).

Comments

[16] There are three key take-aways from the Swiss Federal Court's decision in the matter 4A_184/2022, for Swiss arbitration professionals:

> **First**, in cases where an interim award on jurisdiction was already unsuccessfully appealed, a subsequent request for review must be directed against the Federal Court's appellate decision, and not against the interim award.
>
> **Second**, a review based on new evidence will only be successful if the evidence already existed at the time of the award, and if it is used to prove facts which were argued in the arbitral proceedings, but which could not be proven at the time.
>
> **Third**, a party who becomes aware of facts which might justify a review of an award must act swiftly and cannot wait until such facts are established authoritatively and finally.

[17] The Federal Court's argumentation on the third point, however, raises some questions. In particular, the Swiss Federal Court seems to have taken a middle path when deciding on the moment in which India obtained sufficient knowledge of the facts at issue: In this specific case, the time limit for a request for review was not set in motion by the filing of the application for Devas's winding-up by Antrix, although this application demonstrably brought the invoked fraud to the knowledge of Indian state authorities (the Swiss Federal Court itself states that «*it is clear that without the knowledge of state authorities, no dissolution proceedings could have been initiated against [Devas] at all.*», see cons. 4.3.). Instead, the Swiss Federal Court ruled that the first instance's decision was the relevant event imparting «*sufficiently certain knowledge*» on the applicant and triggering the delay.

[18] This raises the question whether applicants who intend to base a request for review on facts which are simultaneously being determined in (quasi-) judicial proceedings can wait for a decision by the relevant authority before filing a request for review. The answer is: Probably not. Although the Federal Court did not state that India acquired knowledge of the fraud when the first instance decision was issued, *at the latest*, this appears to have been its idea. Otherwise, its decision would be at odds with its own abstract formula, according to which it is the

knowledge of the relevant facts, and not their authoritative determination that sets the time limit for a request for review in motion. Hence, potential applicants are well-advised to apply a precautionary approach, and to file their request for review as early as possible, and in no event later than ninety days after the (quasi-) judicial proceedings were initiated.

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[1] The Swiss Federal Court's decision in the matter 4A_184/2022 concerns the awards rendered under the Germany-India bilateral investment treaty in Deutsche Telekom v. The Republic of India, as is clear from the PCA case number mentioned in the header of the decision (PCA Case No. 2014-10).

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