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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.

Agroasu EAD v. Multiple Plus EOOD, Supreme Court of Cassation of Bulgaria, Decision No. 50169 in commercial case No. 1144/2022, 09 December 2022

Assen Alexiev, Independent Arbitrator and Domain Name Panelist, ITA Reporter for Bulgaria

With this decision, the Bulgarian Supreme Court of Cassation took the position that the debtor of an assigned contractual receivable is bound by the arbitration clause included in the contract vis-à-vis the assignee of the receivable.

Partners Commerce EOOD v. Retail OOD, Supreme Court of Cassation of Bulgaria, Decision No. 2 in commercial case No. 1406/2020, 15 February 2022

Assen Alexiev, Independent Arbitrator and Domain Name Panelist, ITA Reporter for Bulgaria

With this decision, the Bulgarian Supreme Court of Cassation confirmed that there is no legal requirement for an explicit authorization of a proxy for the conclusion of arbitration agreements as long as the authorizing party has issued a power of attorney in favour of the proxy for the conclusion of specific legal acts or contracts on its behalf and the arbitration agreement covers the respective legal relationship arisen as a result of the actions of the proxy acting on the basis of the power of attorney.

Peace River Hydro Partners, Acciona Infrastructure Canada Inc., Samsung C&T Canada Ltd., Acciona Infraestructuras S.A. and Samsung C&T Corporation v. Petrowest Corporation, Petrowest Civil Services LP by its general partner, Petrowest GP Ltd., carrying on business as RBEE Crushing, Petrowest Construction LP by its general partner Petrowest GP Ltd., carrying on business as Quigley Contracting, Petrowest Services Rentals LP by its general partner Petrowest GP Ltd., carrying on business as Nu-Northern Tractor Rentals, Petrowest GP Ltd., as general partner of Petrowest Civil Services LP, Petrowest Construction LP and Petrowest Services Rentals LP, Trans Carrier Ltd. and Ernst & Young Inc. in its capacity as court-appointed receiver and manager of Petrowest Corporation, Petrowest Civil Services LP, Petrowest Construction l, 2022 SCC 41, Supreme Court of Canada (SCC), Docket No. 39547, 10 November 2022

Tina Cicchetti, Vancouver Arbitration Chambers, ITA Reporter for Canada

In some cases where there has been a court-appointed receiver appointed under the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (the 'BIA'), the arbitration agreements in the contracts sought to be enforced by the receiver in court proceedings may be found to be 'inoperative' leading to a refusal to stay those court proceedings under s. 15 of the Arbitration Act, R.S.B.C. 1996, c. 55.

Sociedad Comercial Alemana I. Schroeder KG. v. Exportadora y Comercializadora Las Tinajas Limitada, Supreme Court of Chile, 104.262-2020, 19 July 2021

Cristián Conejero-Roos, Cuatrecasas, ITA Reporter for Chile

The Supreme Court recognition and enforcement of an arbitral award rendered by an Arbitral Tribunal of the Waren-Vereins der Hamburger Borse Registered Association in Germany dismissing the grounds of opposition of the party against whom the award was invoked.

Worley International Services Inc. v. Consultora Tecnazul Cia. Ltda., Court of Appeal of Santiago, Decision No. 6.753-2021, 30 November 2022

Cristián Conejero-Roos, Cuatrecasas, ITA Reporter for Chile

The Court of Appeals of Santiago (the 'Court') rejected the challenge for annulment against an arbitral award rendered under the Rules of the Permanent Court of Arbitration ('PCA'). The challenge was based on Article 34(2)(b)(ii) of Chilean Law 19.971 on International Commercial Arbitration ('LACI') on the grounds that the arbitral award was contrary to Chilean public policy, rules against corruption, and Chilean contractual framework, including the legal principle of Pacta Sunt Servanda.

