

Kluwer Arbitration Blog

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

Qidong Adi Tools Manufacturing Co. Ltd. v. Import Export Italy Trading SpA, Supreme Court of Chile, 124.338-2020, 05 July 2023v

Laura Aguilera Villalobos, Centro de Arbitraje y Mediación de la Cámara de Comercio de Santiago (CAM Santiago), ITA Reporter for Chile

The Supreme Court of Chile grants exequatur, recognizing and authorizing the enforcement of a foreign arbitration award from China. The decision is based on the compliance of the award with Chilean legal requirements, emphasizing the voluntary submission of the defendant to international arbitration.

Tangoe SAS v. Neobis Corp S.A., Supreme Court of Chile, 71.508-2022, 05 October 2023

Laura Aguilera Villalobos, Centro de Arbitraje y Mediación de la Cámara de Comercio de Santiago (CAM Santiago), ITA Reporter for Chile

The Supreme Court of Chile grants exequatur, recognizing and authorizing the enforcement of a foreign arbitration award from France, based on Law No. 19.971 on International Commercial Arbitration and on 1958 New York Convention.

Hugo Issa v. Club Deportivo O'Higgins de Rancagua (SADP), Supreme Court of Chile, 20.169-2023, 18 January 2024

Laura Aguilera Villalobos, Centro de Arbitraje y Mediación de la Cámara de Comercio de Santiago (CAM Santiago), ITA Reporter for Chile

The Chilean Supreme Court refused the recognition and enforcement of an arbitral award rendered by arbitrators Mr. Roberto Moreno Rodríguez Alcalá, Mr. Gustavo Albano Abreu and Mr. Kepa Larumbe in a proceeding before the Court of Arbitration for Sport in Lausanne, Switzerland.

According to CAM Santiago's records, this is the third time since the publication of Law No. 19,971 in 2004 that the Supreme Court of Chile has denied an exequatur. In this case (2024), the ground of procedural public policy is analysed. The previous ones referred to a preliminary measure (2010) and to an annulled arbitral award (2011).

Legal Department du Ministère de la Justice de la République d'Irak v. Société Fincantieri Cantieri Navali Italiani SPA et Société Finmeccanica (devenue Leonardo SPA), Court of Appeal of Paris, 16/05996, 16 January 2018v

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

The Paris Court of Appeal held in its decision of 16 January 2018 that an arbitral award endorsing a sanctions regime under the UN Security Council and European regulations is not contrary to international public policy and no denial of justice could be alleged.

Société New Europe Corporate Advisory Ltd. et autre v. Innova 5/LP ès qualités de liquidateur de la Société Twelve Hornbeams SARL et autres, Court of Appeal of Paris, 18 December 2018

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

The Paris Court of Appeal had to consider whether the arbitration agreement could have been extended to the other members of a consortium who had not signed the agreement. In its decision of 18 December 2018, the Court of Appeal partially set aside an arbitral award on the ground that the arbitrator incorrectly refused jurisdiction over some of the non-signatories of the arbitration agreement.

Société Ancienne Maison Marcel Bauche v. Société Indagro, Court of Appeal of Paris, 15/12614, 27 September 2016

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

The Paris Court of Appeal considered that the recognition or enforcement in France of an award that would allow a party to benefit from its corrupt practices violates in a manifest, effective and

concrete way the French concept of international public policy.

Société Indagro v. Société Ancienne Maison Marcel Bauche, Court of Cassation of France, First Civil Law Chamber, Arrêt n° 951 F-D, Pourvois n° U 16-25.657 et A 16-26.445, 13 September 2017

Nataliya Barysheva and Valentine Chessa, *MCL Arbitration*, *ITA Reporters for France*

The French Cour de cassation confirmed a refusal of recognition and enforcement in France of an award that would allow a party to benefit from its corrupt practices as it would violate in a manifest, effective and concrete way the French concept of international public policy.

Société Pabalk Ticaret Limited Sirketi v. Société Norsolor, Court of Cassation of France, First Civil Law Chamber, Arrêt No. 730, Pourvoi No. 83-11.355, 09 October 1984

Nataliya Barysheva and Valentine Chessa, *MCL Arbitration*, *ITA Reporters for France*

The French Cour de cassation affirmed that according to Article VII of the New York Convention, the provisions of the convention cannot deprive a party of the right it may have to rely on an arbitral award in a manner and to the extent permitted by the law or treaties of the country where the enforcement is sought.

Société Omnium de traitement et de valorisation (OTV) v. Société Hilmarton Ltd, Court of Cassation of France, First Civil Law Chamber, Arrêt No. 484 P, Pourvoi No. 92-15.137 D, 23 March 1994

Nataliya Barysheva and Valentine Chessa, *MCL Arbitration*, *ITA Reporters for France*

The French Cour de cassation established that an international award rendered abroad is not incorporated into the legal order of the State in which it was rendered, and therefore its legal existence is established despite its annulment at the seat of the arbitration and its recognition in France is not contrary to international public policy.

