Russian Arbitration Center

at the Russian Institute of Modern Arbitration

ARBITRATION DIGEST APRIL 2023

CASE LAW DEVELOPMENTS

Arbitrators Cannot Interfere with Annulment of Their Award in State Courts

In Belgium, the arbitral tribunal requested the Supreme Court to overturn the lower court's judgment setting aside an interim arbitral award. The Court found that the tribunal had no legal remedy against setting aside the award. Having resolved the dispute, in the Court's view, the tribunal lost the right to re-examine the award and should refrain from participating in any discussions about setting it aside.

The Supreme Court drew an analogy with state courts, where a lower court's judge is not allowed to participate in proceedings of a higher court when his or her judgment is challenged. The only difference is that the judge could not generally be held liable for his or her judgment. However, arbitrators may be held personally liable for errors committed during arbitration (although on limited grounds). Under Belgian law, the annulment decision itself is not subject to *de novo* appeal, but judgments on the arbitrators' liability – are. Therefore, in liability proceedings, an arbitrator can overcome the presumption that his or her award should be set aside, which, in turn, does not affect the finality of a state court's annulment decision.

Read

The Singapore Court Ordered to Refer Dispute to Mediator before Arbitration

The Singapore High Court ordered the specific performance of the obligation to resolve a dispute in mediation contained in a multi-tier dispute resolution clause. Therefore, the Court ordered a party to initiate mediation despite that (i) arbitration had already commenced (and had not been stayed) and (ii) the clause did not expressly state that recourse to mediation was a condition precedent to the parties' exercise of their right to refer the dispute to arbitration. The Court rejected respondent's argument that once arbitration had commenced recourse to mediation would be futile because the parties had not presented evidence to the contrary. It is the first judgment of a Singapore court requiring a party to commence mediation under a dispute resolution clause.

Read

Could an Arbitral Institution Be Held Liable for the Arbitrators' Award? Approach of the French Court

The French Court of Cassation rejected a party's request to hold an arbitral institution liable for alleged procedural violations of the tribunal. The Court stressed that a distinction should be drawn between the jurisdictional functions of the tribunal on the one hand, and the administrative functions of the arbitral institution on the other hand. Therefore, the Court made it clear that no attempt should be made to confuse liability-incurring acts of arbitrators and arbitral institutions.

Under French law, almost all grounds for annulment relate in some way to the tribunal's procedural or substantive acts in the course of the proceedings. However, one of the parties attempted not to set aside the award but to hold the arbitral institution liable in civil proceedings. The claimant insisted that the tribunal violated the fundamental procedural principles by denying its request for submission of additional briefs, bifurcation, and deciding not to hold hearings.

The lower courts held that under the arbitration rules, the tribunal should always act fairly and impartially and ensure that each party has a reasonable opportunity to present its case. According to the courts, it is important that the tribunal itself and not the arbitral institution is bound by these provisions. A party challenged these judgments, arguing that since the parties' choice of arbitral institution led to incorporation of the arbitration rules into the contract, the arbitral institution should be held liable for failure to enforce its rules.

The French Court of Cassation rejected the party's appeal and emphasized that it follows from the nature of arbitration that a distinction should be made between the jurisdictional function of the arbitral tribunal and the administrative function of the arbitral institution. Therefore, while an arbitral institution (much the same as a tribunal) may be liable if it violates the principle of fair trial, it is only responsible for violations personally committed in organizing the proceedings.

Read

New Arbitration Proceedings Commenced due to Refusal to Build a Nuclear Power Plant in Finland

JSC Atomenergoprom reported in its financial statements that the Finnish company Fennovoima Oy sued the company and its subsidiaries for EUR 1,7 billion requesting repayment of advance with respect to termination of the contract for construction of the Hanhikivi 1 nuclear power plant at the Fennovoima Oy's initiative.

