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Fifth Circuit Upholds $62.9M Arbitration Ruling Against Chinese Wind Farm Investor

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In a case that questioned the power of arbitration panels to resolve issues with foreign-owned companies, the U.S. Court of Appeals for the Fifth Circuit Tuesday upheld a $62.9 million arbitration award against a Chinese-owned holding company.

The appellate panel affirmed rulings by the arbitration panel and a federal district court: that the Chinese company had failed to make the $50 million investment it had pledged to make when entering partnership with Soaring Wind Energy, a Dallas-based alternative energy group.

"Soaring Wind has been waiting for years to recover on its arbitration award," said Lewis LeClair of McKool Smith. "We are gratified that the Fifth Circuit acted quickly and decisively. Soaring Wind now looks forward to collection of this significant judgment."

The dispute arose from a 2007 agreement by Chinese-owned Catic USA with Dallas-based Tang Energy Group. The agreement became a partnership known as Soaring Wind Energy LLC, to which Catic pledged $50 million. The partnership was to provide worldwide marketing for equipment used in wind energy generation and to help develop wind energy farms. The parties and their affiliates agreed to promote the wind energy businesses exclusively through Soaring Wind Energy – an agreement at the core of the dispute.

When, after several years, Tang inquired as to why Catic had not yet provided financial support, it was discovered that the Catic's parent, Aviation Industry Corporation of China (AVIC), had invested through one of its other affiliates at least $50 million to develop wind farms – a violation of its agreement with Tang and Soaring Wind. It was also discovered that one of the Class B members of Soaring Wind, Paul Thompson, was president and CEO of a company that apparently received some of the millions from an AVIC affiliate.

The agreement outlined a binding arbitration procedure to resolve such disputes that allowed each disputing "member" of the agreement to name its own arbitrator. Though Catic and Thompson named an arbitrator, the Chinese-owned AVIC entities named in the dispute refused to participate.

After a five-day hearing, the arbitration panel ruled that Catic and its Chinese affiliates had violated the agreement. The panel awarded $62.9 million to the Soaring Wind partners holding each of the AVIC affiliates, including Catic, jointly and severally liable. Moreover, the panel ordered Catic and its affiliates to divest an estimated 15% interest in Soaring Wind without compensation.

Catic and the Chinese affiliates appealed to a U.S. federal court in Dallas where District Judge Ed Kinkeade confirmed the arbitration ruling.

In their decision Tuesday, the Fifth Circuit panel dismissed three arguments by the Chinese-owned firms: 1. That the district court should have reviewed the power of the arbitrators over Catic and its Chinese-owned affiliates; 2. The arbitration panel was illegally constituted; and 3. That the panel's order to divest AVIC's partnership interest without remuneration was a "punitive" award not allowed in arbitration.

In his opinion Judge Jerry E. Smith dismissed the first complaint summarily. The panel found that Catic and its Chinese affiliates bound by the arbitration, then drew an adverse inference from their refusal to participate. Moreover, he said, they were parties to the agreement they later violated.

"Catic USA made its proverbial bed; therein it must lie," wrote Smith.

On the makeup of the panel, Catic had ordered that the structure was imbalanced. It was, wrote Smith. But it was structured exactly the way it was supposed to be under the agreement.

"Suppose Eris had tossed the Apple of Discord into a Soaring Wind conference

room, prompting a free-for-all among the parties," Smith opined, "—the arbiter selection process would have remained the same."

Finally, Smith agreed that the divestiture-without-remuneration requirement was, from one viewpoint, punitive in nature. A speculative and punitive award would be a violation of the terms of the agreement and might well require the award to be vacated.

Catic USA did not contest that its anticipated rate of return would have been 15%, but argued that the venture's potential profitability was pure speculation and that the award by the panel was both speculative in value and punitive in nature.

But while the panel could not award punitive damages, it was authorized to order equitable damages, Smith wrote. And that, he said, is just what they did.

"The panel divested Catic USA and Thompson of their interest in Soaring Wind to prevent them from receiving incidental benefit for breaching their duties, duties owed not only to the other members of the LLC but also to the LLC itself," Smith wrote.

Richard Salgado of Dentons in Dallas argued the case for Catic and several AVIC subsidiaries in tandem with Cedric Chao, a solo arbitration and appellate specialist based in San Francisco.