Alert

Two Major Developments in Cross-border Arbitration Law

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We would like to update you on two significant developments in cross-border arbitration law.

UK Privy Council

In the recent judgment in *Gol Linhas Aereas SA (formerly VRG Linhas Aereas SA) (Respondent) v MatlinPatterson Global Opportunities Partners (Cayman) II LP and others (Appellants) (Cayman Islands)* [2022] UKPC 21, the Privy Council ruled on (i) the legal effect of a foreign judgment refusing recognition and enforcement of an arbitral award, (ii) the law applicable to the standard of "due process" in arbitration, and clarified (iii) the approach that courts should take when interpreting the scope of the arbitration clause.

A foreign court judgment refusing recognition and enforcement of an arbitral award may create an issue estoppel if such judgment meets the following requirements: (i) unity of parties, (ii) unity of the subject matter, (iii) the judgment must be given by a court of a foreign country with jurisdiction to give it and (iv) final and conclusive on the merits.

Second, it determined that what constitutes a violation of "due process" must be assessed applying local legal standards, but interpretation of those standards should have regard to international law. This involves identifying basic minimum, fundamental and generally accepted standards which are essential to a fair hearing.

Finally, the Privy Council clarified that any artificial attempt to construe the scope of the arbitration clause narrowly will be resisted. Instead, the arbitration clause should be construed liberally to keep up with the purpose of arbitration to provide "a flexible and effective means of resolving disputes and providing redress".

US Supreme Court

In a decision designed to resolve the conflict of approach between various circuits in the US judicial system, the US Supreme Court decidedly rejected the availability of disclosure relief under 28 USC 1782 to assist private international arbitration.

In *ZF Automotive US, Inc. v. Luxshare, Ltd.*, No. 21-401, the US Supreme Court clarified the meaning of "a foreign or international tribunal" with application to commercial and investment treaty arbitral tribunal. The Court determined that reference in section 1782(a) to "a foreign or international tribunal" must be construed as being a reference to "a governmental or intergovernmental adjudicative body" and does not cover a privately formed adjudicative body. The Court came to such conclusion after reviewing the history of the use and the purpose of section 1782(a) noting that one of the main drivers for introduction of this section was the principle of comity which is of little relevance in international arbitration.

Furthermore, since the scope of disclosure under section 1782 is broader than disclosure regime under the US Federal Arbitration Act which governs the domestic arbitration, its application in foreign arbitration would create imbalance.

Finally, the Court observed that reference to "a foreign or international tribunal" must necessarily carry with it an intent of the nation to entrust such tribunal with governmental authority, and that commercial and investment treaty arbitration tribunals are lacking such authority.

As a result, the US Supreme Court put an end to endless debate and uncertainty surrounding availability of section 1782 relief in international arbitration.

Conclusion

Arbitration law is continuously evolving across both continents. Such important decisions go to strategy at both assistance during, as well as enforcement after, the making of an arbitral award. For full judgments of both cases follow the links below:

https://www.jcpc.uk/cases/docs/jcpc-2020-0086-judgment.pdf

http://www.supremecourt.gov/opinions/21pdf/21-401_2cp3.pdf

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