Kluwer Arbitration Blog

KluwerArbitration ITA Arbitration Report, Volume No. XX, Issue No. 9 (July 2022)

Roger Alford (General Editor) (Notre Dame Law School), Crina Baltag (Managing Editor) (Stockholm University), and Monique Sasson · Friday, August 12th, 2022

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.

Angle World LLC v. Jiangsu Beier Decoration Materials Co., Ltd., Intermediate People's Court of Beijing, , 21 April 2022

Arthur X. Dong, JunHe LLP, ITA Reporter for China

An often-seen requirement to a valid and binding arbitration agreement is that the contract containing the arbitration clause must bind upon the parties. However in this case, in a separate proceeding the PRC court found that the arbitration clause in an contract, which provides CIETAC arbitration in Shanghai, was binding although it was only signed by one party. When the respondent applied to set aside the award by arguing the arbitration agreement was not binding, the PRC court dismissed the application by holding that the same issue had been determined in the previous proceeding. Nonetheless, it is noteworthy that when the claimant applied for recognition and enforcement of the award before the U.S. court, the U.S. court dismissed the application by holding that there is no binding arbitration agreement.

RoinvestCo UK Ltd v. The Russian Federation, Supreme Court of Sweden, Ö 2301-09, Case Date 12 November 2010

John Kadelburger, Advokat John Kadelburger AB, ITA Reporter for Sweden

After a tribunal had found itself having jurisdiction to try a dispute the Defendant-Appellee (Russia) had filed a negative declaratory action with a District Court seeking a declaration that the tribunal lacked jurisdiction to try the dispute. The case was appealed to the Svea Court of Appeals which found it has jurisdiction and that the arbitral tribunal lacked jurisdiction. The case was then appealed by the Claimant-Appellant (RosInvestCo) and the to the Supreme Court.

The Claimant-Appellant argued that the suit should be dismissed as the dispute had insufficient connection the Swedish legal system (lack of Swedish judicial interest). The Supreme Court confirming the principle of party autonomy, explained that the parties may freely agree on applicable law, which is normally done by agreeing on the place of arbitration. According to the Supreme Court, Swedish law is applicable to an arbitration if the arbitration agreement states Sweden as the place of arbitration, even if the dispute is international. If Sweden is the agreed place of arbitration it is of no consequence if the parties or the arbitrator convene elsewhere, if the arbitrators are not Swedes, do their work in another country or if the disputed agreement has no connection to Sweden. Because the parties had agreed on Sweden as the place of arbitration, Swedish law was applicable to the arbitration.

The declaratory action was, in the Supreme Court's opinion, permissible as the only legal limitations preventing such an action are the ones given by Chapter 13, Section 2 of the Swedish Code of Judicial Procedure. With those limitations in mind, the Supreme Court discussed whether such an action is appropriate if it cannot be expected to be settled before the arbitral award is given. The Supreme Court noted that the legislative history assumes that such an action is allowed, concluding that the action should be allowed at least when the arbitral award is not imminent. As the action had been brought forth shortly after the tribunal's decision, with no arbitral award imminent, the Supreme Court allowed the action.

NeuroVive Pharmaceutical AB v. CicloMulsion AG, Supreme Court of Sweden, T 796-18, 30 April 2019

John Kadelburger, Advokat John Kadelburger AB, ITA Reporter for Sweden

Issue of procedural irregularity and in particular the relevance of the requirement that the irregularity must have likely affected the outcome of the case. The tribunal set out its position in regard to an issue in a procedural order (PO) which it stated it would not change without the parties being given opportunity to comment. The tribunal changed its position in an award without having given the parties a possibility to comment. Whether alleged procedural irregularity regarding the changed position of the tribunal and not allowing the parties to comment.

Joint Stock Company Belgorkhimprom v. Koca Insaat Sanayi Ihracat Anonim Sirketi, Supreme Court of Sweden, T 5437-17, 20 March 2019

John Kadelburger, Advokat John Kadelburger AB, ITA Reporter for Sweden

Belgor's request to set an award aside was denied in its entirety. Claims to set aside the final award. General Swedish principles of contract law interpretation apply to arbitration agreements. Tribunal best placed to determine its jurisdiction and evaluate evidence which is the starting point

for the review. Issues of scope of the arbitration agreement, alleged failure by tribunal to review disputed circumstance, right and opportunity to present one's case and whether award not based on evidence adduced.

