

4A\_750/2011<sup>1</sup>

Judgment of August 21<sup>st</sup>, 2012

First Civil Law Court

Federal Judge Klett (Mrs), Presiding  
 Federal Judge Rottenberg Liatowitsch (Mrs.),  
 Federal Judge Kolly,  
 Clerk of the Court: Piatti

A. \_\_\_\_\_ SpA,  
 Represented by Mr. Diego Della Casa,  
 Petitioner,

v.

B. \_\_\_\_\_,  
 Represented by Mr. Tuto Rossi,  
 Respondent,

Facts:

A.

On September 27, 2010, the Italian company A. \_\_\_\_\_ SpA, acting as sponsor, entered into a sponsorship contract with Spanish company B. \_\_\_\_\_ which manages the cycling team C. \_\_\_\_\_.

In a final award of July 25, 2011 an *ad hoc* arbitral tribunal rejected the request for a finding of termination of the sponsorship contract, found that the contractual payment obligations of A. \_\_\_\_\_ SpA still fell under the aforesaid agreement and ordered it to pay various amounts of money to B. \_\_\_\_\_ on specified dates for the period from November 30, 2010 to June 30, 2013.

B.

In a request for revision of December 14, 2011 based on Art. 123 (2) (a) LTF<sup>2</sup> A. \_\_\_\_\_ SpA seeks a stay of enforcement and the annulment of the aforesaid award. The Petitioner refers to the agreement between the Parties and asserts that B. \_\_\_\_\_ had undertaken to ensure that the athletes of the cycling team would not use doping substances so that its publicity return would not be jeopardized. The Petitioner further claims that had that duty been breached, the sponsorship agreement could have been terminated immediately. It takes the view that B. \_\_\_\_\_ did not comply with its contractual obligations because in September 2011 (therefore after the award was issued) the Italian press and various internet sites published several articles as to the opening of criminal proceedings for alleged doping against

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<sup>1</sup> Translator's note: Quote as A. \_\_\_\_\_ SpA v. B. \_\_\_\_\_, 4A\_750/2011. The original of the decision is in Italian. The text is available on the website of the Federal Tribunal [www.bger.ch](http://www.bger.ch)

<sup>2</sup> Translator's note: LTF is the Italian and French abbreviation for the Federal Statute of June 17, 2005 organizing the Federal Tribunal, RS 173.110.

D.\_\_\_\_\_, a top cyclist and the “image man” of team C.\_\_\_\_\_. The Petitioner adds that even the internet site of a Swiss daily reported that the aforesaid cyclist was on a confidential list of athletes suspected of doping.

On January 25, 2012 the Presiding Judge of this Court rejected a request for security for costs submitted by B.\_\_\_\_\_ while on February 20, 2012 the request for a stay of enforcement was upheld.

In its observations of February 28, 2012 the Arbitral tribunal doubts that “new facts could be proved simply by newspaper articles or information communicated or presented on internet sites”. In its answer of March 1<sup>st</sup>, 2012 B.\_\_\_\_\_ submits that the request for revision should be rejected and denies that a doping investigation would have been opened against D.\_\_\_\_\_, also asking that the Petitioner should be ordered to pay costs in the amount of CHF 161'250.

The Parties spontaneously exchanged a second round of briefs.

Reasons:

1.

The dispute relates to international arbitration as both parties had their domicile abroad at the time the arbitration clause was entered into. The seat of the arbitration is Lugano and there is no indication that the parties would have entered into an opting out agreement within the meaning of Art. 176 (2) PILA<sup>3</sup>. According to case law, which filled a lacuna in this respect, they may accordingly avail themselves of the extraordinary legal recourse of revision for which the Federal Tribunal has jurisdiction (DTF<sup>4</sup> 134 III 286 a. 2, with reference). The grounds of revision are in particular those spelled out at Art. 123 (2) (a) LTF (DTF 134 III 286 at 2.1).

2.

According to Art. 123 (2) (a) LTF, which is invoked here, revision may be sought when after the award was issued the petitioner becomes aware of relevant facts or finds decisive evidence that he could not adduce in the previous proceedings, to the exclusion of facts or evidence subsequent to the award. As is clear from the wording of the provision – which adopted the old Art. 137 (b) OG<sup>5</sup> – the fact invoked must be pertinent, that is apt to change the findings of fact on which the decision challenged was based and hence to lead to a different solution from that in the award on the basis of a correct legal assessment (judgment 4A\_763/2011<sup>6</sup> of April 30, 2012 at 3.1; DTF 127 V 353 at 5b; 108 V 170 at 1).

In the case at hand the new fact advanced by the Petitioner is the information in the press as to the initiation of criminal proceedings for doping against one of the athletes of the cycling team managed by the Respondent and his being mentioned on a confidential list of suspects. The Petitioner concludes from this that the aforesaid athlete effectively used doping agents and deduces from that that the Respondent would not have complied with its duty to supervise the team members properly and it takes

<sup>3</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>4</sup> Translator's note: DTF is the Italian abbreviation equivalent to ATF or BGE and it means *Decreto del Tribunale Federale*.

<sup>5</sup> Translator's note: OG is the Italian abbreviation for the previous federal statute organizing Swiss Courts.

<sup>6</sup> Translator's note: Full English translation at <http://www.praetor.ch/arbitrage/request-for-revision-of-an-icc-award-rejected-the-petitioner-mus/>

the view that, contrary to what was held by the Arbitral tribunal, this justified the termination of the contract.

The aforesaid arguments show above all that according to the Petitioner a different award would have been justified by the failure to supervise the athletes – a hypothesis resulting from the aforesaid speculations – and not from the news concerning the opening of criminal proceedings for doping as well as the mention of the aforesaid cyclist in a confidential list of suspects attached to the request for revision and specifically alleged as “relevant facts discovered after the award”. Indeed the Petitioner does not explain (and neither is it apparent) in what way the alleged opening of criminal proceedings against a cyclist or his mention on a list of suspects could as such change the factual findings on which the award was based. Accordingly the fact alleged by the Petitioner (the aforesaid news) cannot be considered relevant for the purposes of Art. 123 (2) (a) LTF and consequently the petition must be rejected on that basis while it is not necessary to decide if the revision of an arbitral award could be sought on the basis of mere newspaper articles published in print and electronically.

3.

It appears from the foregoing that the request for revision must be rejected. The legal costs and the other party's costs follow the decision (Art. 66 (1) and 68 (1) LTF). The Respondent requests that they be assessed pursuant to the schedule applicable to actions introduced directly in front of the Federal Tribunal (Art. 5 of the Regulation on the Reimbursement of Costs to the Prevailing Party and to Compensation for Court Appointed Defense in Proceedings in Front of the Federal Tribunal; RS 173.110.210.3) and seeks the attribution of CHF 161'250. Yet there is no reason to treat the costs of the prevailing party in revision proceedings on the same basis as those in a direct action in front of the Federal Tribunal and the aforesaid article 7 of the Regulation specifically mentions only the revision of judgments of the Federal Tribunal; hence in view of the specifics of the revision of an arbitral award the costs must be awarded as they would be in an appeal proceeding.

Therefore the Federal Tribunal pronounces:

1.

The request for revision is rejected.

2.

The judicial costs set at CHF 30'000 shall be borne by the Appellant, which will reimburse CHF 40'000 to the Respondent as costs for the federal proceedings.

3.

This judgment shall be notified to the Representatives of the Parties and to the *ad hoc* Arbitral tribunal.

Lausanne August 21st, 2012.

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

The Presiding Judge:

The Clerk:

Klett (Mrs.)

Piatti