Kluwer Arbitration Blog

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Roger Alford (General Editor) (Notre Dame Law School), Crina Baltag (Managing Editor) (Stockholm University), and Monique Sasson · Sunday, January 8th, 2023

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.

Megabar, S.A. v. Article 12.1 of the Law No. 489-08 on Commercial Arbitration, Constitutional Court of the Dominican Republic, TC/0333/21, 01 October 2021

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

The Dominican Constitutional Court held that Article 12.1 of the Law No. 489-08 on Commercial Arbitration ("LCA") complies with the constitutional requirements for its validity. Article 12.1 provides that decisions by judicial courts declining jurisdiction (when presented with a dispute subject to an arbitration agreement) cannot be appealed.

A professional coach v. AC Kajaani, Court of Appeal of Rovaniemi, Decision No. 262, Case No. S 21/298, 27 September 2022

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

The Court of Appeal of Rovaniemi evaluated the binding nature of an arbitration clause in an employment agreement. The employment contract i.e., the coaching contract was terminated on grounds related to the employee's person without hearing the employee. The Court of Appeal stated that applying the arbitration clause would have led to unfairness and that the claim was

admissible in a state court.

The Court of Appeal noted that, as a rule, arbitration clauses are binding on both parties. However, in an ordinary employment contract, unless there is a special reason to deviate from this starting point, an arbitration clause should often be considered an unfair contract term, as was held in this case. According to section 36 of the Finnish Contracts Act, a contract term can be adjusted or set aside if it is considered unfair. The Finnish Employment Contracts Act contains a similar provision on unfair terms or conditions.

The case is a good reminder that the applicability of the Finnish Employment Contracts Act is wide-ranging, with e.g. all managers apart from CEOs being typically considered employees under the Employment Contracts Act. In determining what is unfair in the context of an employment contract and whether an arbitration clause would be considered binding, regard should be had to the entire contents of the contract, the positions of the parties, the circumstances prevailing at and after the conclusion of the contract, and other factors.

(As of 10 October 2022, the quoted decision is still subject to an appeal period and is not res judicata.)

Donna Wade v. Brian Wade [2022] NZHC 3254, High Court of New Zealand, CIV-2022-454-056, 06 December 2022

Stephen Hunter, Shortland Chambers, ITA Reporter for New Zealand

This decision concerned whether care of children disputes under the Care of Children Act 2004 (COCA) could be the subject of binding arbitration. The High Court held that it is not possible for parties to submit their care of children disputes to arbitration in a manner that is binding and enforceable by the courts. Care of children disputes are not "capable of determination by arbitration" under s 10 of the Arbitration Act 1996 because COCA creates a comprehensive care of children regime in respect of which the Family Court and High Court have exclusive jurisdiction. Arbitration clauses purporting to bind parties to an arbitrator's decision on care of children matters are contrary to public policy.

(Note: The reporting of this proceeding is subject to ss 11B, 11C and 11D of the Family Court Act 1980. The parties' real names have not been used.)

Rooney Earthmoving Ltd v. Infinity Farms Ltd and John Walton [2022] NZHC 2078, High Court of New Zealand, CIV-2022-412-67, 19 August 2022

Stephen Hunter, Shortland Chambers, ITA Reporter for New Zealand

This decision concerns the interpretation and application of the expert determination clauses in the Conditions of Contract for Building and Civil Engineering Construction NZS3915:2005 (NZS3915). The Court makes several observations as to the similarities and differences between arbitration and expert determination clauses. The Court held that, unlike arbitration clauses which carry a presumption that they are to be construed generously, expert determination clauses do not

attract a presumption in favour of a wide interpretation. The Court also comments on the role of an expert and, subject to contract, the powers of an expert to determine the issue by following a similar process to an arbitrator.

Doral S.A. v. Club Olimpia, Court of Appeal in Civil and Commercial Affairs of Asunción, Sentencia 75/2022, 17 November 2022

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

On November 17, 2022, an Asunción Appeals Court rejected an annulment request, as the Applicant did not prove that the alleged annulment ground found in Art. 40 (b) was met in the case at hand.

