# Kluwer Arbitration Blog

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Roger Alford (General Editor) (Notre Dame Law School), Crina Baltag (Managing Editor) (Stockholm University), and Monique Sasson · Saturday, July 27th, 2024

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.

La Fédération Internationale de Football Association (FIFA) v. L.D., in the presence of Union Royale Belge des Sociétés de Football Association ASBL (URBSFA) and Sporting du Pays de Charleroi, Court of Appeal of Mons, 2017/RG/167, 19 September 2022

*Maarten Draye, Bernard Hanotiau and Iris Raynaud, Hanotiau & van den Berg, ITA Reporters for Belgium*

Broad clauses which do not specify, and make it impossible to identify, which disputes are meant to be arbitrated are prohibited under Belgian law.

Société OB Lavau et autre v. Société OB Réseaux, Court of Cassation of France, First Civil Law Chamber, Arrêt n° 551 F-D, pourvoi n° 22-19.859, 27 September 2023v

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

The French Cour de Cassation confirms the negative effect of the principle of competence-competence and rejects that impecuniosity may hinder the effectiveness of an arbitration clause in the absence of a prior attempt to initiate arbitration proceedings.

Republique d'Inde v. Société CC/Devas (Mauritius) Ltd et autres, Court of Appeal of Paris, , 13 February 2024

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

The French pre-trial judge accepts the intervention of third parties in appeal against exequatur orders proceedings, on the basis of the assignment agreements that subrogate the assignees in the rights granted to the assignors by arbitral awards.

Société Campus ESG SARL v. S.A.R.L. Exel'Conseils, Court of Appeal of Paris, , 26 March 2024

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

The Paris Court of Appeal upheld a decision of the Paris Commercial Court noting that the arbitration agreement was not agreed by the party invoking it and was thus inapplicable to the dispute.

République Socialiste du Vietnam v. Société U.S. Global Institute Inc. et autres, Court of Appeal of Paris, , 12 September 2023

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

The Paris Court of Appeal confirms its stance to protect dual nationals under treaties silent on the matter.

AA e BB v. A…Companhia de Seguros S.A., Court of Appeal of Porto, 291/23.9YRPRT, 07 March 2024

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

The judgment of the Court of Appeal of Porto is significant as it addresses the issue of whether the lack of or insufficiency of reasoning can justify the annulment of an arbitral award and allow the alternative recourse to state courts.

AA F, Lda v. R. Banco, SA, Court of Appeal of Lisbon, 6421/22.0T8LSB.L1-6, 11 January 2024

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

*for Portugal*

The judgment of the Court of Appeal of Lisbon is significant as it addresses the issue of whether a party's supervening economic insufficiency can justify the inapplicability of an arbitration clause and allow the recourse to state courts.

Bufkin Enterprises, L.L.C. v. Indian Harbor Insurance Company et al., United States Court of Appeals, Fifth Circuit, No. 23-30171, 26 March 2024

*Juan Manuel Poggio Aguerre, King & Spalding LLP, ITA Reporter for the United States of America*

This case concerns the enforceability of an arbitration agreement through equitable estoppel.

Bufkin Enterprises LLC bought insurance from ten different insurers, eight of which were based in the United States and two were foreign, to insure its property in Louisiana. Bufkin later filed a claim against the insurers, accusing them of delaying payments under the policy. Initially, Bafkin sued only the domestic insurers, but it later added the foreign insurers as defendants before ultimately dismissing them with prejudice (leaving only the domestic insurers as defendants).

Bufkin claimed that all the insurers, both domestic and foreign, engaged in the same culpable conduct, and in its proof of loss documentation, Bufkin did not differentiate between the two. The Defendants moved to compel to arbitration under the Federal Arbitration Act and the Convention on the Recognition and Enforcement of Arbitral Awards (the Convention).

The Western District of Louisiana denied the Defendants' motion, holding that (i) Defendants were not parties to an arbitration agreement with a foreign citizen because each insurer had a separate contract with Bufkin and (ii) equitable estoppel could not be used as the basis to invoke the Convention, as Bufkin's claims were no longer against foreign insurers.

Defendants appealed.

Black Soil Asset Management Ltd., et al., v. Qian Wang, United States District Court, Northern District of California, No. 23-cv-04493 (AGT), 21 March 2024

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

Black Soil Asset Management Ltd. ('Black Soil') and its owner Qiang Chang Sun initiated a HKIAC arbitration against SICCO Investment Inc. ('SICCO') and Qian Wang, a large shareholder of SICCO, for defaulting on a $48 million loan that was intended to finance a real estate project in Shanghai. The arbitral tribunal issued an award in favor of Black Soil and Sun in the amount of $44.3 million, and they petitioned the Northern District of California to confirm the foreign arbitral award. Wang opposed the petition and moved to vacate the award, invoking two grounds for refusal or deferral of recognition under the New York Convention. Specifically, Wang argued that the arbitration procedure failed to comply with the parties' agreement and that he was unable to present his case. The Northern District of California rejected the two grounds and confirmed the

arbitral award.

