Kluwer Arbitration Blog

KluwerArbitration ITA Arbitration Report, Volume No. XXI, Issue No. 5 (May 2022)

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

M.R. do B. R. S/A v. S. S. G. S.A., Court of Justice of the State of São Paulo, Apelação Cível nº 1055194-66.2017.8.26.0100, 06 August 2021

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

The Court of Justice of São Paulo maintained the first instance judge's decision that annulled an arbitral award and determined the constitution of a different arbitral tribunal, composed of impartial arbitrators, to decide the Parties' dispute. The arbitral award was declared void due to the fact that one of the arbitrators failed to disclose that he used to maintain employment relations with one of the Parties.

J&F Investimentos S/A v. C.A. Investment (Brazil) S/A & Eldorado Brasil S/A, Court of Justice of the State of São Paulo, 1027596-98.2021.8.26.0100, 29 July 2022

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

In the Annulment of Arbitral Award nº 1027596-98.2021.8.26.0100, the Parties disputed the nullity of the arbitral award rendered in an ICC arbitration. The award condemned J&F Investimentos S/A ("Claimant") to transfer Eldorado Brasil's ("Eldorado" or "Respondent 2") shareholding control to C.A. Invest (Brazil) S/A ("Respondent 1") and to cooperate with the liquidation of Eldorado´s

collaterals, as a condition for the closing of the transaction.

The award condemned J&F Investimentos S/A ("Claimant") to transfer Eldorado Brasil's ("Eldorado" or "Respondent 2") shareholding control to C.A. Invest (Brazil) S/A ("Respondent 1") and to cooperate with the liquidation of Eldorado´s collaterals, as a condition for the closing of the transaction.

The first instance judge ruled that despite the cyber interception, there was no violation of the principles of due process of law and equal treatment of the parties. Additionally, the judge held that the lack of disclosure by one of the arbitrators was not sufficient to annul the arbitral award. Finally, the judge did not recognize that the arbitral award had exceeded the limits of the arbitration agreement.

Shanghai Automobile Xi'an Joint Operation Sales Co., Ltd. v. Shaanxi Aerospace Construction Group Co., Ltd., Supreme People's Court of the People's Republic of China, (2022) Zui Gao Fa Min Zai No. 312, 13 January 2023

Arthur X. Dong, JunHe LLP, ITA Reporter for China

In this case, two parties signed an asset purchase contract and a capital infusion contract respectively, however the targeted transaction thereunder is the same which is the sale of a land parcel.

The Buyer first initiated an arbitration against the Seller and obtained the land's title based on the capital infusion contract. Then, also based on the capital infusion contract, the Seller initiated another arbitration against the Buyer, claiming damages relating to this land parcel transaction, and such damages were awarded.

The Buyer then filed a litigation against the Seller based on the asset purchase contract, claiming for refunding of the damages awarded to the Seller in the second arbitration. The case was appealed to the Supreme People's Court of PRC ("SPC"), which dismissed the Buyer's claims based on the principle of res judicata.

BGH – I ZB 33/22, Federal Court of Justice of Germany, I ZB 33/22, 12 January 2023

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

In German court proceedings to declare a domestic or foreign arbitral award enforceable, the provisions of Sec. 110 et seq. of the German Code of Civil Procedure ("ZPO") concerning the plaintiff's obligation to provide security for costs of the proceedings apply by analogy. The party who initiated the court proceedings is considered the "plaintiff." In contrast, if the party against whom the court proceedings were initiated submits its own (counter-)request for relief, it is deemed a "counterclaimant" and benefits from a statutory exemption from the obligation to provide security for costs.

BGH – I ZB 41/22, Federal Court of Justice of Germany, I ZB 41/22, 12 January 2023

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

In case of a disagreement among the arbitrators on the ripeness of a case for decision, a "refusal" by one arbitrator to participate in a vote on the arbitral award, which entitles the majority of the arbitral tribunal to decide without that arbitrator pursuant to Sec. 1052(2) of the German Code of Civil Procedure (*Zivilprozessordnung*, or "ZPO"), can be assumed only after the tribunal majority has separately voted in favour of the ripeness for decision. If an arbitral tribunal renders its decision without the participation of an arbitrator in violation of said requirement, German courts will consider that such a procedural error had a causal effect on the arbitral award, thus providing grounds for setting it aside.

As a rule, a party cannot bring a challenge of an arbitrator for doubts as to his or her impartiality after the award has been rendered (except for particularly severe and evident grounds for challenge). An exception applies if the arbitrator, by violating his or her duty of disclosure, deprived the party of the opportunity to file a challenge already during the arbitration. In such a case, German courts must assess, in set-aside or enforceability proceedings, whether the disclosed facts would have provided sufficient grounds for a challenge.

Banco 1…, SA v. AA, Court of Appeal of Guimarães, Case No. 182/22.0YRGMR, 30 November 2022

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

Decisions concerning the annulment of the arbitral award are always of great importance. These decisions provide insights into how a court in a specific country determines the grounds for setting aside an award and the scrutiny applied to arbitral awards. This particular decision exemplifies the rigorous analysis Portuguese courts undertake when examining annulment proceedings, irrespective of the grounds presented. Moreover, the facts surrounding this decision reveal that in some instances, parties dissatisfied with the outcome may attempt to set aside the awards as if appealing the decision. Typically, courts do not accept such efforts to circumvent legal boundaries.