Société Diag Human SE v. Czech Republic, Court of Cassation of France, First Civil Law Chamber, 12-29.112, 05 March 2014

Nataliya Barysheva and Valentine Chessa, *MCL Arbitration*, *ITA Reporters for France*

The French Cour de cassation confirmed the force of res judicata is only attached to arbitral awards that are final and, in a case where a reconsideration request is pending, the arbitral award is neutralized by such request and its enforcement cannot be granted.

X v. Y., Court of Cassation of Turkey, General Assembly of Civil Law Chambers, File No. 2023/103, Case No. 2023/1185, 29 November 2023

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

The General Assembly of the Court of Cassation ('Court of Cassation') adopted a decision, concluding that if parties to an agreement that is automatically terminated due to a time limit clause resume their contractual relationship, the parties can no longer be considered as consenting to the arbitration clause contained in the terminated agreement.

X v. Y, Court of Cassation of Turkey, General Assembly of Civil Law Chambers, File No. 2023/688, Case No. 2023/1348, 21 December 2023

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

The General Assembly of the Court of Cassation ('Court of Cassation') ruled that with the finalization of a court decision establishing the existence of a valid arbitration agreement, it can be stated that the parties implicitly agreed on the arbitration agreement if neither party has appealed the decision and it has become final.

X v. Y, Court of Cassation of Turkey, 6th Civil Law Chamber, File No. 2023/1614, Case No. 2023/2915, 21 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 it was within the arbitrator's discretion to appoint expert and that the arbitrator had addressed all the Plaintiff's claims and thus, there were no grounds for revocation.

Technical Office of the Court of Cassation before the General Assembly of the Court of Cassation, Court of Cassation of Dubai, Case No. 10 of 2023, 24 October 2023

Malak Nasreddine, Al Tamimi & Company, ITA Reporter for the United Arab Emirates

This case involved an application by the Technical Office of the Court of Cassation before the General Assembly of the Court of Cassation, whereby it sought to overturn a legal principle established by a previous ruling of the Court of Cassation. In this case, the General Assembly reversed an established legal principle in the UAE Courts and confirmed that a party's failure to pay the arbitration costs of the DIAC arbitration centre does not constitute a waiver of the parties' rights under the arbitration clause.

X v. Y, Court of Cassation of Dubai, Case No. 828 of 2023, 19 October 2023

Malak Nasreddine, Al Tamimi & Company, ITA Reporter for the United Arab Emirates

This case involved an application before the Dubai Court of Cassation to set aside the decision of the Court of Appeal, in which it dismissed the Appellant's claims because of the existence of an arbitration agreement in the main contract, but not in subsequent purchase orders, between the parties. The Dubai Court of Cassation held that the arbitration clause contained in the main contract was deemed to extend to all subsequent purchase orders entered into between the same parties (which did not contain an arbitration clause).

[Archirodon Construction \(Overseas\) Company Limited v. General Company for Ports of Iraq et al., United States District Court, District of Columbia, No. 22-1571 \(JEB\), 30 January 2024](#)

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

Petitioner Archirodon Construction (Overseas) Company Limited ('Archirodon' or 'Petitioner') initiated an arbitration against Respondent General Company for Ports of Iraq ('GCPI'), a department of the Iraqi Ministry of Transport, on March 2016, before an International Chamber of Commerce ('ICC') tribunal seated in Geneva pursuant to a November 22, 2012 contract between Archirodon and GCPI for the design and construction of a staging pier and breakwater for the Al Faw Grant Port in Iraq. A three-person tribunal unanimously awarded Archirodon approximately EUR 83 million in damages in addition to approximately US\$ 7.5 million in costs and expenses in its November 25, 2019 award. The tribunal also held that Archirodon was not entitled to pre-award interest because Archirodon had raised that claim too late in the proceedings. Subsequently, GCPI refused to satisfy the award.

On June 3, 2022, Archirodon filed an action in the U.S. District Court for the District of Columbia (the 'Court') pursuant to Section 207 of the Federal Arbitration Act ('FAA') seeking to confirm the award against GCPI and also impose liability on two additional parties, the Iraqi Ministry of Transport and the Republic of Iraq.

