Kluwer Arbitration Blog

2023 in Review: U.S. Courts Wrestle with New Issues and Refine Old Doctrine

Eric Lenier Ives (Assistant Editor for Canada and the United States) · Monday, January 8th, 2024

In 2023, the United States courts expanded the role of international arbitration under existing law and wrestled with the application of new arbitration law and fact patterns. This post reviews some highlights and looks forward to developments anticipated during 2024.

At the top, the United States Supreme Court delivered significant rulings in *Coinbase Inc,. v. Bielski*, No. 22-105 (U.S. 2023) and *Yegiazaryan v. Smagin and CMB Monaco v. Smagin*, No. 22-381 (U.S. 2023), which harmonized U.S. arbitration law and opened new doors for litigants to consider as they enforce arbitration awards in the U.S., respectively.

Meanwhile, the U.S. Courts of Appeals delivered rulings which both created and resolved Circuit splits. Finally, the trial-level U.S. District Courts wrestled with the interpretation and application of the recent U.S. Supreme Court ruling on the availability of discovery in aid of investment arbitration under 28 U.S.C. Section 1782, as well as the enforcement of intra-EU arbitral awards in the U.S. after the European Court of Justice's decisions in *Achmea* and *Komstroy*.

United States Supreme Court

In *Coinbase Inc,. v. Bielski*, No. 22-105 (U.S. 2023), the Supreme Court held that district court proceedings are automatically stayed during the pendency of an appeal of the court's denial of a motion to compel arbitration. The Supreme Court's decision reversed a previous appellate court ruling that determined that the underlying litigation was not subject to stay, in effect requiring litigation to proceed in the trial court while the decision on the motion to compel arbitration was considered by an appellate court.

As reported by the Kluwer Arbitration Blog, in a decision authored by Justice Kavanagh, the Supreme Court held by a narrow 5-4 majority that automatically staying the trial court litigation pending appeal was proper because the district court should not maintain control over parts of the case "involved in the appeal" and that an appeal of a denial to compel arbitration meant that the entire case was "essentially 'involved in the appeal.'" After *Coinbase*, an appeal from an order denying a motion to compel arbitration automatically stays litigation before the trial court. Notably, however, there is no equivalent stay following the *grant* of a motion to compel arbitration. Therefore, unlike a litigation which is stayed pending appeal of a denial of a motion to compel, a compelled arbitration may proceed even during the pendency of the appeal of the district court's decision. The practical implications of this different treatment will surely be an issue for

litigators and district courts to grapple with in the coming years.

In *Yegiazaryan v. Smagin and CMB Monaco v. Smagin*, No. 22-381 (U.S. 2023), the Supreme Court recognized that plaintiffs may bring a civil suit under the expansive Racketeer Influenced and Corrupt Organizations Act (RICO) for judgment-creditors' illicit conduct and collusion ("racketeering" under the statute) to avoid payment of an arbitral award which has been recognized and enforced as a U.S. judgment. In general, under U.S. law, civil RICO claims provide a powerful avenue for recourse against covered racketeering offenses – including, among others, wire fraud, witness tampering, and obstruction of justice – because the RICO statute permits successful plaintiffs to claim treble (i.e., triple) damages as a penalty for the severity of such offenses. Under *Yegiazaryan*, the collusion to avoid payment of a judgment based on an international award constitutes the "domestic injury" required under the RICO statute. Longtime followers of RICO jurisprudence will recall that the Supreme Court had previously limited the availability of civil RICO claims in *RJR Nabisco v. European Community*, No. 15-138 (2016), where the Court held that a civil RICO plaintiff must allege and prove a "domestic injury" caused by racketeering to avail themselves of the broad reach of civil RICO claims.

As reported on the Kluwer Arbitration Blog shortly after the decision, *Yegiazaryan* arose from a dispute between Vitaly Smagin and Ashot Yegiazaryan over a joint real estate venture that resulted in an LCIA arbitration and US$ 84 million award against Yegiazaryan, who resided in California. Smagin obtained recognition and enforcement of the award in the Central District of California and later brought a civil RICO claim alleging that Yegiazaryan engaged in a series of acts designed to frustrate enforcement of the award, including a "complex web of offshore entities to conceal the funds," "hiding his assets in the United States through a system of 'shell companies' owned by family members," and fraudulent claims against his assets by members of his "inner circle" to obtain "sham judgments." The Supreme Court eventually held in favor of Smagin, adopting the Ninth Circuit Court of Appeals' context-specific approach, stating that courts should look to "circumstances surrounding the alleged injury" including, in circumstances like these, "the nature of the alleged injury, the racketeering activity that directly caused it, and the injurious aims and effects of that activity." This ruling clarifies the "domestic injury" language which lingered after *RJR Nabisco v. European Community* and provides litigants a new avenue to pursue in the recognition and enforcement of international arbitration awards in the United States.

Circuit Courts of Appeals

In the Circuit Courts of Appeals, several decisions opened new Circuit splits, closed others, and articulated new contours of arbitration doctrine in the United States.

In *Green Enter., LLC v. Hiscox Syndicates Ltd. at Lloyd's of London*, No. 21-1542 (1st Cir. May 19, 2023), the First Circuit held that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") is a self-executing treaty under U.S. law, meaning that the New York Convention's directive to send covered disputes to arbitration is directly enforceable in U.S. courts even without implementing legislation. The First Circuit's decision is a notable split from the Second Circuit's longstanding precedent that the New York Convention is not self-executing and "relies upon an Act of Congress for its implementation" (*see Stephens v. American Intern. Ins. Co.*, No. 1516 (2d Cir. September. 14, 1995)). This decision has a notable impact on insurance disputes, which are often governed by both state and federal law: if the New York Convention is self-executing, its requirement to send disputes to arbitration preempts conflicting state law which often pulls insurance disputes into the courts.

