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

Brazilian Federal Government v. BM&F Bovespa S.A. and others, Regional Federal Court of the 3rd Region, Agravo de Instrumento n° 5014095-90.2021.4.03.0000, 07 December 2021

Joao Bosco Lee, Lee, Taube, Gabardo Sociedade de Advogados, ITA Reporter for Brazil

The Brazilian Federal Court of Appeals for the 3rd Region, in an interlocutory relief decision, decided to maintain an arbitral tribunal and the B3 S.A. – BRASIL, BOLSA, BALCÃO Arbitration Chamber as defendants in a lawsuit initiated by the Brazilian Federal Government to annul the arbitral award rendered in the arbitral proceedings CAM 85/17 and CAM 97/17.

Even though the Brazilian Federal Court of Appeals for the 3rd Region recognized that, usually, an arbitral tribunal and an arbitration chamber have a lack of standing to discuss the nullity of an arbitration award, the case was an exception, once the Arbitral Tribunal allegedly disobeyed prior judiciary decisions that determined the suspension of the arbitral proceedings CAM 85/17 and CAM 97/17.

Luiz Augusto Muller v. Companhia Muller de Bebidas, Court of Justice of the State of São Paulo, Apelação Cível nº 1002077-20.2021.8.26.0457, 29 March 2022

Joao Bosco Lee, Lee, Taube, Gabardo Sociedade de Advogados, ITA Reporter for Brazil

The Court of Justice of São Paulo decided that the arbitration clause prevails in relation to the alleged lack of resources of one of the Parties to fund the arbitral proceeding.

JS v. Câmara de Arbitragem do Mercado (CAM) – Arbitral Tribunals from the arbitral proceedings CAM 186/21, CAM 93/17 and CAM 110/18 and third parties, Superior Court of Justice of Brazil, Conflito de Competência nº 185.702/DF, 22 June 2022

Joao Bosco Lee, Lee, Taube, Gabardo Sociedade de Advogados, ITA Reporter for Brazil

Preliminarily, the Brazilian Superior Court of Justice decided that it has jurisdiction to rule upon a conflicts of competence between Arbitral Tribunals, since arbitration has a jurisdictional nature.

Moreover, the reporting Justice understood that, if there is a conflict of competence between arbitration proceedings whose scope is the liability of the controlling shareholders and former officers due to the same facts, the arbitral proceeding initiated by the company itself must prevail instead of the arbitrations commenced by its minority shareholders.

Bariven S.A. v. Wells Ultimate Service LLC, Court of Appeal of The Hague, 200.244.714/01, 22 October 2019

Richard Hansen, Linklaters LLP, ITA Reporter for The Netherlands

This decision from the Court of Appeals of The Hague regards Bariven's setting aside claim based on Article 1065(1)(e) DCCP (public policy). According to Bariven, the arbitral award confirmed and legitimized a contract that came about under the influence of corruption. The Court of Appeals held that the general starting point that setting aside proceedings cannot be used as an appeal in disguise must be seen as a limitation of a procedural-law nature that cannot hinder compliance with a fundamental legal rule such as the prohibition on corruption. Acting as first and only factual instance, the Court of Appeals then conducted its own investigation into the corruption allegations – including on the basis of new facts Bariven brought forward with respect thereto that came about after the arbitral award was rendered – and set aside the arbitral award, holding that enforcing a contract obtained through corruption would be contrary to public policy.

Bauunternehmung [bauunternehmung] GMBH & Co. v. [de vennootschap 1], Court of Appeal of 's Hertogenbosch, 200.247.923/01, 24 January 2019

Richard Hansen, Linklaters LLP, ITA Reporter for The Netherlands

This Court of Appeals of Den Bosch decision regards Bauunternehmung's application for recognition and enforcement of a Swiss arbitral award in the Netherlands. Under the 2015 Dutch Arbitration Act, the Court of Appeals is competent to hear such an application; under the 1986 Act the Preliminary Relief Judge of the District Court was competent. The Court of Appeals found that the 1986 Act was also applicable to foreign arbitrations commenced before 1 January 2015, even where proceedings were first brought in the Netherlands after 1 January 2015. According to the

Court, taking into account that the transitional law provisions of the 2015 Act do not make a distinction between domestic and foreign arbitrations, the intention of the legislator does not give rise to a different interpretation. The Court thus declared itself to lack jurisdiction and referred the case to the Preliminary Relief Judge of the District Court of Zeeland West-Brabant.

