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ADR Case Update 2019 - 11

Federal Courts

- **ARBITRATOR DID NOT EXCEED POWERS**

YPF S.A.: YPF Europe B.V. v. Apache Overseas, Incorporated; Apache International
2019 WL 2237343
United States Court of Appeals, Fifth Circuit
May 24, 2019

The sales and purchase agreement (SPA) between buyer YPF and seller Apache contained an arbitration clause that designated KPMG as the independent accountant who would determine price adjustments to the sales price. In a subsequent Engagement Letter, which formed part of the arbitration agreement, KPMG provided that partners Menown and Bleger would make any Determinations; it also provided for a five-day period during which either party could point out arithmetical inaccuracies. Following a dispute, the parties proceeded to arbitration and KPMG issued a Determination that Apache owed YPF \$9.8 million. Apache objected, asserting that it could not identify arithmetical inaccuracies because KPMG did not provide details of its calculations. KPMG rejected the objection in a letter signed by partners Bleger and Jones. The award was confirmed and Apache appealed.

The United States Court of Appeals for the Fifth Circuit affirmed. Apache argued that the award should be set aside because the five-day review was conducted by Bleger and Jones, although the agreement provided that the engagement and Determination should be made by Menown and Bleger. Apache asserted that the term "engagement" should be broadly construed to include the five-day review. The Court disagreed. If the parties wanted to allow only Menown and Bleger to conduct the five-day review they presumably would have said so – as they did with the Determination. Apache also asserted that KPMG exceeded its powers because it did not provide sufficient reasoning to support the Determination. Both the SPA and the Engagement Letter required KPMG to include reasoning supporting the determination. A reasoned award requires the arbitrators to submit "something short of findings and conclusions but more than a simple result." KPMG easily complied with this requirement, basing its analysis on the parties' statements and accounting records, pointing to its finding on the accrual of liabilities, and explaining what documentation was found relevant to the proper refund amount.

- **ARBITRATOR EXCEEDED POWERS**

Axia Netmedia v. Massachusetts Technology Park Corporation
2019 WL 2268867
United States District Court, D. Massachusetts
May 28, 2019

MTC, a public instrumentality of the Commonwealth of Massachusetts, entered into a 10-year Network Operator Services Agreement (NOA) with Axia, who agreed to market, maintain, service, and operate the MTC MassBroadband network. Axia and MTC also entered into a Guaranty Agreement, under which Axia guaranteed its performance and payment obligations up to \$4 million. Axia changed its name (to KCST). Soon after, it filed for Chapter 11 bankruptcy protection and sought a declaratory judgment that the Guaranty was unenforceable because MTC breached the NOA. The parties proceeded to arbitration pursuant to the dispute resolution terms of the Guaranty. The arbitrator found that MTC breached the agreement and that the appropriate remedy was “reformation of the NOA.” The arbitrator then reformed the NOA and held that the Guaranty was void as a result of MTC’s breach. The arbitrator left the re-written contract open to KCST to accept or reject. MTC moved to vacate in part and modify the arbitration award and Axia Netmedia (the parent corp.) moved to confirm.

The United States District Court, D. Massachusetts, granted the motion to vacate and denied the motion to confirm. Axia argued that the Bankruptcy Court’s confirmation of the arbitration award and finding that the NOA – as reformed - was enforceable prevented MTC from challenging the award. The Court found that res judicata and collateral estoppel did not preclude MTC from seeking to vacate the award because the issues were not the same. MTC also argued that the arbitrator acted outside the scope of his authority by rewriting the NOA and providing KCST with the right to enter into the contract moving forward while prospectively voiding the Guaranty. The Court did not review whether the arbitrator exceeded his powers in re-writing the NOA because Axia was not a party to that contract – KCST was. The Court found, however, that the arbitrator exceeded his powers by prospectively voiding the Guaranty while rewriting the terms of the NOA. An arbitrator exceeds his powers when he reforms material terms of a contract so that the agreement conforms with his own sense of equity or justice. In rewriting the contract, the arbitrator fundamentally altered the relationship between the parties, constructing an arrangement to which MTC would never have agreed. The necessity of the Guaranty was reflected in the original contractual agreement, which the arbitrator seemed to overlook: “This Agreement and the liability hereunder shall not be affected or impaired by any compromise, settlement, release, renewal, extension, indulgence, changing or modification of any of the obligations and liabilities of the Network Operator under the NOA.”

Case research and summaries by Deirdre McCarthy Gallagher and Richard Birke.

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