Kingdom of Spain v. Athena Investments A/S (ex Greentech Energy Systems A/S), Foresight Luxembourg Solar 1 Sarl, Foresight Luxembourg Solar 2 Sarl, GWM Renewable Energy II Srl, RM , GWB Renewable Energy SpA RM, Svea Court of Appeal of Stockholm, T 1626-19, 09 October 2020

John Kadelburger, Advokat John Kadelburger AB, ITA Reporter for Sweden

The Court of Appeal received a letter from the EU Commission of its intention to submit a written observation to the Court on its own initiative as well as to present observations at the oral hearing.

JSC Gazprom transgaz Belarus v. Energoprojekt Oprema a.d. Beograd, Svea Court of Appeal of Stockholm, T 8181-19, 17 April 2020

John Kadelburger, Advokat John Kadelburger AB, ITA Reporter for Sweden

Dismissal of new grounds for challenge raised after the expiration of the three month time limit for challenge and following which new grounds may not be invoked.

Städexia AB v. Oskar Berger Pension AB, Svea Court of Appeal of Stockholm, T 1151-19, 26 May 2020

John Kadelburger, Advokat John Kadelburger AB, ITA Reporter for Sweden

Jurisdiction of arbitral tribunal. Scope of arbitration clause in share purchase agreement (SAP) and issue of extension to claims under separate (loan) agreement between same parties specifically providing for court proceedings. Interpretation of arbitration agreement. Procedural irregularity for failure to consider motion for dismissal invoked by a party in the event of a certain conclusion of invalidity of an agreement. Time limit for challenge and invoking new grounds. Importance of party's failure to object in the challenge proceedings.

Lifestyle Equities CV & Anor v Hornby Street (MCR) Ltd & Ors [2022] EWCA Civ 51, Court of Appeal of England and Wales, Civil Division, Case No. CA-2021-000460 (formerly A3/2021/0355), 28 January 2022

Nicholas Fletcher, 4 New Square, ITA Reporter for England & Wales

The question of who is a party to an arbitration agreement is a substantive question which depends upon the concept of contractual consensus. Under English conflicts of laws principles, it is to be determined in accordance with the governing law of the putative agreement. As a matter of English

law, absent some provision for accession in an agreement, a person can only become a party to an existing arbitration agreement with the consent of all of the other parties – either by novation of the making of a new agreement.

There is a distinction between the law governing an arbitration clause and the law governing the substantive dispute. The choice of law applicable to the arbitration agreement is relevant to the question who decides the substantive dispute. The law applicable to the substantive dispute applies to the resolution of that dispute. As a general proposition, the law governing the validity of the arbitration agreement also governs the question who becomes a party to it. The same principle must apply to the question of who is bound by the arbitration clause. The applicable law for determining whether a party was bound by an arbitration agreement was not restricted to the law chosen by the parties to govern their agreement. In the present case, the parties had chosen California law to govern their contract, including the arbitration clause. That law is therefore the starting point.

Industrial Steel Construction, Inc. v. Lunda Construction Company, United States Court of Appeals, Eighth Circuit, No. 0:21-cv-2242, 13 May 2022

Julian Ranetunge, King & Spalding LLP, ITA Reporter for the United States

Defendant Lunda Construction Company ("Lunda"), as the general contractor for a bridge construction project, engaged Plaintiff Industrial Steel Construction, Inc. ("ISC") to fabricate structural steel for the bridge. In their contract, they agreed to submit any disputes to arbitration under the AAA Construction Industry Rules, and stipulated that those Rules would "govern all procedural matters not specified" in the contract. In the contract itself, they also agreed that ISC "shall be liable for incidental and consequential damages (including attorneys fees and liquidated damages) resulting from delays," i.e., they struck out the words permitting the recovery of attorneys' fees from ISC.

A dispute arose, which was referred to arbitration. The arbitrator issued a final award that ordered ISC to pay Lunda's attorney's fees. After Lunda sought to confirm the award, ISC moved to vacate it on the basis that the arbitrator did not have authority to award Lunda attorney's fees and expert costs. The district court agreed, finding that the parties' agreement addressed the availability of attorneys' fees when they struck out the relevant wording permitting the recovery of those fees, and so there was no basis for "gap filling" by the AAA Rules.