Serena Equity Limited v. Fincantieri S.p.A., Court of Appeal of Amsterdam, 200.219.927/01, 09 October 2018

Richard Hansen, Linklaters LLP, ITA Reporter for The Netherlands

This decision of the Court of Appeals of Amsterdam regards a request for recognition and enforcement of four London-seated arbitral awards rendered under the rules of the London Maritime Arbitrator's Association. Prior to this decision, the Court of Appeals issued an interim decision that the proceedings would continue under the 2015 Dutch Arbitration Act, with the Court of Appeals acting as first and only factual instance. The defendant argued that the request should be denied due to lack of a valid arbitration agreement, incorrect constitution of the tribunal, violation of the tribunal's mandate, and violation of public policy. The Court of Appeals rejected each of these arguments and granted the request for recognition and enforcement. The Court of Appeals also denied the defendant's request that the Court of Appeals not declare its decision enforceable notwithstanding appeal, or alternatively make such declaration subject to the provision of security by the applicant.

Importadora Ricamar, S.A. v. Marketec Targeted Solutions, S.A., Supreme Court of Justice of Panama, Expediente No. 350-2020, 27 December 2021

Ryan Mellske, Flex Arbitri PLLC, ITA Reporter for Costa Rica

The Supreme Court of Panama rejected the Petitioner's challenge to an international arbitration award issued by Panama's Conciliation and Arbitration Center (CeCAP). The Court considered that (i) the alleged invalidity of the contract (for supposed lack of capacity) did not affect the arbitration agreement or disturb the jurisdiction of the arbitral tribunal; (ii) the Parties intended to subject their dispute to CeCAP arbitration, notwithstanding a minor discrepancy in the name of the institution indicated the arbitration clause; and (iii) the final award did not violate international public order (for the supposed lack of capacity mentioned above). Therefore, the Court upheld the arbitration award and ordered the Petitioner to pay costs.

Korea Trade Insurance Corporation v. Century Metals & Supplies Peru SAC, Superior Court of Justice of Lima, 00028-2022-0-1817-SP-CO-02, 27 July 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 recognized an award issued in the Republic of Korea.

Merck Sharp & Dohme, Corp and Merck Sharp Dohme, Lda, v. Alter S.A. and Farmalter – Produtos Farmacêuticos e dietéticos, Lda., Court of Appeal of Lisbon, 1284/22.9YRLSB-PICRS, 12 October 2022

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

This decision is very important and rare. Since the issue of allocation of costs is in principle not subject to challenge, the only existing case law is solely cases in which the arbitral award may be appealed which is uncommon in Portugal. This decision sets out that the arbitration rules concerning the allocation of costs are based on the principle of distributive justice, the cornerstone of the rules establishing costs follow the event approach and the causation approach.

Portuguese company v. Swedish company, Court of Appeal of Porto, 12021/20.2T8PRT.P1, 27 October 2022

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

This decision is important because it took into account the contractual nature of the arbitration agreement and, going one a step further, examined whether it was a case of abuse of right as set out in the Civil Code.

CVG v. CVH [2022] SGHC 249, Supreme Court of Singapore, High Court, Originating Application No. 297 of 2022 and Summons No. 2715 of 2022, 07 October 2022

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

Can a foreign interim award made by an emergency arbitrator be enforced in Singapore pursuant to s 29 of the International Arbitration Act 1994 (2020 Rev Ed) (“IAA”)? The General Division of the High Court answered in the affirmative.

This dispute arose from an application to set aside the Enforcement Order in respect of an Emergency Interim Award (“the Award”) made by an Emergency Arbitrator (“the EA”) in a Pennsylvania-seated arbitration.

