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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.

Hunland Trade KFT v. Alkhairat Shipping Co. Ltd., Supreme Court of Chile, Decision No. 39,756-2021, 18 February 2022

Cristián Conejero-Roos, Cuatrecasas, ITA Reporter for Chile

The Chilean Supreme Court (the 'Supreme Court' or the 'Court') granted recognition and enforcement of an arbitral award rendered under the arbitration rules of the 1996 Arbitration Act of the United Kingdom, dismissing allegations of violation of Chilean public policy, based on the existence of parallel proceedings and abuse of process.

Tarascona Corporation v. Daniel Yarur, Supreme Court of Chile, Decision No. 21.291-2019, 22 December 2022

Cristián Conejero-Roos, Cuatrecasas, ITA Reporter for Chile

The Chilean Supreme Court (the 'Supreme Court') denied an annulment application filed against a judgment issued by the Court of Appeals of Santiago, which upheld the objection of lack of jurisdiction of national courts to hear a case based on the existence of an arbitration agreement.

Antillian Holding Corp. and Carlos Alberto Bermúdez Pippa v. OI Puerto Rico Sts, Inc., Supreme Court of Justice of the Dominican Republic, Decision No. 2046/2021, 28 July 2021

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

The Dominican Supreme Court of Justice ('Supreme Court') ruled that 1) parties cannot agree to recognition and enforcement of an award process that deviates from the one provided in the New York Convention and Law No. 489-08 on Commercial Arbitration ('Law No. 489-08'); and 2) the recognition and enforcement of an award is a non-contentious process ('*procedimiento gracioso*') under Dominican law, exempt from the procedural formalities associated with regular litigation.

La Republique de Moldavie v. Société Stileks Scientific and Production Firm LLC, intervenante volontaire à titre principal pour la Société Komstroy, Court of Appeal of Paris, RG No. 18/14721, 10 January 2023

Nataliya Barysheva and Valentine Chessa, MGC Arbitration, ITA Reporters for France

In the Moldova v. Komstroy saga, the Paris Court of Appeal set aside, for the second time, an arbitral award for lack of jurisdiction on the basis of the interpretation, provided by the CJEU in a preliminary ruling, of the term 'investment' within the meaning of the ECT, applying it to an arbitration between non-EU parties.

S.A. Alstom Transport et Société Alstom Network UK Ltd v. Société Alexander Brothers Ltd, Court of Appeal of Versailles, RG No. 21/06191, 14 March 2023

Nataliya Barysheva and Valentine Chessa, MGC Arbitration, ITA Reporters for France

Following the referral from the *Cour de cassation*, the Versailles Court of Appeal reassessed the evidence of the purported corruption to confirm the exequatur of an arbitral award rendered in Switzerland, holding that the indicia of corruption were not sufficiently established by Alstom.

Société Kraydon Ltd v. Chambre de commerce internationale de Paris, Court of Cassation of France, First Civil Law Chamber, Arrêt n° 194 F-D, Pourvoi n° J 21-16.238, 22 March 2023

Nataliya Barysheva and Valentine Chessa, MGC Arbitration, ITA Reporters for France

The French highest court has upheld the decision of the Paris Court of Appeal confirming that an arbitral institution cannot be held liable for an alleged violation of due process during the arbitration proceedings.

République du Congo v. Société Commissions Import Export (Commisimpex) et Société EDF Africa Services, Court of Cassation of France, First Civil Law Chamber, Arrêt n° 259 FS-B, Pourvoi n° F 18-20.915, 13 April 2023

Nataliya Barysheva and Valentine Chessa, MGC Arbitration, ITA Reporters for France

In the longstanding enforcement saga involving State's assets, the French *Cour de cassation* delivered an interesting decision, confirming that a State's express waiver of immunity from enforcement is sufficient to allow a creditor of that State to attach tax debts of an entity liable for their payment at its registered office in France.

Mme Mehta et autres v. République orientale de l'Uruguay, Court of Appeal of Paris, RG No. 20/13899, 21 February 2023

Nataliya Barysheva and Valentine Chessa, MGC Arbitration, ITA Reporters for France

The Paris Court of Appeal set aside an arbitral award denying jurisdiction in an arbitration brought on the basis of the Bilateral Investment Treaty for the promotion and protection of investments between the United Kingdom of Great Britain and Northern Ireland and the Oriental Republic of Uruguay.