BGH – KZB 75/21, Federal Court of Justice of Germany, KZB 75/21, 27 September 2022

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

German competition law provisions prohibiting an abuse of dominance are a fundamental element of the German legal system, and therefore form part of German public policy. The prohibition of a *révision au fond* does not apply to the extent a violation of such fundamental provisions is at issue. German courts seized of a public policy objection against a (domestic) arbitral award shall conduct a full factual and legal review of the application of such fundamental rules by the arbitral tribunal when deciding on the annulment or enforcement of the award.

BayObLG – 101 SchH 46/22, Highest Regional Court of Bavaria, 101 SchH 46/22, 10 October 2022

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

In the case of an institutional arbitration, an application to the competent German court to declare arbitration proceedings over a certain dispute admissible or inadmissible complies with the time limit for such applications under Sec. 1032(2) of the German Code of Civil Procedure (*Zivilprozessordnung*, or 'ZPO') if it is filed with the court before the arbitral tribunal has been constituted. In contrast, in cases concerning a permanent arbitral tribunal, a party must file the application before the tribunal has first 'dealt with' the case.

An arbitration clause in the articles of association of a German company that expressly covers all disputes concerning or relating to the articles of association that arise between the shareholders or between the shareholders and the company must be interpreted broadly and in accordance with its objective language, meaning, purpose, and context. Depending on the interpretation of a given arbitration clause, the minimum requirements for arbitration agreements concerning shareholder resolution disputes (*Beschlussmängelstreitigkeiten*), as established by the German Federal Court of Justice (the 'BGH'), are met if the arbitration agreement: (i) provides that disputes shall be finally resolved by an arbitral tribunal in accordance with the Arbitration Rules of the German Arbitration Institute ('DIS Rules'); and (ii) expressly references, or at least tacitly incorporates, the Supplementary Rules for Corporate Disputes of the German Institution of Arbitration (the 'DIS-CDR'). Such tacit reference may apply without express mention of the DIS-CDR if the arbitration agreement is phrased in broad language and makes reference to the 'DIS Rules' in general (i.e., not specifically to the 'DIS main rules' – in this case, the 2018 DIS Arbitration Rules).

OLG Frankfurt am Main – 26 Sch 16/21, Higher Regional Court of Frankfurt am Main, 26 Sch 16/21, 08 September 2022

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

An arbitral award (including an addendum that rules on a request for clarification) violates the prohibition of arbitrariness and contradicts public policy if the arbitral tribunal assumes a restrictive interpretation of a party's prayer for relief, which obviously has no basis in the relevant text and is not justified for other reasons. If the arbitral tribunal issues an award based on such restrictive interpretation without first discussing it with the parties, the award constitutes a surprise decision that violates the right to be heard and, thus, public policy.

S3D Interactive, Inc. v. Oovee Limited [2022] EWCA Civ 1665, Court of Appeal of England and Wales, Civil Division, CA-2022-002199, 19 December 2022

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

An application under s.42 of the Arbitration Act to enforce a peremptory order of a tribunal will be heard and determined by a court notwithstanding that there may be an extant challenge to the jurisdiction of the tribunal. To refuse to hear an application in such circumstances would be contrary to the structure and principles of the Arbitration Act and would permit a recalcitrant party to prevent the exercise of a power provided to help support the tribunal in the face of recalcitrance.

C v. D [2022] HKCA 729, High Court of Hong Kong, Court of Appeal, CACV 387/2021, 07 June 2022

Edward Taylor, Shearman & Sterling LLP, ITA Reporter for Hong Kong

The Hong Kong Court of Appeal rules that the determination of whether a pre-arbitration procedural requirement in an arbitration agreement (i.e., that the parties thereto first attempt to resolve their dispute by negotiation) has been fulfilled should generally be decided by the arbitral tribunal. The aforementioned determination concerns the admissibility of a claim and not the arbitral tribunal's jurisdiction, unless the parties have agreed otherwise. The findings of the arbitral tribunal on this issue would generally not be subject to review by the court under Article 34(2)(a)(iii) or (iv) of the UNCITRAL Model Law.

