Kluwer Arbitration Blog

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

OGH – 3 Ob 152/21f, Supreme Court of Justice of Austria, 3 Ob 152/21f, 21 October 2021

Matthias Hofer and Katherine Khan, Freshfields Bruckhaus Deringer LLP, ITA Reporters for Austria

The interpretation of the validity of an arbitration agreement is in principle case-specific and therefore does not raise a substantial question of law. Moreover, the OGH is not responsible for ensuring the uniformity or further development of foreign law. Only under certain requirements may there be a substantial question of law in connection with the application of foreign law.

OGH – 18 OCg 5/21s, Supreme Court of Justice of Austria, 18 OCg 5/21s, 15 December 2021

Matthias Hofer and Katherine Khan, Freshfields Bruckhaus Deringer LLP, ITA Reporters for Austria

Partial setting aside of the arbitration award is possible in principle. Setting aside due to a violation of the right to be heard requires a certain arbitrariness, as does setting aside due to a violation of the substantive *ordre public*. The *ordre public* is narrower than the range of mandatory norms in Austria.

OGH – 3 Ob 190/21v (3 Ob 201/21m), Supreme Court of Justice of Austria, 3 Ob 190/21v (3 Ob 201/21m), 26 January 2022

Matthias Hofer and Katherine Khan, Freshfields Bruckhaus Deringer LLP, ITA Reporters for Austria

Since a discretionary decision under § 273 (1) Austrian Civil Code Procedure is also not revisable under Austrian law, an arbitral award with a "discretionary decision according to equitable criteria in the estimation of damages" cannot contradict the basic values of Austrian (damages and procedural) law from the outset.

A v. B & C, Market Court of Finland, Case No. 2018/376, Decision No. 10/2022, 22 March 2022

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

The Market Court of Finland evaluated a plea of inadmissibility regarding whether a previous ICC arbitral award creates a res judicata effect and renders the claims presented in the Market Court inadmissible. The arbitral award concerned claims arising out of a contractual relationship between the parties, whereas the process in the Market Court concerned claims based on the Finnish Unfair Business Practices Act ("the Business Practices Act"). The Business Practices Act regulates fair practices in business with an objective to prevent unfair conduct in e.g. marketing efforts and other business relations.

The Market Court dismissed the plea of inadmissibility and decided that the arbitral award did not create a res judicata effect regarding the claims presented in the Market Court. The Market Court reasoned that the arbitral tribunal had not granted and, in fact, could not have granted such penalties (such as a conditional fine) that A was requesting on the basis of the Business Practices Act. The case demonstrates the Market Court's exclusive jurisdiction in market law related matters regulated under the Business Practices Act.

BGH – I ZB 21/21, Federal Court of Justice of Germany, I ZB 21/21, 09 December 2021

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

If an arbitral tribunal violated a party's right to be heard and the court does not set aside the arbitral award despite the party's complaint, the court thereby perpetuates the violation. The court's decision may be attacked on appeal for violating the party's right to be heard.

While lower minimum requirements apply to the reasoning in an arbitral award compared to a court judgment, respecting a party's right to be heard follows the same standard. If the reasoning in the arbitral award does not address the material core of a party's pleadings concerning a factual

or legal issue that is central to the dispute, such omission may indicate that the arbitral tribunal did not duly take note of and consider the party's pleadings (and thereby violated its right to be heard).

BGH – I ZB 31/21, Federal Court of Justice of Germany, I ZB 31/21, 16 December 2021

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

A blanket waiver of the right to request a state court to set aside an arbitral award is invalid if it is agreed prior to receipt of the arbitral award. However, an arbitral award based on an arbitration agreement with such a waiver does not constitute a violation of public policy that would prevent a court from declaring the arbitral award enforceable.

If the claim in dispute is assigned during the pending arbitration proceeding, even an (assumed) error of the arbitral tribunal to nonetheless order payment to the assignor does not amount to a violation of public policy.

BVerfG – 1 BvR 2103/16, Federal Constitutional Court of Germany, 1 BvR 2103/16, 03 June 2022

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

If an athlete's participation in professional sports competitions, which are organized by a sports association that holds a dominant position in the respective sports competitions market, is dependent on the agreement to an arbitration agreement, and the athlete is thereby "forced" into arbitration (here: a disciplinary CAS arbitration concerning alleged violations of anti-doping rules), the arbitration agreement is invalid if the applicable arbitration rules (here: the former CAS rules) do not provide for the right to request a public hearing. The reason is that in case of such a "compulsory disciplinary arbitration" the lack of the right to a public hearing violates the athlete's constitutional right of access to effective judicial relief. If an arbitration clause violates this constitutional right, it is invalid and cannot be invoked against an action brought in state court.