In turn, Atomenergoprom filed counterclaims against Fennovoima Oy for repayment of the loan for the plant's construction for EUR 920,5 million and compensation for the stake in Fennovoima Oy lost due to termination of the shareholder's agreement by the Finnish contractor. The counterclaims amount to EUR 3 billion in total.

According to the financial statements, the claims are heard in international arbitration. However, there are no details as to the specific dispute resolution forum and whether the claims are resolved in different processes or in one.

Earlier, another subsidiary of Rosatom that had also participated in the Hanhikivi 1 construction project achieved some success in a dispute with Fennovoima Oy over the termination of the construction contract. In December 2022, the adjudicators (Dispute Review Board assisted by the ICC) ruled at the request of RAOS Project Oy that termination of the construction contract and refusal to accept the completed works was unlawful.

Read

Kazakhstan Is Going to Collect Tax Arrears in Arbitration

The Kazakh company PSA sued operators of the Kashagan and Karachaganak oil fields for more than 16 billion USD. The claimant was authorized to represent interests of the Republic of Kazakhstan under production sharing agreements.

According to the Kazakh authorities represented by the claimant, the operators unreasonably deducted from the taxable base USD 13 billion in the Kashagan field and USD 3,5 billion in the Karachaganak field. Meanwhile, the claimant alleged that the violations had been taking place for a long period from 2010 to 2019. The claimant further alleged that the operators neither complied with tender procedures nor fully performed work on one of the fields. The claims are being heard in two separate proceedings.

Read

Thrown to the Winds: European Companies Argued about the Right to Terminate Contracts due to Sanctions Against Russia

Finnish energy company Fortum commenced arbitration against Vestas, a Danish manufacturer of wind energy equipment. The respondent had been Fortum's technology partner for a long time, supplying equipment for the claimant's wind energy projects.

However, after the sanctions, Vestas announced its withdrawal from Russia and stopped supplying and servicing equipment for Fortum's subsidiary in Russia. Vestas terminated the supply contract based on a clause giving each party the right to terminate the contract if international sanctions affected ability to perform the contract.

Nevertheless, the Finnish company deemed such termination unfounded and sought to recover EUR 200 million claim in arbitration. Vestas CEO Henrik Andersen told he was "surprised and concerned" that Fortum, which is a Finnish state-owned company, was, in fact, questioning the validity of the sanctions through its actions.

Read

The Russian Commercial Court Prohibited Siemens from Initiating Proceedings against Russian Railways

The German conglomerate Siemens and JSC Russian Railways entered into a contract for the maintenance and repair of the railroads hump yard at Luzhskaya station in the Leningrad region. Russian Railways applied to the Commercial Court of City of Moscow under Article 248.1 of the Russian Commercial Procedure Code for an injunction to initiate legal proceedings in the Higher Regional Court of Berlin and in other foreign courts and arbitrations, international commercial arbitrations for all disputes arising from this contract.

The Court held that prejudicial circumstances established earlier in another case with the same parties should be taken into account in adjudicating the dispute. In case No. A40-98865/2022, the court prohibited

Siemens to initiate proceedings at the International Arbitral Centre of the Austrian Federal Economic Chamber in Vienna.

In that case, in April 2022, Siemens notified Russian Railways of the unilateral termination of the contract based on the need to comply with the EU restrictive measures (sanctions) against Russia since the economic sanctions were introduced against Russian Railways, according to the EU Council Decision of 25 February 2022 No. 2022/327. The Court noted that in the context of unfriendly actions of EU member states it is not possible to protect the rights and economic interests of Russian Railways in the International Arbitral Centre of the Austrian Chamber of Economy in Vienna.

Therefore, the Court partially granted the application of Russian Railways. Siemens was prohibited from initiating legal proceedings against Russian Railways at the Higher Regional Court of Berlin, because "...the imposition of restrictive measures in itself has already created obstacles in access to justice for the Russian party, so its unilateral declaration of will expressed in procedural form is sufficient to transfer the dispute to the jurisdiction of Russian commercial courts." However, the Court refused to grant the injunction to initiate proceedings in other foreign courts and arbitrations, including international commercial arbitrations absent evidence that the dispute is considered in other forums.