Neither GCPI, the Ministry of Transport, nor the Republic of Iraq appeared in the U.S. proceedings to contest Archirodon's petition for confirmation and enforcement of the award. Nevertheless, the Court proceeded with a fulsome analysis. It first confirmed that it maintained subject matter jurisdiction over Petitioner's confirmation and enforcement action since the award fell under the FAA, the implementing legislation of the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the 'New York Convention'). The Court also agreed with Petitioner's argument that neither GCPI, the Iraqi Ministry of Transport, nor the Republic of Iraq were subject to sovereign immunity under the Foreign Sovereign Immunities Act ('FSIA') in light of the arbitration exception. Applying the so-called *Bancec* test for determining whether government instrumentalities should be treated as juridical entities distinct and independent from their sovereign, the District Court found that the Ministry of Transport, GCPI's principal, was an inseparable part of the Republic of Iraq and that both it and the Republic of Iraq were subject to the Court's jurisdiction under the FSIA's arbitration exception. The waiver exception also applied to overcome sovereign immunity as GCPI, on behalf of the Ministry and Iraq, had 'agreed to arbitration in another country,' i.e., Switzerland.

The District Court next confirmed that it could exercise personal jurisdiction over GCPI, the Ministry of Transport and the Republic of Iraq, noting that Petitioner had effected service on all

three defendants pursuant to 28 U.S.C. 1608(a) and 1608(b). On October 5, 2023, the clerk of the Court sent copies of the summons, Petition, and notice of suit—together with Arabic translations of each—to the Iraqi Ministry of Foreign Affairs in Baghdad for each of the defendants. DHL confirmed its delivery of these materials via signed receipt on October 11, 2023, and October 26, 2023. The Court thus confirmed that personal jurisdiction was proper.

The Court also concluded that, in light of the results of the Bancec test, both the Ministry of Transport and Iraq were jointly and severally liable for the award along with GCPI. Accordingly, after determining U.S. law allowed it to diverge from the tribunal’s decision and grant Petitioner both pre and post-judgment interest, the District Court issued a contemporaneous Order granting Petitioner’s petition to enforce the award.

[Telecom Business Solutions, LLC, et al. v. Terra Towers Corp., et al., United States District Court, Southern District of New York, No. 22-CV-1761 \(LAK\), 20 February 2024](#)

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

On February 6, 2024, the Southern District of New York (‘SDNY’) issued an anti-suit injunction in *Telecom Business Solutions, LLC, et al. v. Terra Towers Corp., et al.* in response to foreign litigation filed in the British Virgin Islands to preserve the jurisdiction of a New York-seated arbitral tribunal.

This matter came before the Court on the motion of Telecom Business Solutions, LLC, LATAM Towers, LLC, and AMLQ Holdings (Cay) Ltd. (‘Petitioners’) for an anti-suit injunction against Terra Towers Corp., TBS Management, S.A., and DT Holdings, Inc. (‘Respondents’). Petitioners’ motion (‘SDNY Motion’) was made in response to foreign litigation filed by Respondents’ agent in the British Virgin Islands (the ‘BVI Action’) despite a contractual provision calling for arbitration seated in New York of all disputes between the parties. Following the issuance of two partial arbitral awards, both confirmed by the SDNY, Respondents brought the BVI Action to dispute the arbitral tribunal’s findings regarding control over and performance of obligations in Continental Towers LATAM Holdings Limited (‘Company’), a company in which Petitioners and Respondents are shareholders.

In sum, the SDNY concluded that both the SDNY Motion and the parallel BVI Action are disputes among the Company’s shareholders, which must be referred to arbitration. It accordingly granted Petitioners’ permanent anti-suit injunction to enjoin Respondents from pursuing the BVI Action.

[Conti 11. Container Schiffarts-GMBH & Co. KG M.S., MSC Flaminia v. MSC Mediterranean Shipping Company S.A., United States Court of Appeals, Fifth Circuit, No. 22-30808, 29 January 2024](#)

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

Plaintiff-Appellee, Conti 11. Container Schiffarts-GMBH & Co. KG M.S. (‘Conti’), chartered its cargo vessel, the M/V Flaminia (the ‘Flaminia’), to MSC Mediterranean Shipping Co. S.A. (‘MSC’), pursuant to a charterparty that contained a London-seated arbitration clause. An

American company, Deltech, booked the Flaminia through MSC's wholly-owned subsidiary, MSC (USA), to ship three tank containers of 80% divinylbenzene ('DVB') out of the Port of New Orleans. Third parties loaded the DVB onto the Flaminia in New Orleans in early July 2012 before the cargo exploded on the Atlantic Ocean days later. Conti obtained an arbitral award against MSC in London, and subsequently sought to confirm the award in the United States District Court for the Eastern District of Louisiana. MSC filed a motion to dismiss for lack of personal jurisdiction. The district court dismissed MSC's motion. MSC appealed.