Claimant A & Claimant B v. Respondent Companies, Eighth District Court of Concurrent Jurisdiction of the District of Nuevo Leon, 77/2021 and 83/2021, 22 April 2022

Cecilia Flores Rueda, Flores Rueda Abogados, ITA Reporter for Mexico

The Eight District Judge in Mexico City set aside an arbitral award for considering that the service of process was defective, and that the composition of the arbitral tribunal was not in accordance with the arbitration agreement.

Comision Federal de Electricidad (CFE) v. Transportadora de Gas Natural de la Huasteca,

S. de R.L. de C.V., Fifteenth Collegiate Court in Civil Matters of the First Circuit, 4/2021, 18 July 2022

Cecilia Flores Rueda, Flores Rueda Abogados, ITA Reporter for Mexico

The Fifteenth Civil Collegiate Court of the First Circuit in Mexico ruled that interim measures issued by the courts, in assistance to commercial arbitration, cannot be of constitutive nature, but only conservative.

Estado Paraguayo – Ministerio de Urbanizacion Vivienda y Habitat (MUVH) v. Ing. Carlos Ughelli s/ Cumplimiento de Contrato ((Application for Annulment of Award), Court of Appeal in Civil and Commercial Affairs of Asunción, 35/2022, 04 July 2022

José A. Moreno Rodríguez, Altra Legal, ITA Reporter for Paraguay

On July 4, 2022, an Asunción Appeals Court rejected an annulment request, as the Applicant did not prove that the alleged annulment grounds found in Art. 40 (a)(2) and (3) were met in the case at hand.

Programa Nacional de Saneamiento Rural (PNSR) v. Empresa de Transformación Agraria S.A. Sucursal del Perú (TRAGSA), Superior Court of Justice of Lima, Expediente No. 00182-2021-0-1817-JR-CO-02, 23 March 2022

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

The Commercial Chamber of the Superior Court of Justice of Lima declares inadmissible an action for annulment against a partial award.

C-B.V. v. X, Court of Appeal of Lisbon, 2851/19.3YRLSB.L1-2, 28 April 2022

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

This Decision confirms that, as there is no system of double exequatur in Portugal, the recognition of foreign arbitral awards must be compared with similar procedures, in order to assess whether the recognition is more cumbersome. The court takes as a basis for comparison the procedure for setting aside national arbitral awards. Thus, the Portuguese procedure for recognition of foreign arbitral awards cannot be more onerous or have higher fees or charges than those imposed in the procedure for setting aside national arbitral awards.

Moreover, this Decision was correct in reducing the fees by 90%. As the rules for legal costs in Portuguese proceedings do not contain any cap, in cases where the value at issue is high, the costs can be very onerous. In this case, they were EUR 600,000. If the court did not grant the reduction, there could be grounds for an appeal based on the violation of Article III of the NYC.

Re Shanghai Xinan Screenwall Building & Decoration Co, Ltd [2022] SGHC 58, Supreme Court of Singapore, High Court, Originating Summons No. 682 of 2021 (Summons No. 3925 of 2021), 18 March 2022

Michael Hwang, Michael Hwang Chambers LLC, ITA Reporter for Singapore

The Singapore High Court has refused an application to set aside leave to enforce an arbitral award on the basis that, inter alia, the arbitral institution (i.e. the "China International Arbitration Center") named in the arbitration agreement(s) did not exist.

In this regard, the Singapore High Court held that, if the parties objectively intended to refer to the same arbitral institution, the validity of the arbitration agreement(s) would not be affected. It is only in the case where parties had in mind different institutions, or if it was impossible to tell which institution Parties were referring to, that the misnomer would affect the validity of the arbitration agreement(s). This is in line with the Singaporean Court's pro-arbitration stance, which generally seeks to adopt the interpretation which enables the pathological clause to be upheld, as opposed to interpretations that lead to contrary or nugatory effects.

This case not only serve as a helpful guide to how the Singapore Courts will interpret arbitration clauses naming non-existent arbitral institutions, it also serves as a cautionary tale to Parties that Arbitration clauses should not be treated as an afterthought, or "midnight clauses", but must be carefully negotiated between Parties. Otherwise, Parties risk opening themselves up to challenges against the validity (and enforceability) of said clauses.