Read

Returned to the Sender: the Cassation Court Specified When Respondent is Duly Notified

The company applied to the Saint Petersburg and the Leningrad Region Commercial Court for the recognition and enforcement of award rendered under the rules of the Baltic International Arbitration Court (Latvia) against Russian individual entrepreneur.

The court of the first instance refused the application since the case file did not contain signed slip that respondent had received documents of arbitration. The court further pointed out that the postal code in the tracking report did not correspond to the respondent's address.

The company filed a cassation appeal to the Commercial Court of the North-West District arguing that a tracking letter's printout from the Russian Post website recorded that respondent had received a postal slip of arbitration, which was sufficient evidence of handing the slip over to the respondent. Moreover, according to the response of the Saint Petersburg Federal Postal Service, the mail was, in fact, delivered to the respondent.

The cassation court assessed that the EMS items enjoyed a special procedure for their receipt, processing, transportation, and delivery of domestic and international mail, which differed from the procedure for ordinary mail. As a result, the court concluded that the arbitral institution had sent a notice of the proceedings to the respondent by EMS to the address specified in the arbitration agreement as well as known to the arbitral institution and the company, as confirmed by a receipt for the mail and a printout from the Russian Post website. Therefore, the Commercial Court of the North-West District set aside judgment of the court of the first instance ordering the case be remanded for a new trial.

Read

The Pandemic Is Still Relevant: Canadian Court Refused to Enforce a Chinese Award Because of Improper Notice to Respondents

The dispute arose out of a USD 62 million loan agreement between a Chinese company TDH and Pacific Link Group, as well as individuals, including Canadian citizens, among whom was Pacific Link founder Sha Du (*Tianjin Dinghui Hongjun Equity Investment Partnership (Limited Partnership) v. Du et al.*). The parties' agreements were governed by Chinese law and provided for arbitration before the Shenzhen Court of International Arbitration (SCIA).

In 2020, the Chinese company initiated proceedings in the SCIA against several respondents for payment of the loan. In August 2021, TDH's claims were awarded in full. However, the Canadian citizens who were specified as respondents and held jointly and severally liable for TDH's payment of the loan plus interest did not participate in the arbitration. They later unsuccessfully attempted to set aside the award in Chinese courts. The courts pointed out that the documents in the arbitration had been properly exchanged in accordance with SCIA rules and Chinese law.

TDH applied to a Canadian court to enforce the award. The Ontario Superior Court dismissed the application and found the respondents' arguments justified. During the proceedings, the respondents stated that they could not leave Canada or receive correspondence that came to their Beijing office address because of the COVID-19 pandemic. They also stated that the Chinese law firm Guantao Law Firm was not appointed to represent them in the arbitration.

Referring to the UNCITRAL Model Law, the Canadian court stated that the respondents were not properly notified of the arbitration because notice must be "reasonably aimed to inform the party of the arbitration and give it an opportunity to respond." The court also examined the notice provisions in the contract and stated that the claimant had not used the means of mailing provided in the loan agreements that required acknowledgment by the recipient. The judge also pointed out that respondents had informed TDH of their location in Canada and the travel restrictions in force but claimant, in turn, had not notified SCIA.

The Canadian court also commented on the judgment of the Chinese court noting that the latter did not resolve the issue of whether the respondent's notice was indeed "proper," and thus the judgment had no *res judicata* effect.

Read

The Seat of Arbitration Can Be Changed: ADGM Courts Found Jurisdiction to Hear the Application to Set Aside the Award

In proceedings before the Abu Dhabi Global Market (ADGM) Courts, Judge William Stone found jurisdiction to consider the application to set aside an ICC award referring primarily to the parties' written recognition of the court's jurisdiction.

