

# Kluwer Arbitration Blog

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The ITA Board of Reporters have reported on the following awards/court decisions.

### **A. v. B and C. Ltd, Court of Appeal of Turku, Case No. S 21/334, Decision No. 68, 01 February 2022**

*Ina Rautiainen and Anna-Maria Tamminen, Hannes Snellman Attorneys, ITA Reporters for Finland*

The Turku Court of Appeal evaluated whether the decision of the District Court regarding the appointment of an arbitrator may be appealed. Pursuant to Section 17(3) of the Finnish Arbitration Act, a decision of a court regarding the appointment of an arbitrator is not subject to appeal. The Court of Appeal found, however, that the decision can be appealed because a prohibition of appeals would not be acceptable on the grounds presented. Without a possibility to appeal, the parties' legal protection could be compromised as well.

The Court of Appeal also evaluated whether the court should appoint an arbitrator in the dispute between the parties. Pursuant to Section 17(1) of the Arbitration Act, when a party has requested the court to appoint an arbitrator (except for certain exceptions), the court should make the appointment, unless it is apparent that there are no legal grounds for the arbitration. The Court of Appeal found that in this case, contrary to the District Court's decision, the lack of legal grounds for the arbitration was not apparent. As the parties had intended to resolve their disputes in arbitration, the matter was returned to the District Court for the purposes of appointing an arbitrator.

In conclusion, the Court of Appeal found that an error in an arbitration clause does not render the arbitration clause entirely invalid if that has not been the intention of the parties. There is no prior publicly available case-law regarding the issue.

### **Parties Not Indicated, Supreme Court of Greece, A.P. 35/2019, 10 January 2019**

*Ioannis Vassardanis, Ioannis Vassardanis & Partners, ITA Reporter for Greece*

Following the rendering of an arbitral award in Athens (seat of arbitration), one of the Parties submitted a request to the Athens Court of Appeal in order to annul the arbitral award on the grounds that the arbitration agreement was not valid under the law the parties had chosen (Greek Law). The arbitration agreement formed part of a public procurement multi-page contract which was signed on all pages (and on the last page), except for the pages on which the arbitration clause was written. Both before the arbitral tribunal and before the Greek Courts, the party seeking the annulment of the Award claimed the invalidity of the arbitration agreement. The Athens Court of Appeal annulled the arbitral award, ruling that the arbitration agreement contained in the contract was void. However, the Supreme Court of Greece ('*Areios Pagos*') held that, in finding that the arbitration agreement is void, the Athens Court of Appeal incorrectly interpreted the applicable law; therefore, it annulled the Court of Appeal decision.

### **Parties Not Indicated, Supreme Court of Greece, A.P. 760/2019, 01 July 2019**

*Ioannis Vassardanis, Ioannis Vassardanis & Partners, ITA Reporter for Greece*

Arbitral award. Invalidity of the advance waiver (ex ante) of the right to annul an arbitral award. Validity of the advance waiver of the right to annul an arbitral award when the ex ante waiver of the right to annul an award has been ratified by law. The ICC Rules have the force of law. Implied waiver of the right to object to any irregularity of the constitution of the arbitral tribunal since it has not been brought before it (Art 39 2012 ICC Rules). This procedural forfeiture should be invoked by the defendant. Criteria for qualifying an arbitration as international.

### **SSK Ingeniería y Construcción S.A.C. v. Técnicas Reunidas de Talara S.A.C., Superior Court of Justice of Lima, Expediente Judicial Electrónico N°00207-2021-0-1817-SP-CO-01, 15 February 2022**

*Fernando Cantuarias Salaverry, Law School of Universidad del Pacífico, ITA Reporter for Peru*

The Commercial Chamber of the Superior Court of Justice of Lima recognizes a foreign award under the 1958 New York Convention.

### **CC/Devas (Mauritius) Ltd. v. Republic of India, United States District Court, District of Columbia, No. 1:21-CV-106-RCL, 24 March 2022**

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*Viva Dadwal, King & Spalding LLP, ITA Reporter for the United States of America*

A court adjudicating recognition and enforcement proceedings may grant a motion to stay before deciding its own jurisdiction using the court's 'inherent powers.' In such instances, the court will weigh the 'competing interests' of judicial economy and potential hardship. A request for security is premature if a court has not yet established jurisdiction.

**Olin Holdings Limited v. State of Libya, United States District Court, Southern District of New York, No. 1:21-cv-4150 (JGK), 22 March 2022**

*Hanna Azkiya, King & Spalding LLP, ITA Reporter for the United States of America*

The Court had two items before it: (1) the petition by Petitioner Olin Holdings Limited ('Olin') to confirm a Final Award ('Award') issued by the Arbitral Tribunal of the International Chamber of Commerce (the 'Tribunal'), pursuant to an arbitration Olin brought against Respondent the State of Libya ('Libya') under the Agreement on the Promotion and Reciprocal Protection of Investments between the Government of the Republic of Cyprus and the Great Socialist Libyan Arab Jamahiriya dated 30 June 2004 (the 'Agreement'), and (2) Libya's motion to dismiss the Olin's petition on *forum non conveniens* grounds.

The Court stated that a petition to confirm an arbitral award is treated as a motion for summary judgment, which must be granted if the movant can show that no genuine dispute as to any material fact exists and the movant is entitled to judgment as a matter of law.

The Court treated the Tribunal's jurisdictional ruling with 'considerable deference,' as opposed to reviewing it 'de novo,' agreeing with Olin that the threshold issue between the parties was not an issue of arbitrability (i.e., whether there is a contractual duty to arbitrate at all), but a procedural gateway issue about when the contractual duty to arbitrate arises. The Court also held that 'there is clear and unmistakable evidence' that the parties intended to arbitrate arbitrability, thus 'the Tribunal's jurisdictional ruling is entitled to deferential review.'

Under the 'deferential review' standard, the Court must confirm the Award so long as the arbitrators 'explain their conclusions in terms that offer even a barely colorable justification for the outcome reached,' no matter how persuasively litigants argue for a different result.

The Court held that Libya failed to carry its heavy burden to prove that one of the seven grounds under the New York Convention to refuse enforcement of an arbitral award applies. Libya relied on only one ground under the New York Convention to refuse enforcement, i.e., Article V(1)(c), which the court of appeals has explained should be 'construed narrowly' and not be used to second guess the arbitrators' decision. The Court found that this was precisely what Libya asked from the Court, despite the issue being one already agreed by the parties to be submitted to the arbitrators.

The Court further found that the Tribunal unanimously agreed that Olin's decision to bring proceedings in Libya did not preclude a subsequent arbitration proceeding, and that such a conclusion was obtained after considering several factors, all of which the Court found to be reasonable or 'there is at least a barely colorable justification for it.'

With respect to Libya's motion to dismiss, the Court followed the three-step framework established

by the United States Court of Appeals for the Second Circuit in *Iragorri v. United Techs. Corp.*, 274 F. 3d 65, 73-74 (2d Cir. 2001), and held that (1) on balance of various factors, and heeding the United States Supreme Court's guidance in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947) that the petitioner's choice of forum should rarely be disturbed, Olin's choice of forum is entitled to a small degree of deference; (2) there is one adequate alternative forum to adjudicate this dispute, however; (3) upon weighing the private and public interest factors, in this case neither the private interest factors nor the public interest factors weigh in favor of *forum non conveniens* dismissal. The Court therefore denied Libya's motion to dismiss.


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