



## International Litigation & Arbitration

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Arbitration. Jurisdiction. Confirmation of Award. Fifth Circuit holds that domestic arbitration agreement contemplating overseas obligations subject to New York Convention for jurisdiction purposes, and confirms award issued by nine-arbitrator panel constituted in accordance with contractual arbitrator selection process.

*Soaring Wind Energy, LLC v. Catic USA Inc.*, No. 18-11192 (5th Cir. Jan. 7, 2020) [[click for opinion](#)]

Defendant Catic USA Inc. ("Catic USA"), a California corporation with Chinese corporate parentage, contracted with Plaintiff Tang Energy Group, Ltd. ("Tang Energy") and several other entities and individuals to create Plaintiff Soaring Wind Energy, LLC (the "LLC"), a Delaware limited liability company. In the Soaring Wind Agreement (the "Agreement"), each member agreed to engage in the worldwide marketing of wind energy equipment, services, and materials related to wind energy only in and through the LLC and its controlled subsidiaries. Class A members, including Catic USA, agreed that this restriction also applied to their affiliates.

The dispute arose when Plaintiffs learned that Catic USA's Chinese affiliates had invested tens of millions of dollars to develop several wind turbine projects in the United States, and additional projects abroad, in violation of the restrictive provision in the Agreement. The Agreement provided that, after unsuccessful attempts to negotiate, "any controversy, dispute, or claim arising under or related to" the Agreement "shall be submitted to binding arbitration." Tang Energy thus initiated arbitration against Catic USA, Catic USA's non-signatory corporate affiliates, and Paul Thompson, the president and CEO of one of the Chinese affiliates. The four remaining Class A members joined in Tang Energy's demand for arbitration.

The Agreement provided for "each Member that is a party to [the] Dispute" to appoint its own arbitrator. The party nominees would then collectively choose an additional arbitrator, or two additional arbitrators if needed to constitute an odd-numbered panel. Claimants therefore named their five respective arbitrators, and Catic USA and Thompson named their two arbitrators. Catic USA's non-signatory Chinese affiliates refused to participate in the arbitration altogether and did not name arbitrators. The seven party-appointed arbitrators then collectively appointed two more arbitrators in accordance with the Agreement.

Following a five-day hearing, the panel found in favor of Claimants and held Catic USA and its Chinese affiliates jointly and severally liable for \$62.9 million in lost profits owed to the LLC. The panel also

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ordered that Catic USA and Thompson be divested of their equity interests in the LLC, to prevent them from receiving incidental benefit for breaching the duties they owed to the other members and to the LLC itself. After bifurcating the proceedings and staying the case against the non-signatory Chinese entities at Plaintiffs' request, the U.S. District Court for the Northern District of Texas confirmed the award in its entirety against Catic USA.

On appeal, the Fifth Circuit first considered *nostra sponte* the existence of federal subject-matter jurisdiction, whether in the form of diversity jurisdiction or jurisdiction under the New York Convention (the "**Convention**"). Diversity jurisdiction requires complete diversity at the time a complaint is filed, and the citizenship of an LLC for diversity purposes is determined by the citizenship of all of its members. Therefore, California corporation Catic USA's membership in the LLC on the other side of the case destroyed complete diversity, unless the arbitral panel's divestiture of Catic USA's membership interest had immediate effect. The court concluded it did not, as an arbitral award first must be judicially confirmed to effect a change in legal status; thus, the court lacked diversity jurisdiction.

However, the court satisfied itself of jurisdiction on another basis, determining this was an arbitral award "falling under" the Convention. An award arising out of a legal relationship between U.S. citizens falls under the Convention if the "relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states." The inquiry is not into the parties' relationship, but the legal relationship giving rise to the arbitral award (*i.e.*, the Agreement,) and whether it is foreign in nature.

The court explained that it is not enough that Catic USA is a subsidiary of a Chinese corporate umbrella, as the relationship in the Agreement itself must envisage overseas action or involvement. The Agreement in this case created a Delaware company comprised of U.S. citizen-members, with a principal place of business in Texas, and provided for arbitration in Texas applying Delaware substantive law. Yet, the Agreement also specified that a member's affiliate participating in wind farm development projects, other than through the LLC and its controlled subsidiaries, constituted a breach. Catic USA was well aware that the actions of its Chinese affiliates could trigger a breach, and it was precisely these activities that led to the joint and several damages award here. On balance, the court concluded the Agreement bore sufficient relation to China to "fall under" the Convention and confer federal jurisdiction.

Turning to the arbitral award itself, the court applied the requisite deferential standard of review and rejected each of Defendants' arguments for vacatur. First, it was irrelevant whether Catic USA's non-signatory affiliates were subject to arbitration: the Agreement specified the affiliates' actions could trigger a breach by Catic USA, and the panel reasonably concluded there had been such a breach. Second, the panel was not improperly constituted. There was no departure from the arbitrator selection process clearly set forth in the Agreement, which did not contemplate "sides" but appointments by each member involved in a dispute, and the court declined to rewrite the parties' Agreement. The court also rejected Defendants' contention that an arbitral award issued by such a panel would violate protected rights to due process. Finally, the court determined that the arbitral panel did not award speculative and punitive damages in excess of its authority. Lost profits were reasonably calculated by applying an appropriate rate of return and discount rate, and the divestiture of membership interests constituted injunctive or equitable relief that was within the panel's authority to award. Accordingly, the

Fifth Circuit affirmed the district court's judgment confirming the arbitration award.

*Eugenie Rogers of the Dallas office contributed to this summary.*

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