OLG Cologne – 19 Sch 34/22, Higher Regional Court of Cologne, 19 Sch 34/22, 08 May 2023

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

An arbitral tribunal may consider a video recording of an inspection made by one of the parties as a valid form of evidence. However, if the arbitral tribunal does not possess the necessary technical expertise to evaluate the video recording appropriately, it has to appoint an expert to assist with the evaluation. The arbitral tribunal's failure to take such expert evidence despite the other party's objection to the video recording may constitute a violation of the right to be heard and result in the non-recognition of the foreign arbitral award in Germany.

Kingdom of the Netherlands and Federal Republic of Germany v. Mainstream Renewable Power Ltd, RWE AG, RWE Eemshaven Holding II BV, Uniper SE, Uniper Benelux Holding B.V. and Uniper Benelux N.V., Federal Court of Justice of Germany, I ZB 43/22, I ZB 74/22 and I ZB 75/22, 27 July 2023

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

In 2022, the Higher Regional Court of Berlin (*Kammergericht*, or 'KG'; 12 SchH 6/21) and the Higher Regional Court of Cologne (the 'Court'; 19 SchH 14/21) issued two diverging decisions. The substantial question of both was of whether a German court, pursuant to Sec. 1032(2) of the German Code of Civil Procedure (*Zivilprozessordnung*, or 'ZPO'), has jurisdiction and the competence to rule on the admissibility of an arbitration initiated at the International Centre for Settlement of Investment Disputes ('ICSID') in the context of an intra-EU investment dispute under the Energy Charter Treaty ('ECT'). Both decisions were appealed and the division among

the courts led to a clarifying landmark decision by the German Federal Court of Justice (*Bundesgerichtshof*, or 'BGH'): On July 27, 2023, the BGH followed the Court's reasoning and ruled that the admissibility procedure under Sec. 1032(2) ZPO is also available where the application concerns an intra-EU ICSID arbitration proceeding.

Barrail Hnos. S.A. de Construcciones v. La Química Farmacéutica S.A., Court of Appeal in Civil and Commercial Affairs of Asunción, Decision No. 98/2010, 28 December 2010

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

On December 28, 2010, 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.

VyV S.A. v. Instituto de Previsión Social (IPS), Court of Appeal in Civil and Commercial Affairs of Asunción, Decision No. 361/2015, 30 June 2015

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

On June 30, 2015, an Asunción Appeals Court revoked a First Instance ruling, which had initially determined that state courts lacked jurisdiction in the case at hand since the parties had agreed to arbitration. Consequently, the Appeals Tribunal rejected the Respondents' request to deny the state court's jurisdiction and send the case to arbitration.

Paraguay Energy Operaciones y Logísticas S.R.L. v. Grupo Avanti S.A., Ricardo Javier Ugarriza Tosco and Analía De F. García de Zúñiga, Court of Appeal in Civil and Commercial Affairs of Asunción, Decision No. 60/2023, 15 September 2023

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

On September 15, 2023, an Asunción Appeals Court granted an annulment request based on Arts. 40 (a)(2) and 40 (a)(3) of the Paraguayan Arbitration Law, as the arbitral tribunal disregarded the Applicant's procedural rights by basing its decision on arguments that the parties didn't raise without allowing them to be heard on said premises. Additionally, the arbitral tribunal failed to adjust the award to the procedure agreed upon by the parties.

Ganadera Centauro S.A. v. Coparis, Court of Appeal in Civil and Commercial Affairs of Asunción, Decision No. 38/2020, 12 May 2020

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

On May 12, 2020, an Asunción Appeals Court declared the inadmissibility of an annulment challenge as the Applicant failed to submit the challenge within the available legal timetable

contemplated in Art. 41 of the Paraguayan Arbitration Law.

Inversiones Hoteleras del Paraguay v. Ricsofan (Application for annulment), Court of Appeal in Civil and Commercial Affairs of Asunción, Decision No. 106/2023, 24 November 2023

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

On November 24, 2023, an Asunción Appeals Court, via majority of its votes, granted an annulment request based on Art. 40 (b) of the Paraguayan Arbitration Law after concluding that the arbitral tribunal violated public policy. As decided by the majority of the Appeals Tribunal, the arbitral tribunal violated public policy by not individualizing in the decision the documents that vouched for the experience of some of the experts on whose reports the arbitral tribunal based their award.