Suburbs, SGPS, Lda & Barod, Ltd v. The Navigator Company, SA, Supreme Court of Justice of Portugal, Case No. 2863/21.7YRLBS.S1, 21 March 2023

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

Decisions concerning the annulment of the arbitral award due to violations of international public order are always significant. They enable us to understand how a court in a particular country defines public order and how they scrutinise arbitral awards. This decision affirms that in Portugal,

while the concept of public order is extensive, the scope of review remains narrow, which is appropriate.

X v. Y, Court of Cassation of Turkey, 11th Civil Law Chamber, File No. 2020/1859, Case No. 2022/1005, 10 February 2022

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

The 11th Civil Chamber of the Court of Cassation ruled that public policy cannot be interpreted broadly. It emphasized that the merits of the arbitral award, i.e. the correct application of the law, cannot be grounds to set aside an arbitral award.

X v. Y, Court of Cassation of Turkey, 11th Civil Law Chamber, File No. 2021/8979, Case No. 2022/5142, 22 June 2022

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

The 11th Civil Chamber of the Court of Cassation upheld a decision of the 14th Civil Chamber of Istanbul Regional Court ("14th Regional Court") which ruled that in order to extend an arbitration term, the parties must agree on the extension of time and request the arbitral tribunal for an extension. If the parties cannot reach such an agreement, either party may apply to the court for an extension of time. Furthermore, an arbitral tribunal is not obliged to warn the parties about the expiration of the arbitration term.

X v. Y, Court of Cassation of Turkey, 6th Civl Law Chamber, File No. 2022/3529, Case No. 2022/4699, 12 October 2022

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

The 6th Civil Chamber of the Court of Cassation ruled that Turkish courts are authorized to hear the objection to an interim measure issued by Turkish courts despite the existence of an arbitration clause when a dispute involves a foreign element. According to the court, this even applies if arbitration proceedings have already commenced.

X v. Y, Court of Cassation of Dubai, 1603/2023, 30 March 2023

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 annul a Court of Appeal's judgment on the basis of the existence of an arbitration clause in certain contracts concluded between the Appellant and its suppliers (to which the Respondent was not a party), which had been assigned to the Respondent.

Rodrigo Ribadeneira and Superdeporte Plus Peru S.A.C. v. New Balance Athletics, Inc., United States Court of Appeals, First Circuit, No. 21-1831, 06 April 2023

Arturo Oropeza Casas, King & Spalding LLP, ITA Reporter for the United States of America

Appellant New Balance Athletics Inc., ("New Balance") initiated arbitration under a distribution agreement ("Distribution Agreement") against Peruvian companies Peruvian Sporting Goods S.A.C. ("PSG") Superdeporte Plus Peru S.A.C. ("Superdeporte") and its owner Rodrigo Ribadeneira ("Ribadeneira"). New Balance prevailed against the three parties although Superdeporte and Ribadeneira were not signatories to the Distribution Agreement. Superdeporte and Ribadeneira moved to vacate the award and a U.S. district court confirmed the annulment because the arbitral tribunal did not have jurisdiction over Superdeporte and Ribadeneira. The First Circuit reversed.

The First Circuit held that non-signatory parties can be joined into an arbitration based on the theories of assumption and equitable estoppel. In this case, the First Circuit concluded that Superdeporte became a successor-in-interest to the original party to the Distribution Agreement (PSG) because it represented a mere continuation of operations, assets, and personnel under the same ownership. Separately, in the case of Ribadeneira, it found that equitable estoppel can be used to join a party into an arbitration when it prevents inconsistent conduct in parallel litigation.

TotalEnergies E&P USA, Inc. v. MP Gulf of Mexico, LLC, Supreme Court of Texas, No. 21-0028, 14 April 2023

Nathaniel J. Bilhartz, King & Spalding LLP, ITA Reporter for the United States of America

Petitioner TotalEnergies E&P USA, Inc. ("Total E&P") filed a lawsuit in Harris County district court seeking a declaration construing its Cost Sharing Agreement with Respondent MP Gulf of Mexico, LLC ("MP Gulf"). Specifically, Total E&P sought a declaration that the Cost Sharing Agreement required the Parties to refer to the terms of another agreement, the Chinook Operating Agreement, in order to resolve a dispute regarding the costs of a project on an oil-and-gas lease jointly owned by the Parties.

MP Gulf, meanwhile, initiated an arbitration proceeding before the American Arbitration Association ("AAA"), asserting that the dispute was governed by a third agreement between the Parties, the System Operating Agreement, which was "integrated into" the Cost Sharing Agreement and required that disputes be resolved through the AAA.

