

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, October 12th, 2024

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

Anuar Daher, Barramares Turismo e Hotelaria Ltda. & Barramares Empreendimentos Imobiliarios Ltda – ME v. Delta do Parnaíba Empreendimentos, Turismo e Incorporacoes S/A & Centro Brasileiro de Mediação e Arbitragem – CBMA, Court of Justice of the State of Piauí, Apelação Cível nº 0707537-67.2019.8.18.0000, 19 December 2020

Joao Bosco Lee, Lee, Taube, Gabardo Sociedade de Advogados, ITA Reporter for Brazil

The Court of Appeal of the State of Piauí annulled an arbitral award under the claims of partiality of the arbitrators and a breach of the duty of disclosure.

Oliveira e Merqueades Ltda (Vanorry Holding Eireli) & Sppatrim Administracao e Participacoes Ltda v. BNE Administração de Imóveis S/A, Superior Court of Justice of Brazil, Special Appeal, Recurso Especial nº 2.102.676 – SP (2019/0172590-1), 21 November 2023

Joao Bosco Lee, Lee, Taube, Gabardo Sociedade de Advogados, ITA Reporter for Brazil

The Brazilian Superior Court of Justice ruled that when the claim of nullity is presented in a challenge to the enforcement of an arbitral award, loss of suit costs against are applicable.

Sociedade Naviera Ultragas Ltda & Synteko Produtos Químicos S/A v. HDI Seguros S.A., Superior Court of Justice of Brazil, Recurso Especial nº 1.625.990 – PR (2016/0240719-8), 24 March 2023

Joao Bosco Lee, Lee, Taube, Gabardo Sociedade de Advogados, ITA Reporter for Brazil

The Brazilian Superior Court of Justice ruled that there is no basis for arguing the transmission of the arbitration clause to the subrogated insurer when such agreement was not expressly or implicitly agreed to by its insured party.

Denis Satolo & Luciana Pereira de Andrade Costa v. Diogo Diniz Merlos, Court of Justice of the State of São Paulo, Apelação Cível nº 1038255-35.2022.8.26.0100, 14 December 2023

Joao Bosco Lee, Lee, Taube, Gabardo Sociedade de Advogados, ITA Reporter for Brazil

The Court of Justice of São Paulo upheld a judicial award that annulled an arbitral proceeding, because the arbitrator breached its duty to disclose its relationship with the lawyer of one of the parties and there was irregularity in the procedure of the appointment of the arbitrator. This compromised the impartiality of the arbitrator and led to the nullity of the proceeding.

Município de Itu v. Águas de Itu Gestão Empresarial S/A – Em recuperação Judicial, Court of Justice of the State of São Paulo, Apelação Cível nº 1008052-51.2021.8.26.0286, 02 October 2023

Joao Bosco Lee, Lee, Taube, Gabardo Sociedade de Advogados, ITA Reporter for Brazil

The Court of Appeal of the State of São Paulo decided to partially annul a partial arbitral award on jurisdiction, citing the lack of objective arbitrability regarding public acts, such as the termination of public contracts, when these acts are supported by law.

Fidelidade Viagens e Turismo S.A. & TAM Linhas Aéreas S.A. v. Tour KA Ltda. EPP, Court of Justice of the State of São Paulo, Apelação Cível nº 1014211-49.2021.8.26.0564, 18 October 2023

Joao Bosco Lee, Lee, Taube, Gabardo Sociedade de Advogados, ITA Reporter for Brazil

The Court of Appeal of the State of São Paulo recognized the possibility of extending the effects of an arbitration agreement, included in a franchise contract, to a linked contract that was verbally negotiated between the parties for the sale of flight tickets and package tours. The Court stated that the obligations set out in each contract had a high degree of interdependence, in such a way that it was essential to submit both contracts to arbitration.

Eneva Comercializadora de Energia Ltda. v. Canabrava Energética S/A, Court of Justice of the State of Rio de Janeiro, Embargos de Declaração nº 0071685-67.2020.8.19.0000, 13 November 2023

Joao Bosco Lee, Lee, Taube, Gabardo Sociedade de Advogados, ITA Reporter for Brazil

The Court of Appeals of Rio de Janeiro decided that the judiciary could read just the value of an arbitral award to be paid by a party to its counterparty when the former sought to enforce the arbitral award.

LG Essen – 2 O 447/22, Regional Court of Essen, 2 O 447/22, 12 April 2024

Berta Boknik, Cleary Gottlieb Steen & Hamilton LLP, and Harry Nettleau, Willkie Farr & Gallagher LLP, ITA Reporters for Germany

In its *Achmea* and *Komstroy* decisions, the Court of Justice of the European Union ('CJEU') established that intra-EU arbitration proceedings before the International Centre for Settlement of Investment Disputes ('ICSID') are not compatible with EU law and that the corresponding arbitral awards, therefore, cannot be enforced in the EU (judgment of September 2, 2021, Case C-741/19 and judgment of March 6, 2018, Case C 284/16). In its decision of April 12, 2024, the Regional Court of Essen ('Court') ruled that it does not interpret the aforementioned CJEU case law to state that German courts must prevent the enforcement of this kind of arbitral awards outside of the EU (here: in the U.S.). The Court held that it constitutes an inadmissible anti-suit injunction if a Member State of the European Union ('Member State') asks a Member State court to prohibit a European investor from enforcing an ICSID award issued against that Member State outside of the EU. According to the Court, such a request is aimed at preventing a non-EU third state from conducting proceedings in accordance with the rule of law and therefore violates the principles of territoriality and essential elements of state sovereignty.