On appeal, the United States Court of Appeals for the Fifth Circuit reversed the district court's decision and remanded the matter to the district court with instructions to dismiss for lack of personal jurisdiction. The Fifth Circuit agreed with the district court that contacts relating to the parties' underlying dispute are relevant to a federal court's assessment of personal jurisdiction in a confirmation action under the New York Convention. But the Fifth Circuit held that the district court had no personal jurisdiction to confirm the award because (a) the plain language of the letter of undertaking issued by MSC's insurer did not contain an explicit or implicit waiver; and (b) the loading of the DVB onto the Flaminia, which was the sole contact with the forum, occurred as a result of third parties' unilateral activities, not MSC's choice.

[Metropolitan Municipality of Lima v. Rutas de Lima S.A.C., United States District Court, District of Columbia, Case No. 1:20-cv-02155 \(ACR\) Case No. 1:23-cv-00680 \(ACR\), 12 March 2024](#)

Renzo Seminario Cordova, King & Spalding LLP, ITA Reporter for the United States of America

Rutas de Lima S.A.C. ('Rutas') initiated two arbitrations against the Metropolitan Municipality of Lima ('Lima') for breach of the Concession Contract signed by the parties regarding the design, construction, improvement, and operation of new and existing urban highways. In both arbitrations, Lima responded by arguing among other things that the Concession Contract and its modifications were void due to corruption.

In May 2020, the First Tribunal rejected Lima's arguments, granting Rutas damages for rate recollection. In December 2022, the Second Tribunal also rejected Lima's arguments and granted Rutas damages and arbitration costs. Despite the two awards, Lima refused to perform and threatened to terminate the Contract, leading to a third arbitration, which is still pending.

Lima requested to vacate both awards under the Federal Arbitration Act ('FAA') §10(a)(1) and §10(a)(3), respectively, before the U.S. District Court for the District of Columbia ('the Court'). Rutas moved to confirm them. Given the related nature of both cases, the Court consolidated both actions and rendered its opinion on March 12, 2024.

Regarding the First Award, the Court rejected Lima's request for vacatur. Before analysing the requirements of §10(a)(1), the court rejected Lima's arguments that both new evidence, as well as Rutas' fraud more generally, allowed it to bypass the FAA's limits on vacatur, holding that this was merely an attempt to circumvent the FAA. Further, the Court rejected Lima's alleged 'new evidence' as it was not probative or reliable, since it 'consist[ed] of out-of-court statements made by cooperating witnesses to prosecutors and other cherry-picked documents.'

The Court then considered the three requirements of §10(a)(1), and held that Lima had not satisfied them. In particular, the Court held that (1) Rutas' alleged fraud did not deprive Lima of a fair

hearing, and the fact that Rutas contested Lima's arguments did not render the hearing unfair; (2) Lima did not prove that it could not have discovered Rutas' alleged fraud during the arbitration; and (3) Lima could not establish that the alleged misconduct had some bearing on or any causal connection to the second arbitration's outcome.

Finally, the Court rejected Lima's argument that Rutas committed fraud in the context of a discovery request by denying that it had documents related to the alleged bribery, holding there was no clear and convincing evidence of fraud. The Court also noted that the proper forum for any allegation in this regard was the First Tribunal, and Lima did not challenge the discovery response during the arbitration. Moreover, the Court held that Lima could not show that the documents could have been material to the tribunal.

Finally, the Court rejected Lima's argument for vacatur based on the violation of United States public policy. The Court then granted Rutas' request to confirm the First Award.

Regarding the Second Award, the Court held Lima did not satisfy the requirements of §10(a)(3), allowing a Court to vacate an award based on wrongly refusing to hear or admit evidence when this prejudiced the parties' rights. Lima argued the Court should vacate the Second Award because the Second Tribunal allegedly did not admit certain annexes and writings related to a criminal indictment of Lima's former mayor. But the Court held that Lima never asked the Tribunal to admit these documents. And even if the Court had refused to admit these documents, this was within the Tribunal's discretion. The Court held that the exclusion did not prejudice Lima, as it did not fix the fundamental flaw with the evidence, and actually contradicted Lima's fraud argument.

Finally, the Court rejected Lima's argument that both awards violated the United States' public policy regarding enforcing or procuring contracts through corruption. The Court then granted Rutas' request to confirm the Second Award.

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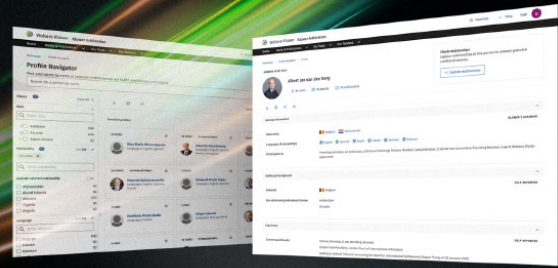
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