On appeal, the Eighth Circuit stated that for a court to vacate an award under Section 10(a)(4) of the Federal Arbitration Act, the arbitrator would have to have clearly disregarded the terms of the contract, rather than erred in his application of it. Here, the arbitrator at least arguably construed the agreement not to address Lunda's fees; determined liability for fees to be a "procedural matter not specified" in the agreement; and then applied the AAA Construction Industry Rules to fill in the gap, as provided by the contract. As there was a basis to infer that the arbitrator had reached his decision on attorney and expert fees by construing the agreement, the Court was bound to affirm the final award.

Cheim and Read LLC et al. v. Faurschou Project ApS, United States District Court, Southern

District of New York, 21-CV-6540 (RA), 18 May 2022

Renzo Seminario Cordova, King & Spalding LLP, ITA Reporter for the United States

The United States District Court for the Southern District of New York confirmed current case law establishing that the burden of proof necessary to avoid confirmation of an arbitration award is very high and the award should be enforced as long as there is a barely colorable justification for the outcome reached. The standard is met when the parties are given a full and fair opportunity to present arguments and defenses and the arbitral award thoroughly details the factual and legal findings.

An unanswered petition to confirm an arbitration award is treated as an unopposed motion for summary judgment.

AlixPartners, LLP v. Fund for Protection of Investors' Rights in Foreign States, Supreme Court of the United States, No. 21-401 and No. 21-518, 13 June 2022

Charles B. Rosenberg, King & Spalding LLP, ITA Reporter for the United States

On June 13, 2022, in a unanimous opinion delivered by Justice Amy Coney Barrett, the U.S. Supreme Court ruled that 28 U.S.C § 1782(a) (Section 1782) does not extend to proceedings before "private adjudicatory bodies." Section 1782 authorizes U.S. district courts to order discovery "for use in a proceeding in a foreign or international tribunal." The Court held that Section 1782 applies only to "governmental or intergovernmental" adjudicatory bodies and private adjudicatory bodies like private commercial arbitral tribunals and certain ad hoc investor-state arbitration panels do not qualify as "foreign or international" tribunals under Section 1782.

Previously, the only U.S. Supreme Court decision interpreting Section 1782 was Intel v. Advanced Micro Devices, which found that the statute conferred broad discretion to U.S. district courts and provided a list of factors to consider when determining whether to grant Section 1782 requests. The opinion included dicta indicting that Section 1782 may include arbitral tribunals. However, since then, a Circuit split has developed, with the Second, Fifth, and Seventh Circuits holding that Section 1782 may not be used for discovery in aid of foreign private arbitrations and the Fourth and Sixth Circuits finding the opposite. In 2021, the Court granted certiorari in two consolidated cases (ZF Automotive v. Luxshare and AlixPartners v. Fund for Protection of Investors' Rights in Foreign States) to resolve the split.

William Attix v. Carrington Mortgage Services LLC, United States Court of Appeals, Eleventh Circuit, No. 20-13575, 26 May 2022