H v. G [2022] HKCFI 1327, High Court of Hong Kong, Court of First Instance, HCCT 71/2021, 10 May 2022

Edward Taylor, Shearman & Sterling LLP, ITA Reporter for Hong Kong

The Hong Kong Court of First Instance set aside an arbitral tribunal's determination that it had jurisdiction over claims concerning a guarantee/warranty in circumstances where an associated contract contained an arbitration clause but the guarantee/warranty itself provided for the non-exclusive jurisdiction of the Hong Kong Courts.

The Fiona Trust ([2007] 4 All ER 952) presumption that parties, as rational businessmen, are likely to have intended any dispute arising out of their relationship to be decided by the same tribunal does not apply where the parties clearly intended otherwise.

LY v. HW [2022] HKCFI 2267, High Court of Hong Kong, Court of First Instance, HCCT 96/2021, 26 July 2022

Edward Taylor, Shearman & Sterling LLP, ITA Reporter for Hong Kong

The Hong Kong Court of First Instance dismisses an application to set aside an award based on claims that the arbitral tribunal failed to deal with key issues that had been put before it and failed to provide sufficient reasons for its decision in the award. The Court reaffirms the high threshold of irregularity required to set aside an award on such grounds.

Entreprise Mukonki Mulimi SARLU (EMM) v. Société Kamato Copper Company S.A. (KCC), Common Court of Justice and Arbitration (CCJA), Case No. 104/2022, 23 June 2022

Mohamed S. Abdel Wahab and Noha Khaled Abdel Rahim, Zulficar & Partners, ITA Reporters for OHADA

The CCJA consolidated two pleas, a nullity action contesting the validity of an arbitral award filed by the Claimant and an application for exequatur of the same award and a second partial award filed by the Respondent. The CCJA considered the nullity action and the application for exequatur connected and rendered one decision addressing both. The CCJA dismissed the nullity action brought against the final award contesting its validity, by declaring all grounds unfounded and granted the exequatur to the two arbitral awards rendered in the same case under the auspices of the Arbitration Centre of the CCJA.

ELAF Senegal SARL v. Saudi Arabian Airlines Corporation, Common Court of Justice and Arbitration (CCJA), Case No. 221/2021, 23 December 2021

Mohamed S. Abdel Wahab and Noha Khaled Abdel Rahim, Zulficar & Partners, ITA Reporters for OHADA

ELAF Senegal SARL is seeking to challenge the Dakar Court of Appeal decision No. 76 rendered on 17 December 2020 which annulled the arbitral award issued on 2 October 2019 by the Centre of Arbitration, Mediation and Conciliation of the Chamber of Commerce, Industry and Agriculture of Dakar in Senegal. Saudi Airlines sought the annulment of the arbitral award on the basis of several grounds: the absence of an arbitration agreement, irregularity in the constitution of the arbitral tribunal, lack of reasoning in the award, expiry of the time limit for rendering the award and violation of international public policy in Senegal. The CCJA overturned the Dakar Court of Appeal judgment and declared unfounded all grounds advanced by Saudi Arabian Airlines Corporation for the annulment of the award.

The Republic of Benin v. Société Générale de la Surveillance S.A. (SGS), Common Court of Justice and Arbirtration (CCJA), Case No. 068/2020, 27 February 2020

Mohamed S. Abdel Wahab and Noha Khaled Abdel Rahim, Zulficar & Partners, ITA Reporters for OHADA

