Kluwer Arbitration Blog

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The Institute of Transnational Arbitration (ITA), in collaboration with the **ITA Board of Reporters**, is happy to inform you that the latest *ITA Arbitration Report* was published: a free email subscription service available at **KluwerArbitration.com** delivering timely reports on awards, cases, legislation and current developments from over 60 countries and 12 institutions. To get your free subscription to the ITA Arbitration Report, click **here**.

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

Al Alameya Company S.A.E. v. Party Not Indicated, Court of Cassation of Egypt, Case No. 13892 of JY 81, 22 February 2022

Noha Khaled Abdel Rahim & Mohamed S. Abdel Wahab, Zulficar & Partners, ITA Reporters for Egypt

The Commercial and Economic Circuit of the Court of Cassation rejected a challenge made against the Cairo Court of Appeal judgment, which rejected a nullity action brought against a CRCICA arbitral award. In its decision, the Court of Cassation explicitly referred for the first time to the IBA Guidelines on Conflicts of Interest in International Arbitration (2014) and quoted Clause 3.3.5 of the Orange list, to serve as guidance in determining the duty of disclosure and its impact on the independence and impartiality of an arbitrator. Furthermore, the Court reaffirmed well-established principles in international arbitration and beyond, which include the arbitrators' duty of independence and impartiality, the capacity to conclude arbitration agreements, the prohibition of de novo review of the merits by nullity courts, and the award of interest with respect to Egyptian public policy and the principles of Islamic Shari'a.

Parties Not Indicated, Court of Appeal of Cairo, Case No. 43 of JY 138, 26 April 2022

Noha Khaled Abdel Rahim & Mohamed S. Abdel Wahab, Zulficar & Partners, ITA Reporters for

Egypt

The 4th Commercial Circuit of the Cairo Court of Appeal has rejected a nullity action filed against an arbitral award. On this occasion, the Court has recognised WhatsApp as a valid means of communication in arbitral proceedings, so long that the fundamental principles of arbitration are guaranteed, such as confidentiality, due process, fair and equitable treatment of parties and the right of defence, etc. The arbitral tribunal informed the parties that it extended the time limit for issuing the final award because two members of the arbitral tribunal caught COVID-19 pandemic. The Court of Appeal has considered the illness of the two arbitrators as a force majeure event that automatically interrupts the period of the arbitration proceedings. Furthermore, the Court has also referred to the wide spread of virtual hearings in international arbitration and the increase in use of new means of communication to facilitate the conduct of arbitral proceedings and to minimise the costs. The Court also referred to the principle of estoppel stating that the plaintiff cannot object before the Court of Appeal on a procedural issue that took place during the arbitration proceedings, which the plaintiff accepted back at the time without objecting.

BGH – I ZB 13/21 ("Schiedsfähigkeit IV"), Federal Court of Justice of Germany, I ZB 13/21, 23 September 2021

Patrick Gerardy & Harry Nettlau, Cleary Gottlieb Steen & Hamilton LLP, ITA Reporters for Germany

The minimum requirements for the validity of arbitration clauses covering disputes over defects in shareholders' resolutions, which the German Federal Court of Justice ("BGH") developed for limited liability companies (GmbH), also apply to partnerships if the articles of partnership provide that such disputes shall not be litigated among the partners but with the partnership. In case of doubt, an arbitration clause that covers "all" disputes arising from the partnership relationship indicates the partners' intention not to completely abandon the clause in the event of its partial invalidity, but to maintain its validity to the extent legally permissible.

BGH – I ZB 16/21, Federal Court of Justice of Germany, I ZB 16/21, 17 November 2021

Patrick Gerardy & Harry Nettlau, Cleary Gottlieb Steen & Hamilton LLP, ITA Reporters for Germany

A provision in an intra-EU bilateral investment treaty ("intra-EU BIT") that offers an investor to settle investment disputes through arbitration generally violates EU law and is invalid, with the effect that there is no arbitration agreement. Accordingly, a German court not only will set aside, or refuse enforcement of, an arbitral award based on an intra-EU BIT arbitration clause, but also, when seized of a related jurisdictional dispute, declare arbitration proceedings inadmissible. An exception to the invalidity of such an intra-EU BIT clause may apply where the (strict) requirements developed in the Achmea, PL Holdings, and Komstroy judgments by the Court of Justice of the European Union (the "CJEU") are met.

BayObLG – 101 Sch 60/21, Highest Regional Court of Bavaria, 101 Sch 60/21, 18 January 2022

Patrick Gerardy & Harry Nettlau, Cleary Gottlieb Steen & Hamilton LLP, ITA Reporters for Germany

Neither the mere possibility of future set-aside proceedings against the arbitral award at the seat of arbitration, nor a set-aside proceeding already pending – in this case pursuant to Sec. 68 of the English Arbitration Act 1996 before the High Court of Justice – establish grounds for refusal of enforcement under Art. V(1)(e) of the New York Convention ("NYC"). Rather, in a proceeding to declare a foreign award enforceable in Germany, the court may exercise its discretion pursuant to Art. VI of the NYC and declare the award enforceable despite set-aside proceedings pending at the seat of the arbitration.