CJA v. CIZ [2022] SGCA 41, Supreme Court of Singapore, Court of Appeal, Civil Appeal No. 35 of 2021, 17 May 2022

Michael Hwang, Michael Hwang Chambers LLC, ITA Reporter for Singapore

Will a tribunal necessarily exceed its jurisdiction if it bases its award on a ground not contained within the Parties' written pleadings and not ancillary to the pleadings? The Singapore Court of Appeal's decision in this case suggests that the answer to the foregoing question is 'no'. The Singapore courts will take a holistic approach and look at the totality of what was placed before the Tribunal in assessing what parties have submitted for arbitration. If a tribunal has put a point to the parties for their consideration, it is likely that it will be entitled to base its decision on reasoning flowing from those points.

This case also serves as a useful reminder that tribunals are entitled to come to conclusions different from the views of the parties (and will not be in breach of natural justice) – even if the parties are agreed – as long as (1) those conclusions are based on evidence that was before the tribunal, and (2) it consults the Parties where the conclusions may involve a dramatic departure from what has been presented to it.

National Investment Bank Ltd. v. Eland International (Thailand) Co. Ltd. & Eland

International Ghana Limited [2022] EWHC 1168 (Comm), High Court of Justice of England and Wales, Queen's Bench Division, Commercial Court, CL-2021-000414, 17 May 2022

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

For a court to exercise its s. 18 powers it was not necessary for it to reach a final decision as to whether or not there was an arbitration agreement between the parties or whether the dispute which was sought to be referred fell within the arbitration clause. It was sufficient that a s.18 applicant could show a good arguable case to that effect.

A party will be held to have waived its right to arbitrate if they have acted in such a way as to lead the other party to believe that they have made an election not to pursue the claim by way of arbitration. A party will be held to have made such an election if it acts in a manner consistent only with it having chosen one of two alternative and inconsistent courses of action.

Union of India v. Reliance Industries Limited & BG Exploration and Production India Limited [2022] EWHC 1407 (Comm), High Court of Justice of England and Wales, Queen's Bench Division, Commercial Court, CL-2021-000100, 09 June 2022

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

The principle of res judicata enunciated in Henderson v Henderson is a procedural power and not a matter of substantive law and is governed by the law of the seat. The principle applies in the context of both arbitral and court proceedings. In so far as arbitration is concerned the principles have their basis in the duties of the tribunal set out in s. 33(1)(a) and s.33(10(b) of the Arbitration Act.

The Henderson v Henderson principle could apply to all stages of the same proceedings, to defenses as well as to claims, and in an arbitration as well as to litigation. The scope of a remission in arbitration was not endless. Finality is a goal in both court and arbitral proceedings.

There is a very high threshold for a s.68 challenge based on a tribunal's failure to deal with an issue. Firstly, it must be shown that there was a relevant issue. Second, it must be shown that the issue was put. Third, it must be shown that the issue was not dealt with.

Hoffmann-La Roche Ltd., Roche Molecular Systems, Inc. and Gen-Probe Inc. v. Qiagen Gaithersburg, Inc., United States District Court, Southern District of New York, 09 Civ. 7326 (WHP) / 09 Civ. 7396 (WHP), 11 August 2010

Inigo Kwan-Parsons

With competing petitions regarding the validity of a final arbitral award, the US District Court of Southern District of New York, clarifies the standard of review to be applied to awards rendered from international arbitrations under the New York Convention (as opposed awards rendered from domestic arbitrations), and exemplifies the high threshold required to set aside arbitral awards under New York law.

Esso Exploration and Petroleum Nigeria Limited v. Nigeria National Petroleum Corporation, United States Court of Appeals, Second Circuit, No. 19-3159 (L), 19-3361, 08 July 2022

Tasmin Parzen, King & Spalding LLP, ITA Reporter for the United States of America

Plaintiff-Appellants Esso Exploration and Production and Shell Nigeria Exploration and Production Company Limited (collectively, "Esso") initiated arbitration against Defendant-Appellee Nigerian National Petroleum Corporation ("NNPC") in 2009. The tribunal ultimately issued a final award in favor of Esso. However, Nigerian courts set aside the award in part. While its appeals in those proceedings were pending, Esso sued to enforce the award in the United States District Court for the Southern District of New York.

While rejecting NNPC's request to dismiss the case for a lack of personal jurisdiction over NNPC and on the ground of forum non conveniens, the district court ultimately denied Esso's petition on the merits, finding that the Nigerian courts' judgments were owed comity. Esso appealed the denial of enforcement, and NNPC cross-appealed the denial of its motion to dismiss.

On appeal, the Second Circuit determined that the district court both appropriately denied NNPC's motion to dismiss and correctly concluded that comity was owed to the judgments of the Nigerian courts. However, it determined that the district court ought not to have denied Esso's petition in full but instead ought to have enforced those portions of the Award left intact by the Nigerian Courts.

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