

5th Circ. Enforces \$63M Award Over Soured Wind Energy JV

By **Caroline Simson**

Law360 (January 7, 2020, 7:51 PM EST) -- The Fifth Circuit on Tuesday affirmed a ruling enforcing a \$62.9 million arbitral award against the American arm of China's state-run aerospace corporation, rejecting arguments that the arbitration had been unfairly manipulated by other investors in a failed wind energy joint venture.

The award in question was issued to the aggrieved investors of Soaring Wind Energy LLC after a tribunal determined that Catic USA Inc. had breached an exclusivity provision in the parties' agreement by pursuing wind power projects outside of the JV.

Catic USA, which has corporate ties to the company that operates China's state-run aviation industry, had argued in the appeal that the underlying arbitral tribunal that ruled in favor of the other investors was "lopsided" since the other investors had appointed five arbitrators, while its "side" had only been able to appoint two. Two other arbitrators were also later appointed over Catic USA's objections.

Catic USA claimed that upholding this arbitrator selection process would lead to "absurd results," since, under those rules, a group of minority shareholders could unite together to eject a majority shareholder controlling 90% of the company.

But any risk of that happening was within the plain terms of the agreement signed by the parties when they formed Soaring Wind, the Fifth Circuit concluded on Tuesday, noting that the agreement allows each Soaring Wind investor to appoint their own arbitrators in disputes without regard for whose "side" those investors are on.

"Catic USA urges this court not to choose from among competing, reasonable interpretations but to discard the plain text of the agreement out of so-called fairness," the three-judge panel held, noting that it's not up to courts to rewrite contracts between sophisticated parties out of a sense of equity or fairness. "One must assume that Catic USA did not expect to be outnumbered in any dispute falling under the agreement; that its expectations were frustrated does not render the agreement absurd or unfair."

The panel likewise rejected Catic USA's argument that the tribunal had exceeded its authority by ordering it to divest its interest in Soaring Wind. Catic argued the order effectively amounted to punitive damages, which were barred under the parties' agreement.

But in fact, the tribunal's divestment order was permissible under the contract since it was aimed at preventing Catic from receiving any further incidental benefits through the JV, the Fifth Circuit found.

"Unlike punitive damages, which are based on a perceived reprehensibility of the breaching party's actions or flow from a desire to make examples of them ... the divestment operates to achieve what the panel considered a fair result," according to the decision.

Catic USA, also known as AVIC International USA, is a subsidiary of AVIC International Holding Co., which is itself a subsidiary of Aviation Industry Corp. of China Group Co. The arbitrators determined that AVIC, which operates China's state-run aviation industry, is an extension of the Chinese Communist party, according to court records.

Counsel for Soaring Wind praised the Fifth Circuit's decision on Tuesday.

"Soaring Wind has been waiting for years to recover on its arbitration award," said McKool Smith PC principal Lewis T. LeClair. "We are gratified that the 5th Circuit acted quickly and decisively. Soaring Wind now looks forward to collection of this significant judgment from AVIC USA."

A representative of Tang Energy Group Ltd., one of Soaring Wind's investors, said the ruling is an important step toward enforcement.

"Controlled by the Communist Party of China, the Aviation Industry Corporation of China will continue to spend vast sums to prolong collection; we must persist," said Tang Energy Group CEO E. Patrick Jenevein III.

AVIC and an entity called China Aviation Industry General Aircraft Co. Ltd., neither of which signed the underlying arbitration agreement, are represented in the litigation by Cedric Chao of Chao ADR PC. Chao noted on Tuesday that his clients have consistently raised two issues of "paramount" concern in the litigation: whether non-signatories to an arbitration agreement are entitled to an independent court determination on whether they're subject to arbitration, and whether a "lopsided" arbitral panel violates a party's due process rights.

"We will study the opinion and make recommendations regarding next steps to the clients," he said. "These two issues have implications far beyond this case, and go to respect for the institution of arbitration as a fair alternative to court litigation."

Soaring Wind was created by Tang Energy Group and Catic USA in 2007 as a vehicle for wind-energy marketing and project development. The dispute arose several years later, after Tang Energy and other Soaring Wind investors accused Catic USA of breaching the agreement by failing to provide any financial support to Soaring Wind.

The underlying arbitration was initiated by Tang on behalf of it and other Soaring Wind members with the American Arbitration Association's International Centre for Dispute Resolution in Dallas in June 2014.

Catic USA and the CEO of AVIC International Renewable Energy Corp. subsidiary Ascendant Renewable Energy Corp., Paul Thompson, subsequently sued the Soaring Wind investors, asking the court to declare that the tribunal in the arbitration had been improperly constituted. The suit was later tossed for lack of jurisdiction under federal arbitration law.

The tribunal in the award ordered Catic and its Chinese affiliates to pay \$62.9 million in lost profits to Soaring Wind's other investors, along with about \$8.6 million in fees and costs, and Catic was ordered to divest its interest in Soaring Wind.

The tribunal concluded that Catic and several Chinese affiliates, which had not signed the JV agreement, were all liable since they operated as one entity. Moreover, the tribunal found that the related AVIC entities had been created so that the companies could try to evade the promises Catic made in the Soaring Wind deal.

In the underlying enforcement proceeding, a Texas federal court has stayed enforcement of the award against the Chinese entities for the time being.

Circuit Judges W. Eugene Davis, Jerry Edwin Smith and Gregg Costa sat on the panel for the Fifth Circuit.

Soaring Wind and Tang are represented by Lewis T. LeClair and Charles E. Fowler Jr. of McKool Smith PC. Investor the Nolan Group Inc. is represented by Deborah Michelle Perry of Munsch Hardt Kopf & Harr PC. Investor Jan Family Interests Ltd. is represented by John T. Cox III of Lynn Pinker Cox & Hurst LLP. Investor Mitchell W. Carter is represented by Kristin A. Regel and David T. Denney of the Law Offices of David T. Denney PC. Mary Young, the wife of deceased investor Keith P. Young, is represented by Jeffrey S. Lowenstein of Bell Nunnally & Martin LLP.

AVIC International Holding Corp. and AVIC International USA Inc. are represented by Richard Salgado, Matthew W. Jaynes and Peter J. Anthony of Dentons US LLP. AVIC International Renewable Energy Corp. is represented by Gregory Richardson Ave of Walters Balido & Crain LLP. AVIC of China and China Aviation Industry General Aircraft Co. Ltd. are represented by Cedric C. Chao of Chao ADR PC and Isabelle Louise Ord and Mauricio Gonzalez of DLA Piper.

The case is Soaring Wind Energy LLC et al. v. Catic USA Inc. et al., case number 18-11192, in the U.S. Court of Appeals for the Fifth Circuit.

--Editing by Kelly Duncan.