OLG Frankfurt am Main – 26 Sch 12/20, Higher Regional Court of Düsseldorf, 26 Sch 12/20, 21 April 2021

Patrick Gerardy & Harry Nettlau, Cleary Gottlieb Steen & Hamilton LLP, ITA Reporters for Germany

Applications before German courts to set aside or declare enforceable an arbitral award under Sec. 1059–1061 of the Code of Civil Procedure (Zivilprozessordnung, or "ZPO") do not fall within the jurisdiction of specialized cartel senates, even if the invoked grounds for setting aside or refusing enforceability are grounded in antitrust law. Rather, senates for arbitration matters remain competent.

The fact that mandatory provisions of antitrust law form part of public policy justifies neither an unlimited review of the arbitral award for conformity with antitrust law nor a summary or "plausibility" review in this regard. Rather, a state court deciding on a public policy objection against an award may review only whether the award disregards fundamental notions of the legislator, as enshrined in the applicable antitrust law provisions ("minimalist approach").

UAB Corolla Ventures v. Panev?žio statybos trestas, Supreme Court of Lithuania, 3K-3-228-823/2021, 15 September 2021

Denis Parchajev, Motieka & Audzevi?ius, ITA Reporter for Lithuania

In September 2021, the Supreme Court of Lithuania annulled the ruling of the Court of Appeal of Lithuania and ruled that a pathological arbitration clause, which refers a dispute to an arbitral institution that has been dissolved, is inoperable or incapable of being performed, and the parties' dispute must be brought before Lithuanian courts. This marks a departure from the previous liberal interpretation inspired, among others, by the likes of the Lucky Goldstar case.

Republic of Lithuania v. Veolia Energie International S.A. et al., Supreme Court of

Lithuania, e3K-3-121-916/2022, 18 January 2022

Denis Parchajev, Motieka & Audzevi?ius, ITA Reporter for Lithuania

In January 2022, the Supreme Court of Lithuania ruled that the Ruling of the Court of Appeal of Lithuania shall remain unchanged, thus establishing that a perfected ICSID arbitration clause set out in the France-Lithuania BIT became invalid based on the CJEU Achmea judgment.

Kaunas Free Economic Zone and Management JSC, Knightsbridge Property Management Limited and Antwerpse Ontwikkelings- en Investeringsmaatschappij v. Channel Hotels and Properties Limited, Supreme Court of Lithuania, e3K-3-68-611/2021, 07 April 2021

Denis Parchajev, Motieka & Audzevi?ius, ITA Reporter for Lithuania

In April 2021, the Supreme Court of Lithuania reversed the ruling of the Court of Appeal of Lithuania and ruled that the avoidance of parallel arbitration and count proceedings constitutes part of international public policy, as the former undermines the principles of civil process and leads to conflicting and incompatible decisions.

Clube v. SAD, Court of Appeal of Lisbon, 22927/20.3T8LSB-B.L1-2, 27 January 2022

Iñaki Carrera, PLMJ Advogados & José Miguel Júdice, Independent Arbitrator, ITA Reporters for Portugal

The Lisbon Court of Appeal issued a decision that bluntly confirms the powers of the state court to assist the Arbitral Tribunal to order the party in breach of the obligation to produce evidence to submit such elements. This decision confirms the favourable arbitration trend of the Portuguese state courts and opens a relevant avenue to reinforce the conditions for compliance with the Arbitral Tribunal's orders.

Advanced Aerofoil Technologies, AG. & Ors v. Todaro & Ors, United States District Court, Southern District of New York, 13 Civ 7181 (RWS), 15 April 2014

Inigo Kwan-Parsons

New York's Southern District Court has affirmed its pro-arbitration stance in refusing to set aside an arbitral award which dismissed claims as to fraudulent representations regarding a termination agreement which had sought to settle 'any and all claims, liabilities and obligations, both known and unknown' between the parties, and applying principles enunciated by the New York Court of Appeals in Centro Empresarial Cempresa SA v. America Movil SAB, 17 NY 3rd 269 (2011).

Superior Energy Services Colombia S.A.S. & Superior Energy Services Inc. v, Premium Petroleum Services Corp., United States District Court, Southern District of New York, 18-

CV-7704 (ALC), 08 July 2019

Inigo Kwan-Parsons

After receiving a favourable arbitral award, Superior Energy Services Colombia S.A.S. and Superior Energy Services Inc. (collectively, Superior), petitioned before the Southern District Court of New York, to enforce the arbitral award, which was opposed by the unsuccessful party to the arbitration, Premium Petroleum Services Corp. (Premium), who filed a petition seeking to vacate the arbitral award. In upholding the award, the Court reaffirmed its jurisdiction's reluctance, and high threshold, to interfere with an arbitral award.
