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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.

Swiss Renewable Power Partners S.A.R.L. v. The Kingdom of Spain, Supreme Court of Justice of Colombia, 11001-02-03-000-2022-02569-00, 30 August 2022

Eduardo Zuleta Jaramillo, ZULETA Abogados Asociados S.A.S., ITA Reporter for Colombia

Swiss Renewable Power Partners S.A.R.L. v. Spain is the first time in which the Colombian Supreme Court of Justice deals with the recognition of an investment award against a third State. In less than a page and a half, the Court determined that it lacked jurisdiction to order Spain to appear before it. According to the Court, the "topic raised" was not excluded from Spain's jurisdictional immunity, more so, when the final objective of the request for recognition was the subsequent execution of the award.

Salvador Maestro SL v. Marco Jhonnier Pérez Murillo, Supreme Court of Justice of Colombia, 11001-02-03-000-2022-00385-00, 15 July 2022

Eduardo Zuleta Jaramillo, ZULETA Abogados Asociados S.A.S., ITA Reporter for Colombia

The Supreme Court of Justice admitted the possibility of granting interim measures in award recognition proceedings in Colombia based on pro-recognition and pro-execution principles.

CEDIMAT v. Stonhard, Ciprián Ingeniería & Terminaciones, S.R.L. & Center for Alternative Dispute Resolution of the Chamber of Commerce and Production of Santo Domingo, Constitutional Court of the Dominican Republic, TC/0506/18, 30 November 2018

Stephan Adell, Adell & Merizalde, ITA Reporter for the Dominican Republic

The Dominican Constitutional Court held that jurisdictional objections relating to the scope and extension of an arbitration agreement must be decided by an arbitral tribunal pursuant to Article 20 of the Law No. 489-08 on Commercial Arbitration.

Kout Food Group v. Kabab-Ji Sal, Court of Cassation of France, First Civil Law Chamber, Arrêt n° 679 FS-B, Pourvoi n° K 20-20.260, 28 September 2022

Nataliya Barysheva and Valentine Chessa, MGC Arbitration, ITA Reporter for France

The French Cour de cassation confirmed the substantive rule of international arbitration law under which the existence and effectiveness of an international arbitration agreement must be assessed subject to the mandatory rules of French law and international public policy without reference to a national law.

BGH – I ZB 36/21, Federal Court of Justice of Germany, I ZB 36/21, 21 April 2022

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

A party's right to be heard is violated if the arbitral tribunal rejects a request to postpone a hearing in an evidently erroneously fashion and this results in the requesting party not being represented by its counsel at the hearing. Such a violation meets the requisite standard of potential causality for the outcome of the arbitration. The reason is that, as a rule, it cannot be excluded that an oral discussion of the dispute with the concerned party and its counsel would have resulted in a different ruling by the arbitral tribunal.

An application to set aside an arbitral award that is filed within the statutory three-month time period does not yet need to include pleadings on the grounds for setting aside. The applicant may file such pleadings at a later time, subject to a time limit set by the court.

OLG Frankfurt am Main – 26 Sch 19/21, Higher Regional Court of Frankfurt am Main, 26 Sch 19/21, 14 July 2022

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

The parties to an arbitration proceeding are free to agree on the formal requirements of translating

witness testimony at a hearing. The arbitral tribunal in principle has the same discretion as the parties to organize the proceedings. Absent a party agreement, the arbitral tribunal is not required to retain a sworn interpreter to translate witness testimony. It does not violate procedural public policy if the arbitral tribunal permits a person, who is on the side of one of the parties, to translate the witness testimony at the hearing.

KG Berlin – 12 SchH 6/21, Higher Regional Court of Berlin, 12 SchH 6/21, 28 April 2022 and **OLG Köln – 19 SchH 14/21, Higher Regional Court of Cologne, 19 SchH 14/21, 01 September 2022**

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

The German arbitration community has recently seen two important but diverging court decisions in cases in which applicants (who are the state respondents in the respective arbitrations) sought German courts to declare ICSID arbitration proceedings concerning intra-EU investment disputes under the Energy Charter Treaty inadmissible pursuant to Sec. 1032(2) of the German Code of Civil Procedure. The question in both proceedings was whether a German court has jurisdiction and may (or, in the light of the Achmea case law by the Court of Justice of the European Union: must) decide on such an application in a case where the underlying arbitration proceeding is governed by the ICSID Convention –which has established a self-contained regime for the settlement of investment disputes that expressly excludes state courts' jurisdiction near-completely.

Gobierno Regional del Cuzco v. Consorcio Salud Cusco, Superior Court of Justice of Lima, Expediente Judicial Electrónico N° 00112-2022-0-1817-SP-CO-01, 09 August 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 annuls an award because the arbitrator declared the arbitration claim to have lapsed without the parties having previously had the opportunity to express their views on the matter.

EGF v. HVF, HWG, TOM, DCK, HRY [2022] EWHC 2470 (Comm), High Court of Justice of England and Wales, Queen's Bench Division, Commercial Court, CL-2022-000065, 16 September 2022

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

In assessing whether the court should remove an arbitrator for justifiable doubts as to their impartiality under s. 24(1)(a) of the Arbitration Act, the question is whether what the decision-maker has done, considered fairly in its context, including whatever the decision-maker has said at the time to explain the decision, by nature or effect such an odd thing to have done in the circumstances that a reasonable person might think the explanation might be bias.

