Paris Court of Appeal Endorses “Adverse Inferences” Principle

On 28 February 2017, the Paris Court of Appeal (the Court of Appeal) rendered an interesting decision endorsing the “adverse inferences” principle provided for under Article 9(5) of the IBA Rules on the Taking of Evidence in International Arbitration (the IBA Rules): “[i]f a Party fails without satisfactory explanation to produce any Document requested in a Request to Produce […] the Arbitral Tribunal may infer that such document would be adverse to the interests of that Party”.

The dispute at hand arose in the context of a share purchase agreement (the SPA) concluded between Dresser-Rand Group Inc. (the Buyer), a U.S. based company, and twelve Spanish companies (the Sellers) for the purchase of all shares in Grupo Guascor SL.

The SPA, however, provided for a price adjustment upon completion of the transaction. Due to a disagreement between the parties on the amount of the price adjustment, the Sellers initiated arbitration proceedings against the Buyer and one of its related companies.
The arbitral tribunal sided with the Sellers and applied Article 9(5) of the IBA Rules in order to draw an adverse inference against the Buyer as regards the fact that it had not disclosed certain audit reports requested by the Sellers.

The Buyer then initiated annulment proceedings before the Court of Appeal against the award arguing essentially that (i) the arbitral tribunal inappropriately relied on the IBA Rules without the prior consultation of the parties; and (ii) that the arbitral tribunal was not entitled to draw an adverse inference as it had never ordered nor asked the Buyer to produce the contested documents.

The Court of Appeal rejected those arguments and found that the IBA Rules were explicitly referred to in a procedural order and, therefore the parties were aware that the IBA Rules could be applied. Since those IBA Rules explicitly provided for the possibility to draw adverse inferences, and the arbitral tribunal had acted within the scope of Article 9(5), there was no breach of due process or the parties’ rights of defence. The Court of Appeal also noted that the arbitral tribunal had mainly reached its decision not on the basis of the contested audit reports but on the basis of exhibits submitted to it. Consequently, the adverse inference principle was relied upon more as a matter of completeness.

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