## Ma Ka Lam v. Rise Huge Corporation Ltd. and Twist Bioscience Corp., United States District Court, Northern District of California, No. 22-cv-06094-TLT, 08 April 2024

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

Plaintiff Ma Ka Lam ('Ma') filed an action in the Northern District of California seeking to uphold an arbitral award issued by the Hong Kong International Arbitration Center ('HKIAC'). Defendant Rise Huge Corporation Ltd. ('Rise'), a Hong Kong entity, moved to dismiss for lack of personal jurisdiction.

The Northern District of California granted dismissal, finding that it lacked specific jurisdiction over Rise because Rise's only connection to the forum was a contract between Rise and Co-Defendant Twist Bioscience Corporation ('Twist') and the contract did not create a 'substantial connection' between Rise and the forum as required under *Burger King v. Rudzewicz*, 471 U.S. 462 (1985).

The court also rejected Ma's argument that jurisdiction was proper under Rule 4(k)(2) of the Federal Rules of Civil Procedure on the basis that upholding a foreign arbitration award is a matter of federal law, finding that the Rise's contacts with the United States were insufficient for the exercise of jurisdiction to comport with due process.

Finally, the court rejected Ma's argument that Rise waived the jurisdictional issue when it entered into the contract because the contract's arbitration clause provided that any disputes were subject to binding arbitration in California. The court reasoned that Ma, who was not a party to the contract, could not invoke its arbitration clause as a basis for the court to exercise jurisdiction over Rise with respect to Ma's claims in the litigation.

## Ecopetrol S.A. v. Offshore Exploration and Production LLC, United States District Court, Southern District of New York, No. 1:18-cv-10024 (JLR), 23 May 2024

*Lorna Maupilé, King & Spalding LLP, ITA Reporter for the United States of America*

In 2011, Respondent Offshore Exploration and Production LLC ('Offshore') initiated arbitration against Petitioner Ecopetrol S.A. ('Ecopetrol'), the national oil company of Colombia, seeking a declaration with respect to certain indemnification terms under a Share Purchase Agreement entered into in 2008 (the '2008 SPA').

In a May 2015 Partial Final Award, July 2015 Correction and Interpretation of the Partial Final Award, and December 2015 Final Award (together the 'Awards'), the tribunal found that Ecopetrol should be compensated under the 2008 SPA's indemnification terms but did not specify the amount of compensation owed. In 2019, after Ecopetrol sought confirmation of the Awards in the U.S. District Court for the Southern District of New York ('S.D.N.Y' or 'the Court'), Ecopetrol and Offshore filed a Stipulation to put the matter of the amount of compensation owed on remand to the tribunal. The tribunal in turn issued an Interim Supplemental Award in December 2021 and a

Final Supplemental Award in March 2022 (together the ‘Supplemental Awards’).

Ecopetrol then filed an amended petition requesting that the S.D.N.Y. vacate the Final Supplemental Award’s discussion of a particular issue on the basis that the tribunal had exceeded its powers in issuing a decision on that issue. Ecopetrol sought confirmation of the rest of the Supplemental Awards.

The S.D.N.Y. concluded that the issue at stake had been within the scope of the tribunal’s mandate on remand, based on both the Stipulation and on the parties’ briefing during the proceedings, with Ecopetrol having specifically asked that the tribunal resolve that issue.

The S.D.N.Y. therefore denied Ecopetrol’s motion to vacate in part the Final Supplemental Award and confirmed the Supplemental Awards in full.

Forbes IP (HK) Limited v. Media Business Generators S.A. de C.V., United States District Court, Southern District of New York, No. 23-cv-11168 (JGLC), 23 April 2024

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

In December 2023, Petitioner, Forbes IP (HK) Limited (‘Forbes IP’), requested an anti-suit injunction before the Southern District of New York (‘Court’) to enjoin Media Business Generators S.A. de C.V. (‘MBG’) from enforcing an ex parte injunction issued in Mexico (‘Mexico Injunction’) which sought to maintain and prolong the validity of a non-exclusive license agreement (‘License Agreement’).

To rule on Forbes IP’s petition, the Court applied the China Trade test which requires the movant to pass two threshold requirements and prevail on the balancing of five discretionary factors. Regarding the two threshold requirements, the Court found that Forbes IP satisfied them because it showed that the parties were the same in parallel proceedings (i.e., Mexico and New York) and because Forbes IP’s anti-suit injunction would be dispositive of the Mexico Injunction.

With respect to the discretionary factors, the Court found that they weighed in favor of Forbes IP’s petition. Among its considerations the Court underscored that there is a strong federal and state policy in favor of forum selection clauses, that MBG obtained the Mexico Injunction *ex parte* and against the express jurisdiction clause of the License Agreement and that the continuation of proceedings in Mexico was likely to cause delay and expense to the parties.

In addition, the Court ruled that Forbes IP was able to show irreparable harm because if the Mexico Injunction was permitted to survive the forum selection would be definitively lost. It also ruled that Forbes IP was likely to succeed in the merits because the Mexico Injunction violated the jurisdictional clause of the License Agreement.

For the above reasons, the Court decided to grant Forbes IP the anti-suit injunction against the Mexico Injunction.

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