A. v. B., District Court of Incheon, Decision No. 2020Na62481, 02 November 2021

Hyunyang Koo and Minjae Yoo, Lee & Ko, ITA Reporters for South Korea

Under Article 168(1) and 170 of the Korean Civil Code, a claim raised in judicial proceedings has the effect of interrupting statute of limitation. This provision enables parties to prevent the statute of limitation of expiring its legal entitlement/claim against another party, for instance, by filing a lawsuit in the courts.

The Korean Civil Code and the Korean Arbitration Act, however, are both silent as to whether a claimant's request for arbitration falls within the category of such 'claims raised in judicial proceedings' under the Korean Civil Code. The absence of any reference to 'requests for arbitration' or 'claims raised in arbitrations' led to considerable uncertainty regarding whether a party's entitlement to claim had been expired due to statute of limitation, despite the party having filed for arbitration within the statutory time period.

A. v. B., District Court of Central Seoul, Decision No. 2018BiHap30171, 11 June 2019

Hyunyang Koo and Minjae Yoo, Lee & Ko, ITA Reporters for South Korea

Recently, a Korean District Court rendered a decision on the validity of an arbitral clause that made reference to a non-existent arbitral institution. In this case, an insurance contract included a dispute resolution clause which referred disputes concerning the 'determination of the amount of damages or compensation' to 'the decision of the Non-Life Insurance Arbitration Committee.'

X v. Y, Court of Cassation of Turkey, 6th Civl Law Chamber, File No. 2023/1231, Case No. 2023/2851, 19 September 2023

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

The 6th Civil Chamber of the Court of Cassation ('Court of Cassation') ruled that the arbitral tribunal's decision to award the payment of interest not requested by the parties was contrary to public order.

X v. Y, Regional Court of Adana, 9th Civil Chamber, File No. 2023/15, Case No. 2023/658, 28 September 2023

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

The 9th Civil Chamber of the Adana Regional Court ('Regional Court') ruled that the parties to a dispute subjected to arbitration are allowed to apply to local courts to request an interim injunction or attachment prior to or during the arbitral proceedings.

The Federal Republic of Nigeria v. Process & Industrial Developments Limited, High Court of Justice of England and Wales, King's Bench Division, Commercial Court, Claim Nos. CL-2019-000752 and CL-2018-000182, 23 October 2023

Nicholas Fletcher, 4 New Square, ITA Reporter for the United Kingdom

The test for finding dishonesty requires the judge or arbitrator to ascertain subjectively the actual state of the relevant individual's knowledge or belief as to the facts. The reasonableness or otherwise of this belief is a matter of evidence going to whether he held the belief but there is no separate requirement that the belief be reasonable. The question is whether it is genuinely held. Once the actual state of mind is established, the question of whether the conduct was dishonest is to be determined by the objective application of the standards of ordinary people.

Section 68(2)(g) of the Act permits a party to challenge an award on the grounds of serious irregularity affecting the tribunal, the proceedings or the award where the award has been obtained by fraud or the award or the way in which it was procured is contrary to public policy. The focus is not on the claim on which the award is based or the cause of action on which the claim is based.

An award obtained by fraud or contrary to public policy and which has caused or will cause substantial injustice is not what the parties agreed to when they agreed on arbitration. Unless the right to object is lost for reasons of finality and subject to the procedural restrictions in s. 70(2) and (3), there is no sanctuary. A high threshold is applicable to s. 68.

As a result of the doctrine of separability, the question of whether the underlying contract was procured by bribery and the consequences for that contract are matters for the tribunal and not the court. It is not sufficient that the contract itself be procured by bribery. However, a case where there is an overall fraudulent enterprise or plan from the start to procure an award would be well within s. 68(2)(g).

Matters falling within s.68(2)(g) will include:

Providing a tribunal and relying upon evidence which is material but which a party knows to be false; Bribery or corrupt payments directed to the arbitration period in order to suppress the fact

that individuals have been bribed when the underlying contract came into existence; and The improper retention by one party of the other party's confidential internal legal documents.