A challenge based upon an assertion that the UNCITRAL Rules do not grant the arbitrators a power to order a provisional payment cannot be framed as a challenge that the arbitrators have exceeded their jurisdiction under s. 67 of the Arbitration Act. The logic of such an argument was that whenever an arbitral tribunal exceeded its powers, it would exceed its substantive jurisdiction. That would deprive s. 68(2) of the Arbitration Act of any content.

Article 34 of the UNCITRAL Rules does not permit an award to be made in respect of relief which is provisional or interim in nature.

Hulley Enterprises Limited, Yukos Universal Limited & Veteran Petroleum Limited v. The Russian Federation [2022] EWHC 2690 (Comm), High Court of Justice of England and Wales, Queen's Bench Division, Commercial Court, CL-2015-000396, 26 October 2022

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

Whether a stay of recognition and enforcement proceedings should be lifted was a matter which required the court to balance various factors. A court may lift a stay of such proceedings in order to determine a jurisdictional challenge despite the fact that there are annulment proceedings pending before the court of the seat in circumstances where the courts of the seat had already disposed of jurisdictional issues and there was no danger of the affected party being unable to present its full case on non-jurisdictional issues before the courts of the seat.

The power to order security to be provided as a condition for a stay under s. 103(5) Arbitration Act 1996 does not exist where a claim to state immunity remains unresolved. Further, it is not appropriate in such circumstances alternatively to make an order for security under the court's general case management powers.

Huzhou Chuangtai Rongyuan Investment Management Partnership et al v. Hui Qin, United States District Court, Southern District of New York, 1:21-cv-09221-KPF, 26 September 2022

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

The Petitioners are three Chinese companies that initiated China International Economic and Trade Arbitration Commission ("CIETAC") arbitration under investment agreements with Chengdu Run Yun Culture Communication Co., Ltd. ("Chengdu Run Yun"), which is a Chinese limited liability company that owns and operates movie theaters, and several of Chengdu Run Yun's affiliates, including the Respondent Hui Qin, alleging that they breached their obligations under the investment agreements. After obtaining an arbitral award in their favor, the Petitioners commenced an action to confirm the arbitral award before the Court, which the Respondent Hui Qin opposed.

The Court first set out the applicable legal principles in determining the Petitioners' motion. First, because the Petitioners are all incorporated in China, the New York Convention applies. Accordingly, for the Court to disregard a foreign arbitral award, the party opposing enforcement must prove at least one of the seven defenses listed in the New York Convention. The party has a heavy burden of proof because of the "strong public policy in favor of international arbitration," which results in courts affording foreign arbitral decisions "great deference."

Second, petitions to confirm a foreign arbitral award are treated as motions for summary judgment, which is warranted when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The party opposing summary judgment must "do more than simply show that there is some metaphysical doubt as to the material facts" and "set forth specific facts showing that there is a genuine issue for trial." The Court noted that although it must "construe the facts in the light most favorable to the non-moving party and must resolve all ambiguities and draw all reasonable inferences against the movant," it should not accord the non-moving party the benefit of "unreasonable inferences, or inferences at war with undisputed facts," nor should it accept "conclusory statements, conjecture, or speculation by the party resisting the motion."

The Court granted the Petitioners' motion for summary judgment, having found that none of the four reasons the Respondent Hui Qin submitted in opposition of the Petitioners' motion was availing:

- the Respondent Hui Qin's defense under Article V(1)(a) of the New York Convention fails for lack of proof that the underlying arbitration agreement was invalid under Chinese law;
- the Respondent Hui Qin's defense under Article V(1)(b) of the New York Convention fails for lack of evidence that the arbitral process lacked fundamental fairness; rather, the Respondent was afforded reasonable notice and ample opportunities to present his evidence and arguments;
- the Respondent Hui Qin's defense under Article V(1)(d) of the New York Convention fails because the Respondent has not shown that "the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties"; and
- the Respondent Hui Qin's defense under Article V(2)(b) of the New York Convention fails because neither of the two theories the Respondent Hui Qin proffered for why the award violates U.S. public policy has any merit.

Jiangsu Beier Decoration Materials Co., Ltd. v. Angle World LLC, United States Court of Appeals, Third Circuit, No. 21-3143, 03 November 2022

Alex Levin Canal, King & Spalding LLP, ITA Reporter for the United States of America

Appellant-Plaintiff Jiangsu Beier Decoration Materials Co., Ltd. ("Jiangsu") initiated arbitration in China against Appellee-Defendant Angle World LLC ("Angle World") under a memorandum of understanding that contained an arbitration clause that Angle World ("July MOU") did not sign.

Nevertheless, a Chinese Court ruled that the July MOU, in combination with correspondence exchanged between the parties, constituted a valid arbitration agreement under Chinese Law. Then, an Arbitral Tribunal ruled on the merits in favor of Jiangsu, finding that Angle World had breached the July MOU.

Jiangsu petitioned a U.S. District Court for confirmation of the foreign award. The District Court dismissed Jiangsu's petition. It considered that (i) Jiangsu failed to prove the existence of an arbitration agreement enforceable under the New York Convention ("NYC"), and (ii) it was not bound by the Chinese Court and the Arbitral Tribunal's decisions on arbitrability.

The Third Circuit first examined the NYC requirement of an "agreement in writing." It then criticized the District Court for not sufficiently analyzing the parties' correspondence and the

background principles of contract law in the creation of a valid arbitration agreement. However, the Third Circuit did agree with the District Court that it should determine arbitrability independently and that it was not bound by the Chinese Court and Arbitral Tribunal's decision. The case was remanded for a further determination on the arbitrability of the underlying dispute.