Total E&P filed a motion with the Harris County district court asking the court to stay the AAA arbitration on the basis that the Cost Sharing Agreement, not the System Operating Agreement, governed the dispute. The district court granted Total E&P's motion, and MP Gulf appealed. MP Gulf argued that the decision as to the scope of the arbitration provision was not for the trial court to decide because the Parties had agreed to have a AAA arbitrator decide issues of arbitrability. The court of appeals agreed with MP Gulf, reversed the trial court's decision, and rendered judgment compelling AAA arbitration.

The Texas Supreme Court affirmed the judgment of the court of appeals. The court held that the AAA Rules, which provide that the arbitrator has the power to rule on his or her own jurisdiction, were incorporated into the System Operating Agreement. It additionally held that, "as a general rule, an agreement to arbitrate disputes in accordance with an arbitration service's rules providing that the arbitrator 'shall have the power' to determine 'the arbitrability of any claim' incorporates those rules into the agreement and clearly and unmistakably demonstrates the parties' intent to delegate arbitrability issues to the arbitrator." Although the court offered no opinion on the merits of the Parties' controversy or on whether it should be resolved through arbitration or the courts, it determined that the Parties had clearly and unmistakably delegated to the AAA arbitrator the question of the arbitrability of the dispute.

Corporación AIC, SA v. Hidroeléctrica Santa Rita S.A., United States Court of Appeals, Eleventh Circuit, No. 20-13039, 13 April 2023

Daniela Bravo, King & Spalding LLP, ITA Reporter for the United States of America

Corporación AIC, SA ("AIC") sought to vacate an arbitral award rendered by a Miami-seated tribunal that ordered AIC to return advance payments it had received from Hidroeléctrica Santa Rita S.A. ("HSR") to build a new hydroelectric power plant in Guatemala. AIC asserted that the arbitral tribunal had exceeded its powers—a ground set out in 9 U.S.C. § 10(a)(4), under the Federal Arbitration Act ("FAA").

The district court rejected the challenge because under Eleventh Circuit precedent, the grounds for vacatur of an arbitral award governed by the New York Convention are limited to those set out in Article V of the Convention.

A three-judge bench in the Eleventh Circuit upheld the district court's decision concluding that it was bound to uphold the precedent set by Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte GmbH ("Industrial Risk") and Inversiones y Procesadora Tropical INPROTSA, S.A. v. Del Monte International GmbH ("Inversiones"), but found that those cases were wrongly decided and should be overruled by the full court. The court later agreed to vacate its decision and ordered rehearing *en banc*. The full Eleventh Circuit vacated and remanded the district court's decision. The court held that the FAA provided grounds to vacate arbitral awards under the New York Convention in which the United States is the primary jurisdiction, thereby overruling the precedent set by Industrial Risk and Inversiones.

Valores Mundiales, S.L. & Consorcio Andino, S.L. v. Bolivarian Republic of Venezuela, United States District Court, District of Columbia, No. 119CV00046ACRRMM, 15 May 2023

Marcio Vasconcellos, King & Spalding LLP, ITA Reporter for the United States of America

After securing an ICSID arbitral award in excess of US$ 430 million against Venezuela, Claimants/Plaintiffs Valores Mundiales, S.L. and Consorcio Andino, S.L. sought to enforce the award in DC District Court while annulment proceedings were pending before ICSID, which subsequently confirmed the award. In resisting the enforcement, Venezuela alleged that ICSID deprived the sovereign nation of representation and the right to be heard for failing to substitute its

representative with an appointee of its interim government. The Court rejected Venezuela's position and paved the way for enforcement of the award, pending further proceedings.

The crux of the case was the fact that while annulment proceedings were pending before ICSID, in January 2019, the Venezuelan National Assembly disavowed President Nicolás Maduro and named Juan Guaidó as the Interim President, who appointed a new Special Attorney General to represent Venezuela in the ICSID annulment proceedings. In the face of this unusual situation and after hearing from all interested parties, the ICSID ad hoc Committee, which oversaw the annulment proceedings, concluded that the Guaidó representative had failed to meet its burden of proving his legitimacy to represent Venezuela and, therefore, was not allowed to replace the Maduro representative. This, Venezuela argued, was a violation of its right to representation and to be heard.

The Court rejected Venezuela's claim on the basis that it has no authority to review the merits of an ICSID award and, even if it did, Venezuela failed to show any due process violations in the conduct of the ICSID annulment proceedings. The Court recognized that Venezuela had counsel throughout the arbitration and the annulment proceedings, and that at no point had the ICSID ad hoc committee prevented Venezuela's counsel from filing any papers or appearing in hearings. In addition, the Court noted that regardless of whether a US court would recognize representatives of the Maduro government over the objections of the executive branch of the US government, an argument Venezuela raised before the Court, it was sufficient that ICSID itself was convinced of Venezuela's proper representation for the enforcement of the award.

The decision reinforces the competent analysis of international arbitral awards by the US federal bench. The opinion is well reasoned, compelling, sound, and does an excellent job of summarizing US law as it pertains to ICSID arbitration. While further decisions and appeals are likely to follow, the Court has laid a solid foundation for enforcement of the award.

This entry was posted on Sunday, June 18th, 2023 at 8:28 am and is filed under ITA Arbitration Report
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