The dispute arose out of a subcontract containing an ICC dispute resolution clause with Abu Dhabi (UAE) as the seat of arbitration. In 2019, arbitration over the subcontractor's claim had been commenced and the

award rendered three years later. The arbitrators dismissed most of the claims awarding the claimant only USD 2,1 million of the USD 31 million.

Unhappy with the award, the subcontractor decided to apply to the Abu Dhabi Court of Appeal for annulment. However, the Court refused to hear the application. In the Court's view, the jurisdiction was exclusive to the ADGM (Abu Dhabi Global Market) Courts since it was the location of the ICC branch that had administered the arbitration. The cassation court upheld this conclusion. The judgment surprised the parties since the arbitration clause referred to Abu Dhabi (UAE) and not to the Free Economic Zone. According to the cassation court, the seat of arbitration chosen by the parties in the clause was "moved" from Abu Dhabi to the ADGM Free Economic Zone as soon as ICC opened its office there.

Following this judgment, the subcontractor applied to the ADGM court. The contractor agreed to the ADGM's jurisdiction stating that "the special circumstances of the case created a unique exception that allowed the ADGM court to be competent to consider an application to set aside the award rendered in onshore Abu Dhabi."

Read

Good Game Well-Played: South Korean Video Game Developer Gets USD 150 million by an ICC Award on Licensing Rights to Popular Online Game

South Korean video game developer WeMade announced that it had been awarded USD 150 million in an ICC dispute with Korean company Actoz and Chinese companies Shanda and Lansha over the licensing rights to the online game The Legend of MIR 2.

In 2017, WeMade resorted to arbitration after a conflict with partners over game rights. In 2020, arbitrators issued an award finding that the license agreement had expired and the respondents no longer had the right to sublicense the game.

During the arbitration, the claimant reduced its claim from USD 2,16 billion to USD 610 million. According to the ICC final award, WeMade will receive USD 150 million plus interest of USD 65,6 million. The South Korean company has already announced that it intends to seek enforcement of the award in China and Korea.

One of the respondents, Actoz, in turn, resists the award in every way and is trying to challenge it in the Singapore High Court and the Seoul District Court. Actoz argues that the tribunal has no jurisdiction due to the 2017 extension agreement that contains a Shanghai International Arbitration Center arbitration clause.

Read

On How the Paris Court of Appeal Did Not Get Rid of the Tax Chains

The Paris Court of Appeal refused to set aside the ICC awards in *Jan de Nul & Credendo v. Port Autonome de Douala (PAD).* In 2008, PAD entered into a contract with Jan de Nul to perform dredging works within the channel providing access to the port of Douala. Between 2009 and 2014, PAD had been paying Jan de Nul's invoices but subsequently began withholding the remaining payments. PAD argued that it was entitled to a refund of the 15% special revenue tax levied by Cameroonian authorities since 2010 that PAD had originally reimbursed Jan de Nul. According to PAD, Jan de Nul was always solely responsible for paying the tax, despite contractual provisions to the contrary.

Upholding jurisdiction in a separate award, the ICC tribunal issued a final award against PAD ordering it to pay more than EUR 8 million to the claimants. PAD sought to set aside the award on jurisdiction arguing that the reference to the Chamber of International Commerce (instead of the International Chamber of Commerce) rendered the clause pathological and invalid or, at best, signified that *ad hoc* arbitration was intended, and that the dispute that, according to the port, was based on tax obligations, was non-arbitrable. Noting a *"drafting blunder"* in the Chamber's name that should not infringe upon the parties' *"manifest intent"* to arbitrate and agreeing that tax-related issues were non-arbitrable, the Court found that the dispute related to who should bear the tax in view of the applicable contractual framework, and was arbitrable.

Challenging the final award, the PAD argued that by disregarding Cameroonian taxation principles, the Court violated international public policy. The Court disagreed since the award could not violate France's international public policy absent any evidence of fraud or corruption. Moreover, the Court pointed out that it saw no evidence that the allocation of the tax burden under the contract was illegal under Cameroonian law.

