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ITA Board of Reporters 1st Quarter Review: Due Process Requirement

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This post initiates a series of posts highlighting key cases published in ITA Arbitration Report, a monthly subscription service provided by the ITA Board of Reporters and available for free at KluwerArbitration.com. The three issues published during the 1st Quarter of 2016 contain more than 60 cases from different jurisdictions worldwide. The selection made for this post includes cases related to the principle of due process and party's rights to present its case.

The case **National Football League Management Council v. National Football League Players Association, United States District Court, Southern District of New York, 15 Civ. 5916/15 Civ. 5982 (RMB) (JCF), 03 September 2015** was reported by William H. Taft V, Natalie L. Reid, Sonia R. Farber and Jing Kang from Debevoise & Plimpton LLP, New York. [1)]

The Court denied the National Football League ("NFL") Management Council's motion to confirm an arbitration award ("Award") imposing a four-game suspension on New England Patriots ("Patriots") Quarterback Tom Brady ("Brady") and granted the NFL Players Association's cross-motion to vacate the Award, concluding that the Award presented "significant legal deficiencies," including the failure to hear pertinent and material evidence. Mr. Brady did not receive access to all the material documents and was not given the opportunity to cross-examine NFL General Counsel Jeff Pash who assisted in the investigation against him.

The Court stated that "although not required to hear all the evidence proffered by a party, an arbitrator must give each of the parties to the dispute an adequate opportunity to present its evidence and argument." The court found that arbitrator's refusal to allow Brady to cross-examine Pash denied Brady the opportunity to explore the circumstances under which the latter had written his accusative Report. On the other hand, the denial of the Players Association's motion to produce investigative files, including notes of witness interviews, for Brady's use at the arbitral hearing was fundamentally unfair because the Management Council had access to the same files for use during the arbitration.

The case **BGer – 4A_54/2015, Federal Supreme Court of Switzerland, 1st Civil Law Chamber, 4A_54/2015, 17 August 2015** was reported by Elisabeth Leimbacher and Georg von Segesser from Schellenberg Wittmer, Zürich. [2)]

The dispute arose out of a "Consultancy Service Agreement" (CSA) the consultant agency and its

client. Based on the CSA, the agency issued seven invoices. Only the first one was paid by the client. The arbitrator permitted the consultant to present arguments and witness testimony regarding the invoice N°6 for the first time at the hearing. In the award, the arbitrator admitted the claims for invoices N°1-5. The claim for invoice N°6 was denied.

The client challenged the award and argued that the arbitrator violated his right to be heard and the right to a fair and equal treatment because the issue of a certain invoice was raised for the first time at the hearing. The Supreme Court dismissed the claim as the petitioner lacked legal interest to set aside the award because the arbitrator decided the issue in his favor by rejecting he was under the obligation to pay that invoice.

The case **AA v. BB, Actividades Hoteleiras Unipessoal, Lda, Supreme Court of Justice of Portugal, 3486/12.7TBLRA.C1.S1, Case Date 10 December 2015** was reported by José Miguel Júdice from PLMJ, Lisboa. [3)]

In a domestic arbitration conducted before the Arbitration Centre of the Portuguese Chamber of Commerce and Industry, the defendant asked to be heard as a witness. That kind of "party testimony" was provided for by the Terms of Reference. The sole arbitrator denied the request.

The defendant filed for the award to be set aside alleging a violation of the principle of equality. The issue finally reached the Supreme Court that found no violation of the principle of equality. In Court's view, the principle of equality under the Portuguese Civil Procedure Code aims at limiting the use of party testimony and ensures it is inadmissible unless it is blatantly necessary. The arbitrator made the decision within his authority and his approach was in line with the principle of equality between the parties. This would not be the case only if the arbitrator had prevented one party from giving personal testimony and had allowed the other to do so.