A. SA v. Y and Z. SA, Federal Supreme Court of Switzerland, 1st Civil Law Chamber, 4A_277/2021, 21 December 2021

Angelina M. Petti, von Segesser Law Offices, ITA Reporter for Switzerland

The Swiss Federal Supreme Court (the "Supreme Court") dismissed an application to set aside an award rendered by a sole arbitrator in a domestic arbitration under the rules of the Swiss Arbitration Centre ("Swiss Rules"), finding that there had been no violation of the right to be heard where a party is refused the opportunity to file a reply to a simultaneously filed post-hearing submission.

Sun Yang v. World Anti-Doping Agency (WADA) and International Swimming Federation (FINA), Federal Supreme Court of Switzerland, 1st Civil Law Chamber, 4A_406/2021, 14 February 2022

Angelina M. Petti, von Segesser Law Offices, ITA Reporter for Switzerland

The Swiss Federal Supreme Court (the "Supreme Court") dismissed an application to set aside an award of the Court of Arbitration for Sport which reversed an earlier ruling of the Antidoping Commission of the International Swimming Federation ("FINA") and imposed a ban of four years and three months on Chinese swimmer Sun Yang. The Supreme Court confirmed that the timeliness of the appeal to the Court of Arbitration for Sport ("CAS") does not pertain to questions of jurisdiction, but rather was an issue of admissibility. Furthermore, the Supreme Court ruled that Sun Yang's right to be heard had not been infringed and the ban issued does not violate fundamental principles of public order.

A. v. B., Federal Supreme Court of Switzerland, 1st Civil Law Chamber, 4A_464/2021, 31 January 2022

Angelina M. Petti, von Segesser Law Offices, ITA Reporter for Switzerland

The Swiss Federal Supreme Court (the "Supreme Court") dismissed an application to set-aside an award rendered by a sole arbitrator seated in Geneva based on an alleged violation of substantive public policy, or alternatively revise the award on the grounds of allegedly newly discovered facts.

A. AG v. B. SA, Federal Supreme Court of Switzerland, 1st Civil Law Chamber, 4A_600/2021, 28 February 2022

Angelina M. Petti, von Segesser Law Offices, ITA Reporter for Switzerland

The Swiss Federal Supreme Court ("Supreme Court") dismissed an application to set-aside a sole arbitrator's award for lack of jurisdiction and violation of the right to be heard. Although the decision arises in the context of domestic arbitral proceedings, the Supreme Court's opinion on the doctrine of separability and its limitations are equally applicable to international arbitrations seated in Switzerland.

X v. Y, Court of Cassation of Abu Dhabi, Cassation No. 817 of 2021 [Commercial], 12 December 2021

John Gaffney and Malak Nasreddine, Al Tamimi & Company, ITA Reporters for the United Arab Emirates

This case involved an application before the Abu Dhabi Court of Cassation to challenge the Abu Dhabi Court of Appeal's decision to annul an interim award issued by an arbitral tribunal ("ADCCAC Tribunal" or "Arbitral Tribunal") under the Rules of Arbitration of the Abu Dhabi Commercial Conciliation and Arbitration Centre ("ADCCAC"). The Appellants argued that the Court of Appeal lacked jurisdiction to set aside the Interim Award. The Court of Cassation upheld the Court of Appeal's decision to nullify the Interim Award and dismissed the appeal.

Aiteo Eastern E&P Company Limited v. Shell Western Supply and Trading Limited [2022] EWHC 2192 (Comm), High Court of Justice of England and Wales, Queen's Bench Division, Commercial Court, Case Nos CL-2022-000187 and CL-2022-000457, 17 November 2022

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

While a dispute resolution clause could provide that an option to refer to arbitration a dispute which one party has brought to court can only be exercised by the commencement of an arbitration, it would require clear words to achieve that outcome. Whilst it will depend upon the wording of the clause, what matters is whether there is an unequivocal statement requiring a party to refer the dispute to arbitration, whether that takes the form of serving a Request for Arbitration, seeking a stay or some other communication. It is the message which matters, not the medium.

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