The Republic of Benin filed an action before the Cotonou Administrative Court of First Instance to annul a Contract it had concluded with Société Générale de la Surveillance S.A. which included an arbitration agreement. Société Générale de la Surveillance S.A. filed a request for arbitration in

compliance with the arbitration agreement. The Cotonou Administrative Court of First Instance annulled the Contract. The arbitral tribunal rendered a partial award ruling that it has jurisdiction to decide over the dispute. The Republic of Benin filed a nullity action against the partial arbitral award before the Ouagadougou Court of Appeal and the latter rejected the nullity action. The Republic of Benin is now seeking to challenge the judgment of the Ouagadougou Court of Appeal and annul the arbitral award. The CCJA overturned the judgment No. 098 of the Ouagadougou Court of Appeal (Burkina Faso) rendered on 21 September 2018 which rejected the nullity action filed by the Republic of Benin against an ICC arbitral award, declared the nullity action admissible and annulled the partial arbitral award.

Consorcio Chaco Boreal v. Estado Paraguayo (Servicio de Saneamiento Ambiental), Court of Appeal in Civil and Commercial Affairs of Asunción, 13/2022, 16 March 2022

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

On March 16, 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.

Ministerio Publico v. Empresa Constructora Baumann S.A. y Otros, Court of Appeal in Civil and Commercial Affairs of Asunción, 24/22, 11 March 2022

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

On March 11, 2022, an Asunción Appeals Court rejected an annulment and appeal request, confirming the First Instance Ruling and declaring that it lacked the competence to resolve the matter as a valid arbitration agreement was signed between the parties.

Sideri Bros S.A. & Coulter Business Inc. v. Inversiones Siderúrgicas (INSIDSA) & Martín Sergio Ferreira González, Court of Appeal in Civil and Commercial Affairs of Asunción, 10/2022, 23 February 2022

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

On February 23, 2022, an Asunción Appeals Court rejected an annulment request, as the Applicant did not prove that any of the grounds for annulment found in Art. 40 of the Paraguayan Arbitration Law were met in the case at hand.

T.S. v. Association P., Supreme Court of Poland, II CSKP 28/22, 03 March 2022

Wojciech Sadowski, Queritius, ITA Reporter for Poland

Polish Supreme Court defines the conditions in which a party may lose the right to object against the absence of an arbitration agreement in enforcement proceedings. The party cannot raise such

objections, if it had actual or construed knowledge of the arbitration proceedings and failed to object against the jurisdiction of the arbitral tribunal in due time. The conduct of the party accepting the jurisdiction can be either explicit or implicit. It can also be established on the basis of all circumstances, including compliance with the award and the failure to initiate set-aside proceedings in due time.

Company X v. Company Y, Court of Appeal of Szczecin, VIII GCo 224/22, 01 September 2022

Wojciech Sadowski, Queritius, ITA Reporter for Poland

A Polish regional court dealt with the situation in which a sole arbitrator sitting under the ICC Arbitration Rules issued a procedural order under Article 27 of the Rules, in which the arbitrator closed the proceedings and advised the parties about the intention to prepare an award declaring lack of jurisdiction and to submit such award for scrutiny of the International Court of Arbitration of the ICC pursuant to the Rules. That arbitrator stepped down for personal reasons before the award was delivered and was replaced with another arbitrator who instead issued an award confirming jurisdiction. Upon the challenge of that award, the Polish court declared that the procedural order of the first arbitrator was not binding and did not preclude the findings of the second arbitrator recorded in an award issued under the Rules.

X v. Y, Court of Cassation of Turkey, General Assembly of Civil Law Chambers, File No. 2019/574, Case No. 2021/1710, 21 December 2021

Ismail Esin, Esin Attorney Partnership, and Stephan Wilske, Gleiss Lutz, ITA Reporters for Turkey

The General Assembly of Civil Chambers of the Court of Cassation ('General Assembly') ruled that a creditor does not have to initiate arbitration proceedings to obtain an award, which confirms that their claim exists, before they can initiate bankruptcy proceedings. The principle of procedural economy would stand against the obligation to initiate arbitration proceedings first.

