July 8, 2020

ADR Case Update 2020 - 13

Federal Circuit Courts

- **IN ACTION TO CONFIRM AWARD, NIGERIA'S ASSERTION OF IMMUNITY TO BE ADDRESSED BEFORE IT IS REQUIRED TO ADDRESS THE MERITS**

  Process and Industrial Developments Limited v. Federal Republic of Nigeria
  2020 WL 3393452
  United States Court of Appeals, District of Columbia Circuit
  June 19, 2020

  Process and Industrial Developments, Limited (P&ID) contracted with the Federal Republic of Nigeria to build and operate a natural gas processing facility in the Niger Delta. When the deal fell apart, the parties, in accordance with the contract, proceeded to arbitration in London. The arbitration panel bifurcated the proceeding and found Nigeria liable for breach of contract. The Federal High Court of Nigeria set aside the determination as inconsistent with Nigerian law. The panel agreed with P&ID's argument that the Nigerian court had no jurisdiction to set aside the award and awarded $6.5976 billion plus interest. P&ID filed a petition in the U.S. to confirm the award under the FAA. Nigeria moved to dismiss for lack of subject matter jurisdiction, invoking the Federal Sovereign Immunities Act (FSIA). The court agreed with P&ID's argument that Nigeria should present its merits arguments and all of its defenses in a single response to the motion to confirm and ordered Nigeria to do so. Nigeria filed a notice of appeal, which the court refused, and P&ID filed a motion with the United States Court of Appeals for the District of Columbia Circuit to dismiss the appeal for lack of jurisdiction.

  The United States Court of Appeals for the District of Columbia reversed and remanded. Because the district court conclusively rejected Nigeria's assertion of immunity from having to defend the merits in this case, the order was immediately appealable under the collateral-order doctrine. Nigeria's immunity defense was colorable enough to support appellate jurisdiction. That established, the Court found that the district court erred in ordering Nigeria to brief the merits before resolving its assertion of immunity. Immunity protects foreign sovereigns from suit and must be decided at the threshold of every action in which it is asserted. The FAA

seeks to streamline the procedures for confirming arbitral awards, but it does not prohibit the filing of defense motions or prevent a foreign sovereign from seeking what the FSIA guarantees – resolution of an immunity assertion before the sovereign can be compelled to defend the result. Immunity did not turn on the extent of litigation burdens imposed, as the district court suggested. "Unless an exception applies, the FSIA does not permit courts to contemplate how much merits litigation is too much. Instead, they must resolve colorable assertions of immunity before the foreign sovereign may be required to address the merits at all."

- **ARBITRATOR TO DECIDE QUESTIONS OF ARBITRABILITY**

Blanton, Piersing, and others similarly situated v. Domino's Pizza Franchising LLC, et al.
2020 WL 3263002
United States Court of Appeals, Sixth Circuit
June 17, 2020

Piersing worked at a Domino's franchise for four years. When he took on a second job with another Domino's franchise, Piersing signed an arbitration agreement, which specified that arbitration would be conducted according to AAA Rules. The first franchise fired Piersing soon after he took the second job, pursuant to Domino's requirement that franchises obtain prior consent before hiring employees from other franchises. Piersing and another plaintiff filed a class action against Domino's, alleging that the company's franchise agreement violated federal antitrust law. Piersing opposed Domino's motion to compel arbitration, asserting that Domino's could not enforce the agreement because it did not sign (only its franchises had). The court ordered the plaintiffs to arbitration. Plaintiffs appealed.

The United States Court of Appeals for the Sixth Circuit affirmed. The Court found clear and unmistakable evidence that Piersing agreed to have an arbitrator decide issues of arbitrability. Piersing's agreement expressly incorporated AAA Rules, which clearly empower an arbitrator to decided questions of arbitrability.

California

- **ARBITRATOR EXCEEDED POWERS**

California Union Square v. Saks & Company
2020 WL 3097391
Court of Appeal, First District, Division 3, California
June 11, 2020

In 1991, Union Square and Saks entered into a 25-year lease (with option to renew) for a San Francisco location. The lease provided that if the parties were unable to agree on a rent amount, they would submit the issue to arbitration. In 2016, the parties did so, selecting Jan Kleczewski as arbitrator and outlining his scope of work to include reviewing materials, inspecting the subject property, inspecting the party experts' lease comparables, and conducting the arbitration in accordance with the process set forth by the parties. Before issuing an award, Jan emailed the parties to say that he was going to Manhattan to look at the properties discussed in testimony. Jan then issued his award, ruling that the rent for the new lease term would be $13,917,364. He outlined the work that he did to reach his determination, including inspecting the various stores referenced in testimony and "visit(ing) the Saks store on Fifth Avenue as well." Union Square moved to confirm and Saks moved to vacate, alleging that Jan violated the arbitration agreement's limitation on conducting his own due diligence and investigation. The court granted the motion to vacate, after which the parties proceeded to a second arbitration hearing before a different arbitrator, who found in favor of Saks. Union Square moved to vacate and Saks moved to confirm the Second Award. The court granted Saks' motion and Union Square appealed, challenging only the court's order vacating Jan's award.

The Court of Appeal, First District, Division 3, California affirmed. Jan exceeded his powers when he visited the Saks flagship store on Fifth Avenue, a store that was not the subject property, was not a party expert's lease comparable, and was not discussed in testimony in terms of sales volume. The award showed that Jan explicitly relied on his inspection of Saks New York in reaching his rent determination and could not be corrected by simply deleting references to Saks New York. Saks did not waive its objection to Jan's New York trip by not responding to the email because it could not have known that Jan would inspect Saks New York and rely on information obtained from that inspection.