CNQ v. CNR [2022] SGHC 267, Supreme Court of Singapore, High Court, Originating Application No. 51 of 2022, 31 October 2022

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

The claimant Buyer alleged that the arbitrator had failed to understand the new evidence and contentions before him on various grounds, and that he had prejudged the Second Arbitration by

being unreasonably inclined to upholding his prior ruling in the First Arbitration. The General Division of the High Court affirmed the settled principle of law that there is no breach of natural justice if the arbitrator has attempted to understand the parties' evidence and contentions but makes an erroneous decision. The Court also clarified the law on what amounts to prejudgment.

Bagadiya Brothers (Singapore) Pte Ltd v. Ghanashyam Misra & Sons Pte Ltd [2022] SGHC 246, Supreme Court of Singapore, High Court, Originating Summons No. 1115 of 2021, 30 September 2022

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

The plaintiff filed an application to set aside an arbitral award ("the Award") under s 24(b) of the International Arbitration Act (Cap 143A, 2002 Rev Ed) ("the IAA"), and Arts 34(2)(a)(ii) and 34(2)(a)(iii) of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law"). The Judge found that there was a breach of natural justice. However, instead of setting aside the Award in its entirely, and at the defendant's request, the Judge exercised his powers under Art 34(4) of the Model Law to suspend the setting aside proceedings and remit the Award to the Arbitrator. This case illustrated settled statements of law on the breach of natural justice, and clarified the law on when remission is appropriate.

Lao Holdings NV and another v. Government of the Lao People's Democratic Republic [2022] SGCA (I) 9, Supreme Court of Singapore, Court of Appeal, Civil Appeal No. 55 of 2021, 24 November 2022

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

The Court of Appeal clarified that the court will not revisit a tribunal's construction of an agreed procedure in an arbitral agreement entered into between the parties where the construction is open on the text of the agreement. Having ruled that the Arbitral Tribunals' construction of s 34 of the Settlement Deed was open, the Court of Appeal upheld the judgment of the Singapore International Commercial Court ("SICC") and dismissed the Appellants' setting aside application.

The Government of the Lao People's Democratic Republic and others v. Sanum Investments Limited and another and another matter [2022] SGHC(I) 9, Supreme Court of Singapore, High Court, Originating Summons No. 6 of 2022 (Summons No. 5882 of 2021)Originating Summons No. 7 of 2022, 01 June 2022

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

In The Government of the Lao People's Democratic Republic and others v Sanum Investments Limited and another and another matter [2022] SGHC(I) 9, the Singapore International Commercial Court ("SICC") held that an award made on the basis of res judicata principles would not, for that reason, be contrary to public policy, nor would it give rise to a breach of natural justice. The SICC also held that the concepts of champerty and maintenance are not engaged by an

agreement between a defendant and its lawyer that the defendant need only pay the lawyer's costs above a certain fee cap to the extent that that defendant succeeded in its defence and obtained a costs order in its favour.

CKH v CKG and another matter, Supreme Court of Singapore, Court of Appeal, Civil Appeal No. 42 of 2021 and Summons No. 91 of 2021, 08 April 2022

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

The Court of Appeal held that, while pleadings are the first place in which to look for the issues submitted to arbitral decision, matters can arise which are or become within the scope of the issues submitted for arbitral decision, even though they are not pleaded. Whether a matter falls within the scope of the agreed reference depends upon what the parties, viewing the whole position and the course of events objectively and fairly, may be taken to have accepted between themselves and before the arbitral tribunal.

A.AG v. Ba. LLC, Federal Supreme Court of Switzerland, 1st Civil Law Chamber, 4A_460/2021, 03 January 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 partial award on jurisdiction based on Article 190(2)(b) of the Swiss Private International Law Act ("PILA"). The Supreme Court rejected the applicant's contention that the arbitration agreement in question lacked formal and substantive validity and confirmed that the arbitral tribunal had properly accepted jurisdiction in the case at hand.