X v. Y, Regional Court of Ankara, 32nd Civil Chamber, File No. 2020/1508, Case No. 2021/1196, 09 June 2021

Ismail Esin, Esin Attorney Partnership, and Stephan Wilske, Gleiss Lutz, ITA Reporters for Turkey

The 32nd Civil Chamber of Ankara Regional Court ('Regional Court') ruled that, when the Turkish Code of Civil Procedure No. 6100 ('CCP') applies, an annotation, which declares the award enforceable (*icra edilebilirlik ?erhi*), is not required and that pending set-aside proceedings do not prohibit the enforcement of an arbitral award. The Turkish International Arbitration Law No. 4686 ('IAL'), which sets out these requirements, would only apply if the dispute relates to a foreign element.

X v. Y, Court of Cassation of Turkey, 11th Civil Law Chamber, File No. 2020/8347, Case No.

2022/3672, 09 May 2022

Ismail Esin, Esin Attorney Partnership, and Stephan Wilske, Gleiss Lutz, ITA Reporters for Turkey

The 11th Civil Chamber of the Court of Cassation ('Court of Cassation') ruled that a choice of forum clause submitting the disputes arising from a contract to foreign jurisdictions, cannot overcome the exclusive jurisdiction of Turkish Courts under Turkish law.

X v. Y, Court of Cassation of Turkey, 11th Civil Law Chamber, File No. 2022/2105, Case No. 2022/4906, 15 June 2022

Ismail Esin, Esin Attorney Partnership, and Stephan Wilske, Gleiss Lutz, ITA Reporters for Turkey

Although the Turkish courts do not have jurisdiction to review the merits of an arbitral award in accordance with the prohibition of *révision au fond*, awards cannot be enforced if that would be contrary to public policy. The 11th Civil Chamber of the Court of Cassation ('Court of Cassation') ruled that the existence of contradictory arbitral decisions, which violates legal certainty, transparency and stability and raises serious issues in the execution of an award, is contrary to Turkey's public policy. Therefore, to avoid having contradicting decisions, arbitrators are required to examine the facts and the conclusions of another related pending case, if necessary, and its effects on the case before them.

X v. Y, Court of Cassation of Turkey, 11th Civil Law Chamber, File No. 2020/8088, Case No. 2022/3493, 27 April 2022

Ismail Esin, Esin Attorney Partnership, and Stephan Wilske, Gleiss Lutz, ITA Reporters for Turkey

The 11th Civil Chamber of Court of Cassation ('Court of Cassation') ruled that communications with regard to the constitution of the arbitral tribunal are to be sent to the authorized attorney only after a power of attorney has been submitted to the file. Noncompliance with this process constitutes a violation of the right to be heard under Article 432/c.2 of the Turkish Code of Civil Procedure No. 6100 ('CCP') which justifies the setting aside of an arbitral award.

X v. Y, Court of Cassation of Turkey, 11th Civil Law Chamber, File No. 2020/5852, Case No. 2022/2988, 13 April 2022

Ismail Esin, Esin Attorney Partnership, and Stephan Wilske, Gleiss Lutz, ITA Reporters for Turkey

The 11th Civil Chamber of the Court of Cassation ('Court of Cassation') decided that it does not necessarily justify the setting aside of an arbitral award if the parties did not follow a dispute resolution mechanism where the parties have to negotiate in good faith before the arbitration. Furthermore, the Court found that it does not violate a party's right to be heard when a request to hear a witness through teleconferencing is denied but the witness was given the opportunity to attend to the oral hearing and their written witness statement was accepted as evidence by the arbitral tribunal.

X v. Y, Court of Cassation of Dubai, Case No. 1083 of 2019, 14 June 2020

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

This case involved an application before the Dubai Court of Cassation to nullify an arbitral award issued by an arbitral tribunal under the rules of arbitration of the Dubai International Arbitration Centre ('DIAC') on the basis that the arbitral tribunal failed to sign the pages containing the dispositive section of its award.

