Kluwer Arbitration Blog

KluwerArbitration ITA Arbitration Report, Volume No. XXI, Issue No. 9 (October 2022)

Roger Alford (General Editor) (Notre Dame Law School), Crina Baltag (Managing Editor) (Stockholm University), and Monique Sasson · Saturday, November 11th, 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.

Fujian Dragongate Wine & Spirits Co. Ltd. v. Pacific Vintners PTY Ltd., Intermediate People's Court of Beijing, (2022) Beijing 04 Minte No. 64, 27 December 2022

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

In this case the petitioner seeks to set aside an CIEATC arbitral award before the Beijing Court, arguing that the arbitration agreement in a sales contract is not binding because the respondent did not sign the sales contract. Without having a de novo fact finding process, the Court dismissed the petitioner's case, by concurring to the arbitral tribunal's finding that the arbitral agreement is binding because the petitioner had consented to the unsigned draft sales contract by sending text messages through social media.

Rofs Microsystem (Nanchang) Co., Ltd. v. Air Liquide (Wuhan) Co., Ltd., Intermediate People's Court of Beijing, (2022) Beijing 04 Minte No. 542, 25 July 2023

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

According to Arbitration Law of the People's Republic of China ('PRC'), an arbitration agreement shall be deemed invalid if the arbitration institution referred therein is non-existent. In this case, the disputed contract is bilingual, which contains a Chinese text and an English text as well as a

language clause that provides the Chinese text shall prevail in case of discrepancy. However, the arbitration agreement in the contract's Chinese text referred to a non-existent arbitration institution while the English text referred to an existing arbitration institution. The Fourth Intermediate People's Court of Beijing Municipality held that, despite there is a language clause in the contract, pursuant to validation principle, the arbitration agreement shall be deemed valid based on its English text.

SRT Capital SPC LLC v. Shanghai Zhongxin Electronic Development Co., Ltd., First Intermediate People's Court of Shanghai, (2021) Shanghai 74 Xie Wai Recognition No. 3, 30 December 2022

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

In this case, the Shanghai Financial Court ('Court') applies the 1958 New York Convention to determine whether a foreign arbitral award shall be recognized and enforced. Eventually, the Court refused to enforce the interest ordered in the award presumably on the basis that the paragraph in the disposition section of the award for the interest erroneously cross-referenced to another paragraph of the award, which renders the subject matter to be enforced ambiguous. The Court emphasized that it is not empowered to voluntarily amend the clerical error (if any) in the arbitral award.

DACU C. por A. v. BACALAR S.R.L., Constitutional Court of the Dominican Republic, Sentencia TC/0425/20, 29 December 2020

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

The Dominican Constitutional Court held that real state disputes can be subject to arbitration if parties decide so.

Proyme Ingenieria y Construccion S.L., Sucursal del Peru v. Southern Perú Copper Corporation, Sucursal del Perú, Superior Court of Justice of Lima, 05 June 2023

Fernando Cantuarias Salaverry, Law School of Universidad del Pacìfico, ITA Reporter for Peru

The Commercial Chamber of the Superior Court of Justice of Lima declared the annulment of an award unfounded.

Suburbs, SGPS, Lda and Barod, Ltd v. The Navigator Company, SA, Supreme Court of Justice of Portugal, 2863/21.7YRLSB.S1, 21 March 2023

José Miguel Júdice, Independent Arbitrator, ITA Reporter for Portugal

This award is one among many issued by Portuguese courts concerning actions for the annulment of arbitral awards on the grounds of violating international public order. The real question is not

about the definition of 'international public order,' as this concept has been treated so broadly that it encompasses principles such as good faith, pacta sunt servanda, and party autonomy. Rather, the issue lies in the manner in which the courts scrutinize the cases when such a broad concept is involved. This particular decision is exemplary in its scrutiny. The claimants appeared to seek a review of the decision as if it were an appeal. The Arbitral Tribunal, based on the available facts, determined that a specific contractual obligation existed in line with the parties' intent. The losing party contested this, aiming to annul the arbitral award based on an alleged violation of the principle of private autonomy. However, the Supreme Court rejected this argument. The Supreme Court reasoned that determining the existence or non-existence of the parties' intent would equate to reviewing the decision. Since the Arbitral Tribunal found that such intent did exist and consequently ruled against the Claimants based on that specific contractual obligation, this outcome does not contravene the international public order of Portugal.

Heliotrop, SAS v. Magpower Soluções de Energia, S.A. and Magp Inovação, S.A., Supreme Court of Justice of Portugal, 991/20.5YRLSB.S1, 22 June 2023

José Miguel Júdice, Independent Arbitrator, ITA Reporter for Portugal

This decision serves as another example from the Portuguese Supreme Court of Justice, emphasizing the court's balanced yet pro-arbitration stance in recognizing foreign arbitral awards. In this particular case, one of the parties chose not to attend the hearing because the arbitral tribunal did not grant a postponement. As a result, the party was unable to cross-examine the witness. Despite this, the Supreme Court scrutinized the party's overall conduct in the arbitral proceedings and identified it as another delaying tactic. The court also rejected the argument that the inability to cross-examine the witness due to the tribunal's refusal to postpone the hearing constituted a violation of due process principles and Portuguese international public policy.

X v. Y, Regional Court of Istanbul, 14th Civil Chamber, File No. 2022/438, Case No. 2023/610, 06 April 2023

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

The 14th Civil Chamber of the Istanbul Regional Court ('Regional Court') ruled that the validity of the arbitration clause in the surety agreement signed after the general loan agreement shall not be affected by the fact that there is reference to the jurisdiction of Turkish courts in the general loan agreement. Additionally, the failure to raise an arbitration objection during mediation but later raising an arbitration objection during the subsequent lawsuit shall not constitute an abuse of right.