Texas

- **ARBITRATOR TO DECIDE QUESTIONS OF ARBITRABILITY**

  Berry Y&V Fabricators v. Bambace
  2020 WL 3240796
  Court of Appeals of Texas, Houston (14th District)
  June 16, 2020

  Bambace worked for the Berry Company as a tutor for the Berry children and a personal assistant for Danielle Berry. After Bambace notified HR that she was subjected to sexual harassment and a hostile work environment, the Company terminated Bambace's employment. Bambace sued the Berry Company for sexual harassment, discrimination, and retaliation under the TX Commission on Human Rights Act. Berry moved to abate the case and compel arbitration pursuant to the arbitration agreement in the contract. The court denied the motion to compel arbitration, finding that requiring Bambace to litigate her sexual harassment claim in confidential and binding arbitration violated TX public policy. Berry appealed.

  The Court of Appeals of Texas, Houston (14th District) reversed and remanded with instructions. The arbitration agreement in question contained a delegation clause stating that "included in matters subject to arbitration shall be any question or dispute concerning whether any Claims are subject to arbitration." The parties clearly and unmistakably delegated to the arbitrator all questions concerning whether Bambace's claims were subject to arbitration.

New York

- **AWARD CONFIRMED EVEN THOUGH IT "WOULD NOT WITHSTAND SCRUTINY AS A RATIONAL CONSTRUCTION" OF CONTRACT TERMS**

  Matter of Rose Castle Redevelopment II, LLC v. Franklin Realty Corp
  2020 NY Slip Opinion 03293
  New York Supreme Court Appellate Division, First Judicial Department
  June 11, 2020

  Rose Castle acquired three parcels of property in Brooklyn from Franklin Realty. Per the parties' contribution agreement, Rose Castle made an initial contribution of $10 million to FRO; the second contribution was dependent on the outcome of Rose Castle's rezoning effort at the time of the mortgage loan due date. The contract also had a section providing for a clawback amount payable in the event a favorable rezoning decision was issued after the mortgage loan due date in an amount based on the square footage resulting from the rezoning decision. Rose Castle obtained a rezoning one month after the mortgage loan due date, reducing the square footage that was available for market rate residential use. Rose Castle then commenced an arbitration proceeding before AAA on the sole issue of the amount of its second contribution to FRO. In reaching a decision, the arbitrator based the payment on the subsequent rezoning footage and determined that the clawback provision in the parties' contract was ambiguous and should be viewed against Franklin, the drafter of the clause. The arbitrator determined that Rose Castle owed $27.5 million, less the $10 million already paid, for a total of $17.5. Rose Castle moved to

confirm and Franklin cross-moved to vacate. The Supreme Court confirmed and Franklin appealed.

The New York Supreme Court Appellate Division, First Judicial Department, affirmed. The Court agreed with Franklin that the clawback was not ambiguous and found that the arbitrator's reason for inserting a $10 million deduction into the formula to be applied to the square footage figure was not in reliance on anything in the clawback provision. Though this would not withstand scrutiny as a rational construction of terms of the contract as written, given the highly deferential standard of review accorded arbitration awards, the result the arbitrator reached was supportable as a reformation of the parties' agreement.

International

- **HELLS ANGELS' MEDIATION NOT UNLAWFUL EVEN IF SUBJECT MATTER MAY INVOLVE ALLEGED UNLAWFUL ACTIVITY**

  British Columbia (Director of Civil Forfeiture) v. Angel Acres Recreation and Festival Property Ltd.
  2020 BCSC 880

  British Columbia's Director of Civil Forfeiture sought the forfeiture of three Hells Angels' clubhouses in British Columbia, alleging that the clubhouses were acquired directly or indirectly from proceeds of unlawful activity; had, in the past, been used as instruments of unlawful activity; and will, in the future, likely be used as instruments of unlawful activity.

  In the opinion, the Court addressed the Director's submission that one of the clubhouses had been used as a venue for dispute resolution among members and between chapters of the Hells Angels. The Director asserted that mediation of disputes played a role in ensuring relative harmony within the organization and submitted that resolving these disputes maintained the Hells Angels brand so that members and associates of the club continued to benefit from the opportunity to monetize the brand through criminal means. The Court determined that mediation of disputes by or between Hells Angels' members/chapters was not an unlawful activity under British Columbia's Civil Forfeiture Act even if the subject matter of the disputes involved unlawful activity. The Court also found that the use of the Clubhouses as venues in which to resolve disputes did not constitute the use of property to "engage in unlawful activity" – which was required before property was subject to forfeiture as an instrument of unlawful activity under the Civil Forfeiture Act.

- **AWARD ANNULLED DUE TO ARBITRATOR'S FAILURE TO DISCLOSE RELATIONSHIP WITH EXPERT**

  Eiser Infrastructure Limited and Energia Solar Luxembourg v. Kingdom of Spain
  ICSID Case No. ARB/13/36

  Spain applied to annul the arbitration award in Eiser v. Spain based on arbitrator Dr. Alexandrov's failure to disclose a prior and continuing relationship with the expert, Carlos Lapuerta of the Brattle Group. The Committee found that Alexandrov's relationship with Brattle and Lapuerta had developed over 15 years during which on eight separate occasions, the arbitrator acted as counsel in matters in which his clients also retained Brattle. The Committee noted that while the underlying arbitration was pending, Brattle was retained on at least three separate cases for clients for whom Alexandrov also acted as counsel. This concurrent relationship and Alexandrov's extensive history of working with Lapuerta and Brattle created a manifest appearance of bias and should have been disclosed. The Committee ruled that the appearance of a lack of impartiality or independence tainted the award sufficiently to justify annulling it on the grounds set forth in article 52(1)(a) of the ICSID Convention.

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