X v. Y, Court of Cassation of Abu Dhabi, Appeal No. 1045 of 2022 [Commercial], 18 January 2023

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

This case involved an application before the onshore Abu Dhabi Court of Cassation to ratify an arbitral award issued by an arbitral tribunal under the rules of arbitration of the International Chamber of Commerce ('ICC'). The courts declined jurisdiction in favour of the courts of the Abu Dhabi Global Market ('ADGM').

Global Marine Exploration, Inc. (GME) v. Republic of France, United States Court of Appeals, Eleventh Circuit, No. 20-14728, 12 May 2022

Carson W. Bennett, King & Spalding, LLP, ITA Reporter for the United States of America

Appellant-Plaintiff Global Marine Exploration, Inc. ('GME') initiated suit against Appellee-Defendant the Republic of France ('France' or 'the State') seeking compensation for GME's efforts in finding the French shipwreck, La Trinité, off the coast of Florida.

France objected under Rule 12(b)(1) of the Federal Rules of Civil Procedure, claiming it was immune from suit under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 – 1611 ('FSIA') and that GME had failed to show that the commercial activity exception applied. The district court upheld France's objection and dismissed the case, holding that France and Florida were working together to protect and preserve France's sovereign military property, which the district court did not consider commercial activity. The district court noted that while private actors could also engage in maritime exploration and preservation efforts, 'that alone did not make France's activities commercial.' Additionally, even assuming arguendo that the activity qualified as 'commercial activity' within the meaning of the FSIA, the district court determined that GME's suit was not 'based on' France's activities. The district court portrayed GME's injury stemming from France asserting ownership over La Trinité, not from France's activities to preserve its culture or recover the shipwreck and its artifacts.

The Eleventh Circuit reversed the district court. The Eleventh Circuit reviewed the plain language

of the statute defining 'commercial activity' (28 U.S.C. § 1603(d)) and rehearsed U.S. Supreme Court precedent, including Republic of Argentina v. Weltover, 504 U.S. 607 (1992), to emphasize that the nature of the foreign state's actions is what determines whether a foreign state engaged in 'commercial activity.' A foreign state's motives are irrelevant, regardless of whether a state sought to accomplish unique sovereign objectives. The Eleventh Circuit criticized the district court for conducting a 'narrow and 'purpose' oriented' analysis. The Eleventh Circuit held that fundraising, contracting with private parties to carry out excavations of shipwrecks (i.e., asset recovery), and overseeing logistics were commercial in nature. Therefore, France was not immune from suit because GME's suit was based on France's commercial activity in the U.S. The case was remanded to the district court.

Commodities & Minerals Enterprise Ltd. (CME) v. CVG Ferrominera Orinoco, C.A., United States Court of Appeals, Second Circuit, 49 F.4th 802, 03 October 2022

Timothy M. McKenzie, King & Spalding, LLP, ITA Reporter for the United States of America

Petitioner-Appellee Commodities and Minerals Enterprise Ltd. ('CME') and Respondent-Appellant CVG Ferrominera Orinoco, C.A. ('Ferrominera') are parties to a contract involving a ship called the General Piar, which Ferrominera chartered from CME for purposes of transporting iron ore. In 2016, CME initiated an arbitration pursuant to this contract against Ferrominera in New York under the rules of the Society of Maritime Arbitrators, seeking to recover for unpaid invoices, lost profits, and attorney's fees.

In February 2018, the arbitral panel ruled in CME's favour and awarded it roughly US$ 12.7 million in damages plus interest. CME brought an action to confirm the award in the U.S. District Court for the Southern District of New York ('SDNY'). In December 2020, the SDNY confirmed the award and granted CME's application for attorney's fees and costs.