X v. Y, Court of Cassation of Turkey, 11th Civil Law Chamber, File No. 2022/5454, Case No. 2022/8276, 23 November 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 it is not in

violation of public order for an arbitral tribunal to determine that it can in principle rule on the compensation for the denial of enforcement (*icra inkar tazminat?*).

Elizabeth Stafford v. IBM Corporation, United States Court of Appeals, Second Circuit, No. CV 22-1240, 14 August 2023

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

Respondent-Appellant International Business Machines Corporation ('IBM') appealed from a decision of the Southern District of New York ('SDNY') granting Petitioner-Appellee Elizabeth Stafford ('Ms. Stafford')'s motion to unseal an arbitration award granted in her favor under the Age Discrimination in Employment Act of 1967 ('ADEA'). Ms. Stafford had filed a petition to confirm her arbitration award under the Federal Arbitration Act ('FAA') in the SDNY and had simultaneously moved to unseal the award and render it public. The SDNY granted both motions.

On appeal, IBM argued that Ms. Stafford's petition to confirm the arbitration award rendered in her favor under the FAA had become moot when IBM had paid the award in full and that, accordingly, the SDNY should not have granted Ms. Stafford's motion to unseal. It also alleged that Ms. Stafford's motion to unseal was an improper effort to evade the confidentiality provision in Ms. Stafford's separation agreement with IBM, the agreement that had given rise to the arbitration.

The Second Circuit agreed with IBM that Ms. Stafford's petition for confirmation had become moot on IBM's satisfaction of the arbitration award and overturned the motion to unseal granted by the SDNY for two primary reasons. First, when IBM paid the amount due in the arbitration award to Ms. Stafford, Ms. Stafford lost any 'concrete' interest in enforcement of the award that was necessary to satisfy the ongoing 'case or controversy' requirement for the jurisdiction of federal courts under Article III of the U.S. Constitution. Second, any presumption of public access to court documents should be outweighed by the importance of confidentiality of arbitrations under the FAA and the impropriety of Ms. Stafford's effort to evade the confidentiality provision in her separation agreement with IBM. The Second Circuit thus vacated the SDNY's confirmation of the award, reversed the SDNY's grant of Ms. Stafford's motion to unseal, and remanded the case to the SDNY with instructions to dismiss the confirmation petition as moot.

Von Pezold, et al. v. Republic of Zimbabwe and Border Timbers Limited, et al. v. Republic of Zimbabwe, United States District Court, District of Columbia, No. 21-cv-2004(APM)No. 21-cv-2428(APM), 09 August 2023

Flora Jones, King & Spalding LLP, ITA Reporter for the United States of America

The District Court for the District of Columbia rejected Zimbabwe's attempt to avoid enforcement of two related ICSID awards.

The Petitioners asked the court to recognize two ICSID arbitral awards made in their favor against the Republic of Zimbabwe. The court had previously found that the petitioners in both actions had failed to serve Zimbabwe pursuant to the requirements of the Foreign Sovereign Immunities Act

('FSIA'). In both actions the court had granted Zimbabwe's motion to dismiss on the basis of lack of service only, but permitted both petitioners 60 days to perfect service. The petitioners then served Zimbabwe as required by the FSIA.

Before the court, in both actions, were Zimbabwe's motions to dismiss which included the following arguments: (1) the court lacked subject matter jurisdiction; (2) the doctrine of *forum non conveniens* made the venue improper in this court; (3) the petitioners had failed to state a claim; and (4) petitioner Elisabeth von Pezold had not demonstrated sufficient standing to seek recognition of the award.

The von Pezold Petitioners also sought judgment on their petition, alternatively a summary judgment briefing schedule.

The court determined that none of Zimbabwe's arguments were convincing and denied both of Zimbabwe's motions to dismiss. The court ordered the parties in the von Pezold action to submit a proposed schedule for summary judgment motions.

Rosalie Simon, et al. v. Republic of Hungary and Magyar Allamvasutak Zrt., United States Court of Appeals, District of Columbia Circuit, No. 22-7010, 08 August 2023

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

The case consolidates two lawsuits against Hungary for wrongs perpetrated during World War II, specifically the confiscation of property from victims of the Holocaust. The United States Court of Appeals for the District of Columbia ('D.C. Circuit') largely affirmed the ruling of the lower court, which found that Czechoslovakian survivors could bring expropriation claims against the Hungarian government and its agencies under the Foreign Sovereign Immunities Act ('FSIA').

The nationality of the plaintiffs proved to be a critical issue for jurisdiction under the FSIA. U.S. Supreme Court precedent states that 'a country's alleged taking of property from its own nationals generally falls outside the scope of [the FSIA's] expropriation exception.' Fed. Republic of Germany v. Philipp, 141 S. Ct. 703, 708 (2021) ('Philipp'). This is known as the domestic takings rule. In response to the domestic takings rule, certain plaintiffs who were from Hungary nevertheless claimed to be 'stateless persons.' While not making a determination as to whether the plaintiffs in this case were de facto rendered stateless by Hungary's antisemitic policies, the D.C. Circuit held that the plaintiffs 'failed to identify adequate affirmative support in sources of international law for their contention that a state's taking of a stateless person's property amounts to a taking 'in violation of international law' within the meaning of the [FSIA].'

As such, the D.C. Circuit agreed with the district court that the plaintiffs claiming statelessness should be dismissed, while those claiming Czechoslovakian nationality could proceed. Certain factual matters were remanded.

To make sure you do not miss out on regular updates from the Kluwer Arbitration Blog, please subscribe here. To submit a proposal for a blog post, please consult our Editorial Guidelines.

This entry was posted on Saturday, November 11th, 2023 at 8:55 am and is filed under Arbitration, ITA Arbitration Report
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.