Foreign Investors v. Local Investors, Court of Cassation of Syria, Judgment No. 302 in Case No. 346 of 2020, 30 November 2020

Abdulhay Sayed, Sayed & Sayed, ITA Reporter for Syria

Enforcement in Syria of an LCIA arbitral award rendered in London – New line of judgments from the Court of Appeal and the Court of Cassation leaving more questions as to the scope of application ratione materiae of Article 311(b) of the Syrian Code of Civil Procedure, governing enforcement of foreign arbitral awards, as well as the nature of the judicial decision granting exequatur.

Brass City Local, CACP v. City of Waterbury, Superior Court of Connecticut, No. CV 21-6063548, 15 August 2022

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

Plaintiff Brass City Local, CACP brought an action on behalf of Mr. Ryan Duncan ("Duncan") to vacate an arbitration award that found that the defendant, the City of Waterbury, had just cause in terminating Duncan from his job as a city police officer.

Duncan argued that a majority of the three-person employment arbitration tribunal had unlawfully denied him the opportunity to present material evidence pertaining to the dispute and that the Superior Court should thus vacate the arbitral award pursuant to Connecticut General Statutes Section 52-418. Specifically, Duncan asserted that the arbitral tribunal had refused to hear a voicemail left by his ex-wife that would have cast doubt on the veracity of one witness' accusation that Duncan had used a racially motivated insult against him.

The Superior Court dismissed Duncan's motion for vacatur, finding that he had not shown that the tribunal deprived him of a "full and fair hearing" under Section 52-418(a)(3) (citing Kellog v. Middlesex Mutual Assurance Co., 326 Conn. 638, 648 (2017)). Moreover, noted the court, it was not for the appellate court to determine whether the voicemail Duncan wanted considered was "relevant evidence;" under the Connecticut Code of Evidence Section 4-1, determinations on the relevancy of evidence are for the "trier and not the appellate reviewer" (citing State v. Morlo, 206 Conn. App. 690, 692 (2021)).

Finally, the court observed that the "entire issue" was a "red herring." The tribunal had found that it could "neither confirm nor deny" that Duncan had used the racial slur against the witness, but nevertheless concluded that the City of Waterbury maintained other sufficient "just cause[s]" to terminate Duncan's employment. The Superior Court thus confirmed the tribunal's award against Duncan.

LLC SPC Stileks, v. The Republic of Moldova, United States District Court, District of Columbia, 21-7141, 21 December 2022

Nicolas D. Franco, King & Spalding LLP, ITA Reporter for the United States of America

The district court's denial of a stay in a litigation seeking to confirm an arbitral award was not an abuse of discretion: (i) where the litigation was, at that point, more than 10 years old and related foreign litigation seemed to be indefinitely delayed; and (ii) under the law of the case doctrine where the Court of Appeals had previously affirmed that arbitral award.

Webuild S.p.A. and Sacyr S.A. v. WSP USA Inc. and Republic of Panama, United States District Court, Southern District of New York, No. 22-MC-140 (LAK), 19 December 2022

Viva Dadwal, King & Spalding LLP, ITA Reporter for the United States of America

Applicants Webuild S.p.A. and Sacyr S.A. ("Webuild") were granted an ex parte application for discovery pursuant to 28 U.S.C. § 1782 ("Section 1782") for use in an arbitration constituted under the International Center for the Settlement of Investment Disputes ("ICSID") Convention. Respondent WSP USA Inc. and intervenor the Republic of Panama ("Panama") moved to vacate the order granting discovery following the U.S. Supreme Court's decision in ZF Automotive US, Inc. v. Luxshare, LTD., 142 S. Ct 2078 (2022) ("ZF Automotive"). Movants argued that the

ICSID tribunal did not constitute a “foreign or international tribunal” within the meaning of Section 1782 following the U.S. Supreme Court’s decision in ZF Automotive. The Court agreed. Since the statutory requirements of Section 1782 were found unmet, the movants’ motion to quash the discovery was granted.

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