Kluwer Arbitration Blog

Brazil Refuses Recognition of an ICC Award Set Aside in Argentina

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In December 2015, the Brazilian Judiciary faced, for the first time, the question as to whether a foreign arbitral award annulled by the Judiciary at the arbitration seat could be granted recognition.

Specifically, in EDF International S/A v. Endesa LatinoAmérica S/A & YPF S/A (SEC No. 5.782/AR), the EDF International S/A corporation ("EDFI") commenced arbitration proceedings in Buenos Aires, Argentina, under the ICC Rules, against (a) Endesa Internacional S.A. (currently named Endesa LatinoAmérica S/A and (b) Astra Compañia Argentina de Petróleo S/A, which later merged into YPF S/A. The arbitration arose out of a contractual dispute as to the acquisition of the controlling shares of Empresa Distribuidora y Comercializadora Norte S.A. (hereinafter "Edenor") and Eletricidade Argentina S.A. Endesa and YPF filed counterclaims against EDFI in the ICC proceedings. The arbitral tribunal granted EDFI´s claims and the Respondents´ counterclaims and ordered that the respective awards be set off against each other. This led to an outstanding credit in favor of EDFI.

EDFI applied for the recognition of said award in Brazil before the Superior Court of Justice ("SCJ"), which has exclusive jurisdiction to rule on recognition applications. In their respective challenges to recognition, Endesa and YPF argued that Claimant and Respondents to the arbitration had applied to an Argentinean court for an order to vacate the ICC award. Respondents to the recognition proceedings subsequently filed evidence to the effect that the Argentinean court had vacated the award, and that said court decision had already become res judicata. They also argued, inter alia, that EDFI's request for recognition would violate the applicable provisions of the New York Convention ("NYC") and the Brazilian Arbitration Act ("BAA"), according to which an award annulled before the competent court of the arbitration seat cannot be recognized in another country.

The Brazilian Public Attorney´s Office, which, according to Brazilian law, must in recognition proceedings, issue an opinion as to whether the award should be recognized or not, took the view that the ICC award could not give rise to legal effects in Brazil due to the fact that it had been previously annulled by the Argentinean Judiciary.

The case was submitted for a ruling by the Special Chamber, composed of the fifteen senior Justices of the SCJ. The court commenced its ruling by stating that under the applicable provisions of the Brazilian Arbitration Act, the Brazilian statute on the Conflict of Laws, as well as the

Internal Rules of the SCJ, a foreign arbitral award could only be recognized in Brazil if it had previously become res judicata in the place where it was granted. The SCJ also stated that there was no dispute between the parties as to the fact that the ICC award had been vacated in Buenos Aires in 2010, and that said decision to vacate had already become res judicata.

The SCJ went on to list the applicable – and very similar to each other – provisions of the New York Convention (Article V 1 (e)), Panama Convention (Article V 1 (e)), and the Brazilian Arbitration Act (Art. 38 VI), according to which recognition may be refused by the country in which recognition is sought in the event of the award having been annulled or suspended by the courts of the seat. The court also cited Article 216 D of its Internal Rules, which requires that the arbitral award be final and binding (res judicata) before being presented for recognition in Brazil.

The SCJ referred to the fact that the ICCA Guide to the Interpretation of the New York Convention, in its remarks on Article V 1 (e), also makes provision for refusal of recognition of arbitral awards which have been vacated at the seat. The court also cited Brazilian legal scholars who are of the same view. In closing, the SCJ referred to Article 20 (e) of the Las Leñas Protocol, which also requires that the arbitral award be final and binding (res judicata) and capable of enforcement at the arbitration seat.
Because the ICC award had been vacated at the seat, the SCJ held that it could not be recognized in Brazil, to wit: "[t]herefore, due to the fact that the award was annulled in Argentina by a court decision issued in that country, it is not possible to have it recognized in Brazil."

Although not expressly stated in the judgment handed down by the Reporting Justice, the SCJ´s Special Chamber made it clear during the hearing that recognition proceedings are designed to allow a foreign award to take legal effects in Brazilian territory. According to the SCJ, therefore, recognition is a means of extending the efficacy of the award to another jurisdiction. Thus, if the award no longer has legal effect at the arbitration, there is no efficacy to be extended to the Brazilian territory.

The SCJ took a rather restrictive view of the scope of Article V 1 (e) of the New York Convention, without entering into in-depth analysis of circumstances in which an arbitral award set aside at the arbitration seat might be recognized in Brazil. However, differently from earlier decisions, criticized in a previous post in this Blog, the SCJ now seems to be embracing the provisions of the treaties that are in force in Brazil, especially the New York Convention, which is, in the main, good news for the international community and for international commercial relations with Brazil.

* Sergio Bermudes Advogados represented one of the Defendants in this case.

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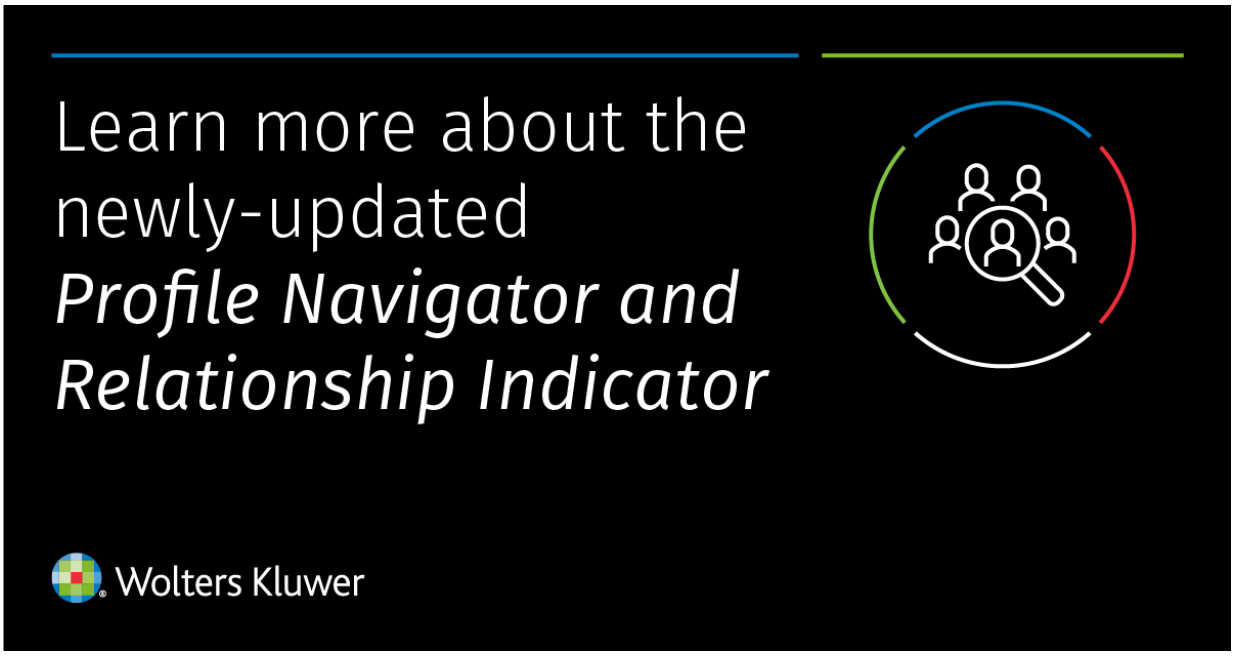

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