Read

An Asymmetrical Arbitration Clause Given the Green Light in China

In 2015, China Development Bank (CDB) and (Cambodia) Fiber Optic Communication Network Co., Ltd. (Cambodia Network) entered into a pledge agreement that contained an arbitration clause providing for disputes to be resolved in CIETAC arbitration, unless CDB decides otherwise – the latter was vested with the right to refer disputes to the non-exclusive jurisdiction of the Cambodian courts. After the parties' relationship soured, in 2021, CDB commenced arbitration in CIETAC and Cambodia Network applied to the Beijing Financial Court in early 2022 to invalidate the clause ((2022) *Jing 74 Min Te No. 4*).

To justify the invalidity of the clause, Cambodia Network argued that it was "either arbitration or litigation" clause prohibited under Article 7 of the Interpretation of the Supreme People's Court on Certain Issues relating to Application of the Arbitration Law of the PRC. The applicant also argued that the clause was "manifestly unfair" and standard for a bank, because the CDB, unlike the CDB Network, could choose the dispute resolution forum.

However, the Court upheld validity and legality of the clause:

- The clause was negotiated by the parties in commercial negotiation process and was an expression of the party autonomy. Once CDB submitted the dispute to CIETAC and waived its right to bring proceedings before a competent court, the bank expressly agreed to refer the dispute exclusively to arbitration. Thus, this provision was not an "either arbitration or litigation" clause and did not cause the legal uncertainty – the reason why it is prohibited in the above Interpretation (because when each party refers a dispute to a different forum in the absence of any agreement, including clear and unambiguous consent to arbitration, it is unclear which of the competing forums should take precedence). Moreover, the clause was rather asymmetrical in nature, which was not contrary to Chinese law;

- Cambodia Network did not prove that the text of the clause was manifestly unfair and standard. Cambodia Network submitted the initial draft of the contract containing the asymmetrical arbitration clause, and then both parties, advised by professional lawyers, amended the clause during the negotiations.

Therefore, the Beijing Financial Court upheld the validity of the asymmetrical arbitration clause since it did not contravene to the PRC law.

Read

A Ticket to Court and Arbitration

The Ontario Supreme Court examined the equitable principles governing the enforcement of a foreign award in a dispute between US corporations Costco Wholesale Corporation and TicketOps Corporation (*Costco Wholesale Corporation v. TicketOps Corporation*, 2023 ONSC 573).

In 2018, Costco and TicketOps entered into a Master Tickets and Program Agreement. Under the Agreement, TicketOps provided digital services to Costco for Costco's e-ticket or voucher program, and the latter, in turn, sold e-tickets to customers through its online platform. According to the scheme, after a Costco customer purchased a ticket to an event of a third-party vendor advertised on Costco.ca, TicketOps issued the ticket to that customer. TicketOps, accordingly, had to pay the third-party vendors of those tickets to book them for the Costco customers. Costco paid TicketOps every 25 days for the tickers distributed through its website. However, during the COVID-19 pandemic, even though Costco continued to pay TicketOps, the latter stopped paying its vendors for tickets. Costco then sought recovery of the monies that TicketOps received as Costco's purported agent, and after TicketOps refused, Costco initiated arbitration before International Centre for Dispute Resolution at the American Arbitration Association. Third-party vendors did not stand aside and filed numerous lawsuits in the United States. Costco Canada had also taken assignments of numerous of the third-party vendors' claims against TicketOps in Canada making Costco Canada a party to the Canadian litigation both on its own behalf and as assignee of various claims of the third-party vendors.

The arbitrator appointed to resolve the present dispute disclosed prior to his appointment that when he was in-house counsel 20 years ago the current Costco counsel acted as his primary external counsel but all of his interactions with this counsel's firm have been limited since then. The arbitrator was nevertheless appointed.

TicketOps subsequently attempted to lift the "unconscionable" two-day hearing limit provided in the arbitration clause. However, the arbitrator denied the application because, in his view, short hearings reduced the parties' costs and were not unusual for arbitration or unconscionable in the that case.