Section 73 of the Act provides that a party may lose its right to object to an award if it takes part or continues to take part in proceedings without objecting unless he can show that at the time he took part he did not know and could not with reasonable diligence have discovered the grounds for the objection. The fact that a party has obtained an award by fraud does not prevent in from contending that an innocent party had acted unreasonably in failing to uncover the fraud.

Obiter

Although the innocent party's lawyers in the arbitration process were not corrupt, the question arose whether the tribunal should have been more direct and interventionist when it was clear that those lawyers were not getting instructions or were failing to put necessary points to the relevant witnesses.

The danger of a party intending from the outset to use a contract as a device deliberately to get an arbitration award or settlement should not be discounted. Is greater visibility required in arbitrations involving a state or state-owned entities where large sums of public money are at stake ?

Hulley Enterprises Limited, Yukos Universal Limited & Veteran Petroleum Limited v The Russian Federation [2023] EWHC 2704, High Court of Justice of England and Wales, King's Bench Division, Commercial Court, Case No. CL-2015-000396, 01 November 2023

Nicholas Fletcher, 4 New Square, ITA Reporter for the United Kingdom

There is no reason why, if the appropriate test are met, an issue estoppel cannot arise out of a foreign judgment against a state, just as there could be against an ordinary company or individual. Caution must be exercised, but such an issue estoppel may include a finding that a state has agreed in writing to arbitrate and has no state immunity under the State Immunity Act in respect of proceedings relating to the arbitration.

Republic of Mozambique v. Privinvest and Others [2023] UKSC 32, Supreme Court of the United Kingdom, 20 September 2023

Nicholas Fletcher, 4 New Square, ITA Reporter for the United Kingdom

There is now an international consensus among the leading jurisdictions involved in international arbitration in the common law world which are signatories to the New York Convention on the determination of 'matters' which must be referred to arbitration. In England & Wales, s. 9 of the Arbitration Act involves a two-stage process. First, the court must determine what the matters are which the parties have raised or foreseeably will raise in the court proceedings, and secondly, the court must determine in relation to each such matter whether it falls within the scope of the arbitration agreement.

In carrying out that exercise, the court must ascertain the substance of the dispute between the parties. This will involve looking at the pleadings but not being overly respectful to the formulations used which may be aimed at avoiding a reference to arbitration. It will also involve a consideration of the defences, which may be skeletal at that stage and should take into account all reasonably foreseeable defences to the claim. Section 9 expressly provides for a stay and the 'matter' need not encompass the whole of the dispute between the parties.

Thirdly, a 'matter' is a substantial issue that is legally relevant to a claim or a defence, or foreseeable defence, in the legal proceedings, and is susceptible to be determined by an arbitrator as a discrete dispute. It does not extend to an issue which is peripheral or tangential to the subject-matter of the proceedings, It is also something more than a mere issue or question that might fall for decision in the court or arbitral proceedings.

Fourthly, the exercise involves a question of judgment and the application of common sense rather than a mechanistic exercise.

Fifthly, when turning to the second stage of the analysis, namely whether the matter falls within the scope of the arbitration agreement on its true construction, the court must not only have regard to the true nature of the matter but also to the context in which the matter arises in the legal proceedings.

Further, the existence of multiple arbitration clauses in a case suggests that a narrow approach to the sufficiency of each connection is required.

Best Sunshine International, Ltd. (BVI) and Imperial Pacific International (CNMI), LLC v. Commonwealth Casino Commission, United States Court of Appeals, Ninth Circuit, No. 22-16630, 28 June 2023

Yusuf Saei, King & Spalding LLP, ITA Reporter for the United States

License revocation dispute about force majeure clause could not be arbitrated, where the arbitration agreement defined 'dispute' as any and all disagreements 'excluding issues relating to . . . proceedings regarding revocation or suspension of [the] license.'

Where arbitration agreement submitting disputes to American Arbitration Association rules stated parties 'may' submit dispute to 'non-binding' arbitration, the agreement did not delegate gateway question of arbitrability to the arbitrator under the 'clear and unmistakable evidence' test. *Brennan v. Opus Bank*, 796 F.3d 1125 (9th Cir. 2015).