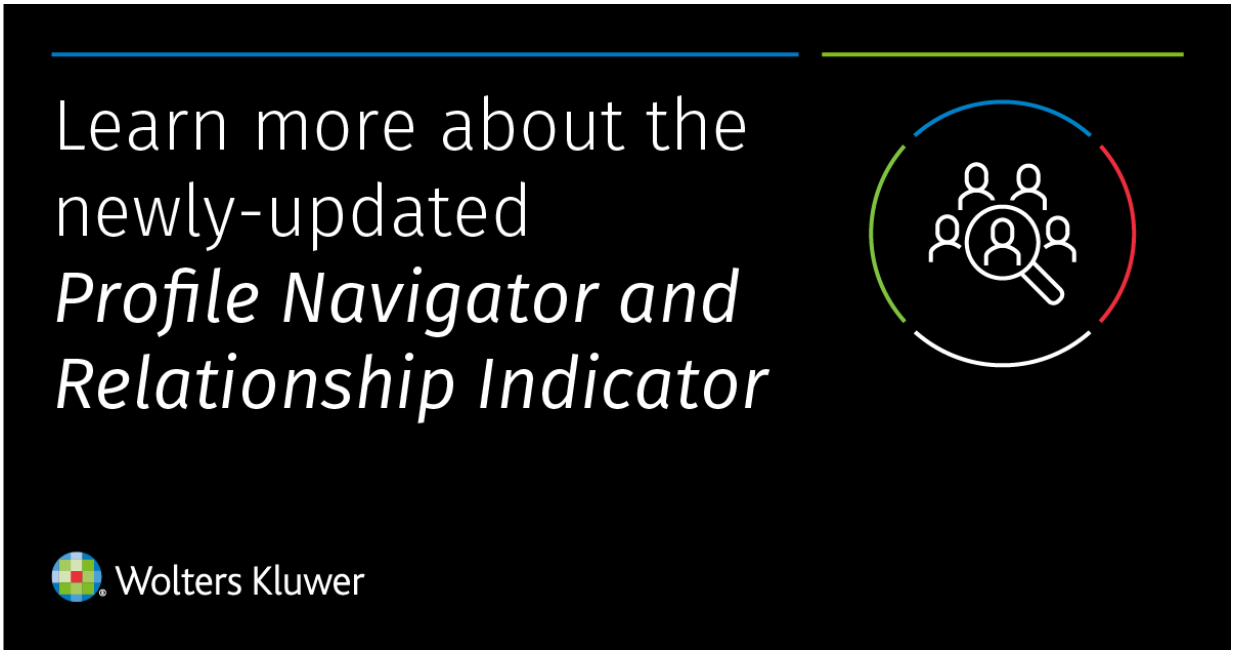
Emma Iannini, King & Spalding LLP, ITA Reporter for the United States

Plaintiff-Appellee William Attix brought suit in federal district court against mortgage servicer Carrington Mortgage Services LLC in May 2020 under the Fair Debt Collection Practices Act (FDCPA) and Florida law. Attix's claims related to a mortgage payment he had made to Carrington using an automated pay-by-phone service operated by Speedpay, a third-party provider.

Before making his payment to Carrington, Attix had agreed to be bound by Speedpay's terms of service; those terms of service—to which Attix, Speedpay, and Carrington were all parties—provided that "any dispute arising from" Attix's use of Speedpay's service "shall be" arbitrated by a sole arbitrator appointed under the American Arbitration Association (AAA) Rules. Speedpay's terms of service also stated that the "arbitrator shall also decide what is subject to arbitration unless prohibited by law," and that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction."

Faced with Attix's suit in the district court, Carrington moved to compel arbitration pursuant to Speedpay's terms of service. dispute must be arbitrated according to the conditions to which Attix had agreed. Carrington argued that, by agreeing that the AAA arbitrator would decide "what is subject to arbitration" and would "rule on his or her own jurisdiction," Attix and Carrington had consented to allow the arbitrator to decide whether Attix's claims under Speedpay's terms of service were arbitrable. Attix conceded that he had agreed to the arbitration clause included in Speedpay's terms of service and that the claims he brought against Carrington were covered by those terms of service; however, he countered that a provision of the Dodd-Frank Wall Street Reform and Consumer Protection Act prohibited enforcement of the parties' arbitration agreement.

The district court denied Carrington's motion to compel arbitration, accepting Attix's assertion that the Dodd-Frank Act prohibited the court from ordering the parties to commence AAA arbitration. On appeal, the 11th Circuit overturned the district court's holding, ruling that Attix and Carrington "clearly and unmistakably agreed that an arbitrator would decide all threshold claims about [] arbitrability, including whether the[] arbitration agreement is enforceable [despite the existence of allegedly contrary provisions in the Dodd-Frank Act]." Thus, explained the 11th Circuit, the "arbitrability dispute" between Attix and Carrington— i.e., whether the Dodd-Frank Act prohibited enforcement of the arbitration agreement—was solely for the AAA arbitrator to decide. The 11th Circuit reversed and remanded the case to the district court with instructions to compel arbitration and stay the district court proceedings.



This entry was posted on Friday, August 12th, 2022 at 8:28 am and is filed under ITA Arbitration Report
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.