As a result, the arbitrator issued three final awards in favor of Costco, two of which were partial awards and the third was a final one. In the first award, the arbitrator held that an agency relationship existed between the parties, under which TicketOps was required to pay suppliers all monies advanced to Costco. However, the arbitration neither addressed any issues of liability between Costco and the third-party vendors, nor were any of those third-party vendors a party to the arbitration. Then, in a second award, the arbitrator ordered Costco to reduce the amount of any recovery from TicketOps by any sums recovered by Costco Canada in litigation over the third-party vendors' claims, although the arbitrator noted that he had no jurisdiction to decide the issue of any liability of TicketOps to Costco Canada.

TicketOps filed an application to set aside the award in the District Court of Washington in Seattle since the arbitrator had exceeded his authority or made a manifest legal error by finding that TicketOps was acting as Costco's agent. Secondly, it sought annulment because of the risk of double recovery from TicketOps in Canada and since the final award was contrary to public policy. However, the US District Court ended up refusing the TicketOps' application and granted Costco's petition for recognition of the awards. Six months later, TicketOps discovered that the arbitrator and Costco's counsel were friends on a popular foreign social network and filed an appeal that was also rejected.

At that time, Costco requested the Ontario court to enforce the awards. In its defence, TicketOps argued that it was denied natural justice because the arbitration clause provided for a simplified two-day hearing, third-party vendors did not participate in proceedings, TicketOps was denied a request for witness testimony, and the friendship of the arbitrator and Costco's representative in social media raised reasonable apprehension of bias.

Having assessed the parties' arguments, the superior court ruled that none of the grounds raised by TicketOps, taken both individually or as whole, were "sufficiently serious to offend our most basic notions of morality or justice" or so serious that they could not be justified under Ontario law. Moreover, TicketOps had the right to present the testimony of nine witnesses in the preliminary stages of the arbitration, and only a tenth witness was denied to the company. Regarding the arbitrator's friendship, the court found that a reasonable person in today's world would place little or no weight on the fact that two people are friends on social media, echoing the finding in DeMaria v. Law Society of Saskatchewan. Regarding alleged violation of public policy, the court pointed out that TicketOps agreed to a two-day hearing period and had ample opportunity to investigate and introduce evidence and arguments to sufficiently present its case. Therefore, there was no violation of natural justice in enforcing the awards.

Read

Where the Money Are or a Malaysian Approach to Enforceability of the Arbitration Clause If Arbitration Fee Was Not Paid

It is no secret that payment of the arbitration fee in full, including the administrative and arbitrator's fees, or at least the payment of the deposit of costs, is a prerequisite for arbitration administered by any arbitral institution. However, in *JKP Sdn Bhd v Anas Construction Sdn Bhd [2023] 2 AMR 443 (HC); [2022] MLJU 3058 (HC),* the parties reached the Malaysian High Court to make sure on their own example that failure to pay the arbitration fee could not be used to invalidate an arbitration clause.

JKP (the plaintiff) entered into a contract with Anas Construction (the defendant), under which the latter was the main contractor for the construction of a building in Penang. The dispute arose after Anas Construction had failed to supply goods required under the contractual specifications. JKP then

commenced arbitration under the 2018 AIAC Arbitration Rules, after which filed a civil suit against Anas Construction. The latter, in turn, filed a counterclaim with the court arguing that (1) the claim be dismissed or, alternatively, (2) the claim be stayed pending resolution of the dispute in arbitration. However, the defendant refused to pay the second part of the arbitrator's fee and deposit.

The arbitrator gave plaintiff a choice: either to pay the defendant's part of the fees itself or terminate part of the arbitration proceedings, namely the defendant's counterclaim and the third-party claim. However, the plaintiff decided to go all-in and terminate the arbitration altogether. In the civil proceedings, the plaintiff stated, firstly, that the arbitration agreement was no longer operative because the defendant refused to pay its part of the fees and, secondly, that by filing a striking out application, the defendant affirmed the court's jurisdiction.