Olin Holdings Limited v. State of Libya, United States Court of Appeals, Second Circuit, No. 22-825-cv, 12 July 2023

Tamsin Parzen, King & Spalding LLP, ITA Reporter for the United States

On July 3, 2014, Plaintiff-Appellee Olin Holdings Limited ('Olin') initiated an ICC arbitration against the State of Libya ('Libya') under the bilateral investment treaty between Cyprus and Libya

(the ‘BIT’). Prior to initiating arbitration, Olin had twice initiated proceedings in Libyan courts regarding the same measures at issue in the arbitration.

In the arbitration, Libya argued that the Arbitral Tribunal lacked jurisdiction over the dispute because Olin was precluded from submitting the dispute to arbitration as a result of its first litigating the disputes in Libyan courts. The Tribunal rejected Libya’s arguments as to jurisdiction and found for Olin on the merits. Olin sought confirmation of the award in New York state court. Libya removed the petition to federal court in the U.S. District Court for the Southern District of New York and filed a motion to dismiss on *forum non conveniens* grounds.

Finding that Libya’s jurisdictional objection raised a ‘procedural gateway’ issue that was delegated to the Tribunal, the District Court applied a deferential standard of review and confirmed the award. It further rejected Libya’s *forum non conveniens* argument on the basis that the public and private interest factors did not justify dismissal. Libya appealed, arguing that the District Court erred by failing to independently review the Tribunal’s jurisdictional decision because it was a question of arbitrability and the parties did not ‘clearly and unmistakably’ agree to submit arbitrability questions to an arbitral tribunal.

On appeal, the Second Circuit affirmed. It rejected Libya’s argument that the District Court erred by failing to independently review the Tribunal’s jurisdictional decision, holding that regardless of whether Libya’s jurisdictional objection went to arbitrability, Libya agreed to arbitrate such issues when it signed a treaty providing investors with the option of resolving disputes under the International Chamber of Commerce (‘ICC’) arbitration rules. It found that the District Court did not err in confirming the award or in rejecting Libya’s motion to dismiss.

Preble-Rish Haiti, S.A. v. Republic of Haiti, United States District Court, Southern District of New York, No. 22-CV-7503 (PKC), 7 September 2023

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

Petitioner Preble-Rish Haiti S.A. (‘Preble-Rish’) initiated arbitration against the Republic of Haiti (‘Haiti’) and its state-owned development agency Bureau de Monétisation des Programmes d’Aide au Développment (‘BMPAD’) for non-payment of invoices under a series of fuel supply contracts.

In August 2022, the arbitration panel issued an award in favour of Preble-Rish in the amount of approximately US$ 28.2 million. Preble-Rish sought confirmation of the award in the U.S. District Court for the Southern District of New York (‘S.D.N.Y’ or ‘the Court’), and the S.D.N.Y. entered judgment in its favour on July 20, 2023. Haiti timely appealed this judgment to the Second Circuit Court of Appeals (‘Second Circuit’), and moved for a stay of enforcement pending the appeal.

The S.D.N.Y. denied the motion for a stay. It first found that Haiti had not made a strong showing that its appeal was likely to succeed on the merits, noting that its objection to the arbitral panel’s jurisdiction was precluded by Haiti’s failure to raise that argument in earlier New York state court proceedings in which Haiti had sought a stay of the underlying arbitration. Haiti also argued that the S.D.N.Y. had erred in finding that the underlying contracts established a ‘special arrangement’ for service of process within the meaning of the U.S. Foreign Sovereign Immunities Act (‘FSIA’), but the S.D.N.Y. rejected this argument and found that Preble-Rish complied with its service of process requirements.

The S.D.N.Y. also found that Haiti had not demonstrated that it would suffer irreparable prejudice in the absence of a stay. It noted that the only harm alleged by Haiti was harm associated with the payment of the underlying judgment, and this form of economic harm is generally insufficient to demonstrate an irreparable injury.

Finally, the S.D.N.Y. rejected Haiti's argument that public interest considerations weighed in favour of a stay. Haiti had argued that the Court had not considered the question of sovereign immunity on the merits, and therefore the public interest in comity towards foreign sovereigns weighed in favour of a stay. The Court observed, however, that it had already found that Haiti waived its immunity.

The S.D.N.Y. therefore denied Haiti's motion for a stay pending appeal, but granted a limited 14-day stay to allow Haiti to apply to the Second Circuit for a stay.

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