On appeal before the U.S. Court of Appeals for the Second Circuit ('Second Circuit' or 'the Court'), Ferrominera challenged the lower court judgment on three grounds: 1) the district court lacked personal jurisdiction over Ferrominera because CME did not serve a summons when it moved to confirm the arbitral award; 2) the district court erred in confirming the award due to defects in the arbitral panel's jurisdiction, issues with the scope of the panel's award, and conflicts between the award and U.S. public policy; and 3) the district court abused its discretion in awarding attorney's fees and costs to CME.

The Second Circuit affirmed the lower court judgment in part and vacated it in part. As to Ferrominera's first argument, which raised a matter of first impression, the Second Circuit agreed with the SDNY that a party is not required to serve a summons in order to confirm a foreign arbitral award under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 'New York Convention'), as applied through Chapter 2 of the Federal Arbitration Act ('FAA').

The Second Circuit also affirmed the SDNY's decision to confirm the arbitral award in CME's favor. The Court rejected Ferrominera's arguments that the parties' arbitration agreement was invalid under Venezuelan law, that the arbitral panel exceeded its jurisdiction under the arbitration agreement through its calculation of damages, and that confirming the award would violate U.S. public policy because the underlying contract was a product of corruption.

The Court agreed with Ferrominera's third argument, however, finding that the district court improperly awarded CME attorney's fees. It held that the relevant section of the FAA did not provide statutory authority for an award of attorney's fees, and that the district court's exercise of its equitable power to award attorney's fees was not warranted in the circumstances of the case because Ferrominera did not oppose confirmation of the award in bad faith.

Zhongshan Fucheng Industrial Investment Co., Ltd. v. Federal Republic of Nigeria, United States District Court, District of Columbia, No. 22-170 (BAH), 26 January 2023

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

In 2018, Petitioner Zhongshan Fucheng Industrial Investment Co., Ltd. ('Zhongshan') initiated arbitration against the Federal Republic of Nigeria ('Nigeria') under the China-Nigeria Bilateral Investment Treaty ('BIT'). On March 26, 2021, the tribunal rendered an award in favour of Zhongshan, finding that Nigeria had violated Zhongshan's rights under the BIT and awarding Zhongshan $70 million in damages, interest, legal fees, and costs.

On January 25, 2022, Zhongshan initiated confirmation proceedings in the United States District Court for the District of Columbia ('D.D.C.') pursuant to the Federal Arbitration Act ('FAA'), which governs the confirmation of arbitral awards falling under the New York Convention. In response, Nigeria filed a motion to dismiss for lack of subject matter and personal jurisdiction under the Foreign Sovereign Immunities Act ('FSIA'), arguing that the award did not fall under the New York Convention.

The court denied Nigeria's motion to dismiss, finding that it had subject matter and personal jurisdiction over the dispute. It first considered whether it had jurisdiction under the Federal Arbitration Act, which required that the award fall under the New York Convention. Nigeria claimed that the award did not meet the Convention's commercial reservation, adopted by the United States, which requires that an award arise out of a commercial relationship between the parties in order to be governed by the Convention. The court rejected Nigeria's arguments, concluding that the relationship was commercial even though it arose under the BIT as opposed to under a contract. The court then considered its jurisdiction under the FSIA and found that the proceedings fell under the FSIA's arbitration exception.

Telecom Business Solution, LLC, et al. v. Terra Towers Corp., et al., United States District Court, Southern District of New York, 22-cv-01761 (LAK), 18 January 2023

Xiaomao Min, King & Spalding LLP, ITA Reporter for the United States of America

Petitioners, Telecom Business Solution, LLC, LATAM Towers, LLC and AMLQ Holdings (Cay) Ltd (collectively, 'Petitioners'), sought confirmation of an arbitral award ('Award') against respondents, Terra Towers Corp., TBS management, S.A. and DT Holdings, Inc. (collectively, 'Respondents') in the Southern District of New York. Respondents moved to vacate the Award and two interim orders issued by the tribunal pursuant to Section 10(a) of the Federal Arbitration Act. The district court granted Petitioners' motion to confirm the Award and dismissed Respondents' vacatur application.

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