The case **OGH – 18 OCg 2/15s, Supreme Court of Justice of Austria, 18 OCg 2/15s, Case Date 19 August 2015** was reported by Günther J. Horvath from Freshfields Bruckhaus Deringer, Vienna. [4)]

The parties entered into a brokerage contract for a "mandatory agency at purchasing of shares". The aspired sale of the shares failed and the company's owner filed a request for arbitration and requested the repayment of 50% of the management fee paid to the broker.
Arbitration was administered by the Vienna International Arbitral Centre (VIAC). Before the award was issued, the parties entered into settlement negotiations and requested the tribunal not to render the award. Two years later, the tribunal issued a procedural order requesting information on parties' negotiations in order to outline the next procedural steps. At the same time, the tribunal deposited the award at the VIAC. Claimant informed the tribunal that the settlement was successful and the award should not be rendered. Respondent contended that the settlement negotiations had failed and asked for the award to be issued. The tribunal issued the award dismissing the claim.

Pursuant to Claimant, the right to be heard was allegedly violated because against its assurances in the procedural order, the tribunal rendered the award without disclosing its intended procedure and without giving it the opportunity to make a statement. The Supreme Court saw no proof that the tribunal denied the parties' right to be heard. It must have been clear to the parties that no further evidence production was going to take place since the tribunal deposited the award at the VIAC.

The case **Worldwide Medical Assurance (WWMA), Ltd. Corp. v. SISA Vida S.A., Seguro de**

Personas (SISA), Supreme Court of Costa Rica, RES. 000280-F-S1-2015 (EXP. 14-000159-0004-AR), Case Date 05 March 2015 was reported by Ryan Mellske from Three Crowns LLP, Washington.

In 2006, SISA, a Salvadoran company, and WWMA, a Panamanian company, entered into a Medical Expenses Reinsurance Contract. WWMA agreed to reimburse SISA when SISA indemnified policy holders for their insurance claims. Later, additional agreements and covering notes have been entered into by the parties.

In 2012, SISA initiated an ICC arbitration against WWMA for alleged failure to reimburse its claim arising under the covering notes. During the arbitration, SISA's witnesses did not appear at the hearing and WWMA was unable to cross-examine them. Nevertheless, the arbitral tribunal relied on their written statements.

The Supreme Court denied WWMA's application to annul the award. Among other reasons, the Court held that the tribunal did afford WWMA equal treatment despite WWMA not having an opportunity to cross-examine SISA Vida's witnesses as WWMA's had not objected in a timely manner.

The case **Sea Emerald S.A. v. State Enterprise "61 Communards Shipbuilding Yard" seeking recognition and enforcement of an arbitral award, Supreme Court of Ukraine, 6-26??15, 30 September 2015** was reported by Yaroslav Petrov and Anna Tkachova from Asters, Kyiv.

Sea Emerald S.A. filed a motion with Ukrainian court to recognize and enforce the arbitral award rendered against State Enterprise "61 Communards Shipbuilding Yard". Before the Supreme Court the debtor agued that the procedure for service of notices specified in the arbitral clause had been breached.

English law was applicable to the contract, pursuant to which the parties were entitled to choose the way of serving notices. Under the contract, the party seeking arbitration had to send the other party a written notice via telex, telegram, airmail, mail and hand delivery. The notice of arbitration was sent to the debtor via e-mail.

The Court stated that according to Article 5 (1) of the New York Convention, recognition and enforcement of the award may be refused when the party furnishes proof that it was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present its case. In Court's opinion, the parties did not provide for the use of electronic documents, moreover, no e-mail addresses of the parties were stated in the contract. The Court remanded the case to the lower court to determine whether the debtor was given proper notice of the appointment of the arbitrator and the arbitration proceedings and was able to present its case.

References

?1 ITA Board of Reporters Volume XIV – Issue 2, March 2016. Available here.
?2 ITA Board of Reporters Volume XIV – Issue 1, January 2016. Available here.
?3 ITA Board of Reporters Volume XIV – Issue 3, April 2016. Available here.
?4 ITA Board of Reporters Volume XIV – Issue 3, April 2016. Available at here.