In *Smarter Tools, Inc. v. Chongqing SENCI Import & Export Trade Co., Ltd.*, No. 21-724, (2d Cir. January 17, 2023), the Second Circuit (which includes New York) held that a district court's remand of an arbitrator's unreasoned award does not violate the Federal Arbitration Act ("FAA") or the *functus officio* doctrine. Typically, under the *functus officio* doctrine, once an arbitrator issues an award, they have no further authority to redetermine the issues of the dispute. In limited circumstances, a district court may remand an issue to the arbitrator, such as where the award contains an ambiguity or clerical error. In *Smarter Tools*, the Second Circuit created a further exception to this rule, allowing a district court to remand to the arbitrator to provide additional reasoning for their award. The Second Circuit held that remand to provide additional reasoning was a "permissible choice" because "[i]t simply makes no sense to redo an entire arbitration proceeding over an error in the form of the award issued." The Second Circuit further found that failure to state reasons for an award "best fits under Section 11 of the FAA" governing modifications and corrections of an award rather than Section 10 of the FAA which governs vacatur.

In *Corporacion AIC, SA v. Hidroelectrica Santa Rita S.A.*, No. 20-13039 (11th Cir. April 13, 2023), an *en banc* panel of all judges on the Eleventh Circuit (which includes Miami, Florida and Atlanta, Georgia) held that Section 10 of the FAA provides the exclusive grounds for vacatur of an arbitral award, rather than Article V of the New York Convention. The Eleventh Circuit had previously applied the New York Convention's grounds for non-enforcement to vacatur petitions in the Circuit and had been a notable outlier compared to its sister Circuits. In practice, arbitral awards issued in the Eleventh Circuit avoided certain grounds for vacatur under the FAA, including the ground that the arbitrators "exceeded [their] powers," which is unavailable under the New York Convention and less familiar to international arbitration practitioners. The Eleventh Circuit's decision now aligns the Circuit with other U.S. courts and resolves a lingering split.

District Courts and Looking Ahead to 2024

In 2023, the U.S. District Courts wrestled in applying new law on the availability of discovery in aid of investment arbitration under 28 U.S.C. Section 1782 ("Section 1782") and the enforcement of intra-EU awards in the United States.

Readers will recall the U.S. Supreme Court's decision in June 2022 that Section 1782 does not permit discovery for use in private commercial arbitral proceedings in foreign countries because the term "foreign or international tribunals" arguably left open the question whether an International Centre for the Settlement of Investment Disputes (ICSID) arbitration panel qualifies as a "foreign or international" tribunal under the statute. Since then, two New York District Courts have concluded that Section 1782 discovery is not available for use in ICSID proceedings and, in 2023, both cases were appealed to the Second Circuit. (*see In re WeBuild* and *In re Alpene*). *In re Alpene Ltd.* concerned an ICSID arbitration under the Malta-China BIT. The magistrate judge concluded – and the District Court judge affirmed – that ICSID does not "exercise[ ] governmental authority such that granting discovery requests by parties in arbitrations before the ICSID would 'promote[ ] respect for foreign governments and encourage[ ] reciprocal assistance.'" *In re Webuild S.P.A.* involved an ICSID arbitration under the Panama-Italy BIT. The court reasoned that ICSID tribunal's independence from and lack of affiliation with either State, its lack of "government funding," and "the confidentiality of the ICSID Panel" weighed against concluding that the tribunal acted with governmental authority. These decisions surprised many in the arbitration community and have been the subject of much discussion and debate at recent conferences and programs. Practitioners and parties will likely continue to explore new legal

strategies, approaches, and solutions in the years to come as, oftentimes, important and significant evidence in aid of international arbitrations can be found in the possession of third-parties located in the United States.

Finally, in *9REN Holding SARL v. Kingdom of Spain*, No. 1:19-cv-1871-TSC (D.D.C. Feb. 15, 2023) and *Blasket Renewable Investments LLC v. Kingdom of Spain*, No. 21-3249 (RJL) (D.D.C. March 31, 2023), District Judges Tanya S. Chutkan and Richard Leon, respectively, of the District Court for the District of Columbia reached opposite conclusions on U.S. courts' jurisdiction to enforce intra-EU awards following the ECJ's decisions in Achmea and Komstroy. Under U.S. law, district courts have jurisdiction over the enforcement of arbitral awards against foreign sovereigns solely to the extent that the "arbitration" exception to the Foreign Sovereign Immunities Act (FSIA) applies, requiring the foreign sovereign's consent to arbitration and assent to an international agreement providing for enforcement in the United States (including the New York Convention). In *9REN*, the District Court held that Spain's alleged lack of capacity to consent to arbitration under the Energy Chater Treaty was an arbitrability issue rather than a jurisdictional issue and the agreement to arbitrate nonetheless existed for purposes of the FSIA's arbitration exception. In *Blasket*, the District Court found that the ECJ's decisions in *Achmea* and *Komstroy* deprived Spain of the capacity to agree to arbitrate and therefore no valid arbitration agreement existed. Both cases are now on appeal to the DC Circuit and are scheduled to be heard in February 2024.

Conclusion

This year, more questions were posed than answered. Looking ahead to 2024, the Courts of Appeals will likely resolve highly pressing issues in both international commercial and investment arbitration, with the potential for these issues to reach the Supreme Court in the 2024 or 2025 terms.

Additional 2023 year in review posts are available here.

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