OLG Frankfurt am Main – 26 SchH 8/23, Higher Regional Court of Frankfurt am Main, 26 SchH 8/23, 05 March 2024

Berta Boknik, Cleary Gottlieb Steen & Hamilton LLP, and Harry Nettleau, Willkie Farr & Gallagher LLP, ITA Reporters for Germany

A signed arbitration agreement is not valid and does not replace a pre-existing jurisdiction clause if the arbitration agreement does not meet the parties' agreed form requirements for deviating from the existing contractual terms. It is possible to implicitly waive contractual form requirements. However, for such a waiver, the corresponding will of the parties not to hold on to the form requirements must be evident.

P.M. of K. & A.M. of K. v. Hellenic Public Properties Co. (HPPC), Supreme Court of Greece, Decision No. 533/2024 (A2, Civil), 08 April 2024

Ioannis Vassardanis, Ioannis Vassardanis & Partners, ITA Reporter for Greece

An arbitral award may be annulled, either wholly or partially, only by a court decision if the arbitrators, who issued it, exceeded their powers, i.e. they acted beyond the authority granted to

them by the arbitration agreement. According to the true meaning of this provision, the term ‘excess of powers’ as a ground for annulment of an arbitral award includes the case where the arbitrators adjudicate on a matter that was not submitted to them by the arbitration agreement or lies beyond its scope. The annulment of the arbitral award can be requested by the parties which entered into the arbitration agreement and any person with a legal interest. ? party is entitled to file both the annulment action and the action for the recognition of the nullity of an arbitral award, provided that they are adversely affected by the grounds cited. In principle, this would be the defeated party to the arbitration, or the successful party who has a legal interest in seeking its annulment (Supreme Court Decision No. 1679/2018). The participation of a third party not covered by the arbitration agreement violates the principle of confidentiality of the proceedings; however, this fact has not been established as an independent ground for annulment or nullity of an arbitral award issued between parties who have lawfully agreed to an arbitration clause and participated lawfully in the arbitration. Arbitrators are appointed from among the senior judges in rotation. This means that the appointment may not always go to the current senior judicial officer, depending on whether the other senior judges have been appointed as arbitrators or not. There is no breach of the principle of the equity of the parties if an Arbitrator participated in another arbitration with the same parties and a similar case file. The arbitral award can be annulled, either in whole or in part, only by a court decision if it is contrary to public order provisions or the principles of morality. ?he contradiction with public order provisions must arise directly and exclusively from the content of the arbitral award, and therefore, the corresponding ground for annulment of the arbitral award is not established when it has incorrectly interpreted and applied the law or has merely insufficient reasoning.

[Michael Flatley v. Austin Newport Group Limited et. al \[2024\] IEHC 359, High Court of Ireland, Record Number 2023/5909P, 14 June 2024](#)

Klaus Reichert, Brick Court Chambers, ITA Reporter for Ireland

An arbitration clause is not unfair if it does not state that the consumer will never be liable for legal costs. It is not a basis under Section 132(1) (e) of the Consumer Rights Act 2022 to avoid the consequences of agreeing to an arbitration clause if such clause does not mention legal costs.

[X v. Y, High Court of Tokyo, Reiwa 4 \(NE\) 5183, 26 April 2023](#)

Akiko Inoue and Koki Yanagisawa, Nagashima, Ohno & Tsunematsu, ITA Reporters for Japan

Plaintiff/Appellant ‘X’, a U.S. citizen, filed a lawsuit against Defendant/Appellee ‘Y’ before Tokyo District Court, claiming that he remained an employee at the Defendant and requesting for compensation or salary payment from the date when Plaintiff received Defendant’s notice of termination of the contract.

Since Tokyo District Court rejected the claims submitted to the court on the ground that the arbitration agreement was valid, the plaintiff appealed to Tokyo High Court. Tokyo High Court upheld the decision by Tokyo District Court.

Bathurst Resources Limited v. LMCHB Limited [2024] NZHC 1058, High Court of New Zealand, CIV-2023-485-000575, 03 May 2024

Stephen Hunter, Shortland Chambers, ITA Reporter for: New Zealand

This decision considers whether the costs award in an international arbitration can be set aside on the ground that it is contrary to public policy or given in breach of natural justice. The Judge noted that counsel had not been able to identify any Commonwealth decision where a court had set aside the costs award in an international arbitration. The Judge held the court has the power to set aside a costs award, but found that neither of the submitted grounds were made out. The judgment contains a detailed discussion of the public policy and natural justice grounds for setting aside an award in the context of an international arbitration.

Nicasio Acosta e Hijos S.A. v. Agroforestal Tacuatí S.A., Court of Appeal in Civil and Commercial Affairs of Asunción, 34/2024, 10 May 2024

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

On May 10, 2024, an Asunción Appeals Tribunal rejected an annulment request against an award rendered by an arbitral tribunal, as the Applicant did not prove that the alleged annulment ground found in Art. 40 (3) was met in the case at hand.

Ministerio Público v. Consorcio MYG: Carlos Vicente Gueyraud s/ Autorización Judicial, Court of First Instance in Civil and Commercial Affairs of Asunción, 475/2024, 05 August 2024

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

On August 5th, 2024, an Asunción Civil and Commercial First Instance Judge rejected a challenge that requested the removal of the president of an arbitral tribunal in an ongoing proceeding. Invoking Articles 9 and 15 of the Paraguayan Arbitration Law, the Applicant petitioned the removal of the challenged arbitrator due to her lack of disclosure of a close familiar relationship with a governmental official, which is significant since, in the Applicant's view, the Paraguayan State had an interest in the outcome of the case.

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