However, the High Court rejected plaintiff's arguments and stayed the civil suit pending termination of the arbitration:

- Neither Malaysian procedural law nor the AIAC Arbitration Rules provide that failure to pay fees renders the arbitration agreement inoperative;

- A different interpretation could lead to a situation where the parties are able to easily circumvent the arbitration agreement by refusing to pay their portion of the fees;

- The defendant's striking out application does not constitute taking a step in litigation in the procedural sense unless it constitutes an unequivocal agreement of the defendant to the matter being determined by the court (and, therefore, a waiver of the arbitration agreement).

Read

INVESTMENT ARBITRATION NEWS

Spanish Immunity Failed to Resist Enforcement of Award by Australian Court

The Australian High Court confirmed that Spain could not invoke sovereign immunity and the European Court of Justice's ban on intra-EU investment arbitration to avoid recognition and enforcement of the EUR 101 million ICSID award. In the Court's view, Spain's entry into the 1965 Washington Convention amounted to a waiver of foreign State immunity with respect to the jurisdiction of Australian courts to recognize and enforce the ICSID award (*Infrastructure Services Luxembourg S. à.r.l. and Energia Termosolar B.V. (formerly Antin Infrastructure Services Luxembourg S.à.r.l. and Antin Energia Termosolar B.V.) v. Kingdom of Spain,* ICSID Case No. ARB/13/31, Order of the High Court of Australia [2023] HCA 11, 12 April 2023).

After the investors applied to the Australian courts for enforcement of the award, Spain argued that it enjoyed immunity under the Australian Foreign State Immunities Act 1985, under which foreign States are immune from jurisdiction of the national courts unless they submitted to the jurisdiction *"by agreement"*, including by treaty.

Spain believed that, under Articles 53–55 of the English text of the Convention, States must *"recognize"* ICSID awards as binding and *"enforce"* them as if they were final judgments of their own courts, which is not to be construed as derogating from the national law in force relating to the State's immunity. However, Spain argued that the Spanish and French texts of the Convention did not distinguish between enforcement and execution-related acts, therefore a State was immune from enforcement.

Despite Spain's argument that, under international law, its waiver of immunity under the 1985 Act should be express and not implied, the High Court stated that this principle did not preclude the possibility that a waiver of immunity could be subject to consequences arising from the text of the treaty in light of its purpose. The Court found that the terms *"recognition," enforcement"* and *"for this purpose"* in Articles 53–55 of the Convention had different meanings and that Spain's arguments would require a *"distorted interpretation"* of the Convention demanding a separate consent to waive immunity before an award could be enforced against the State. In rejecting Spain's not fully substantiated argument on the prohibition of intra-EU investment arbitration, the Court pointed out that Spain's entry into the Convention included its consent to *"the consequences of the award."*

Read

Dutch Courts Will Not Set Aside Awards for Tribunal's Lack of Jurisdiction

The Dutch Supreme Court upheld a lower court's judgment that had refused to set aside the 2019 award in *Manuel Garcia Armas et al. v. Venezuela,* and confirmed that awards on lack of jurisdiction due to the absence of an arbitration agreement could not be set aside under Dutch law. According to the award, the UNCITRAL tribunal did not found jurisdiction over the dispute because the claimants had dual Spanish and Venezuelan nationalities, whereas the Spain-Venezuela BIT prohibited claims of dual nationals.

The claimants applied to the court at the seat of arbitration to set aside the award. However, the Hague Court of Appeal stated that the ground, such as the absence of a valid arbitration agreement contained in Article 1065(1)(a) of the Dutch Code of Civil Procedure (DCCP), was not applicable to setting aside awards on lack of jurisdiction – it could only be applied to awards, where tribunal found its jurisdiction.

The Supreme Court sided with the Hague Court of Appeal and relied on Article 1052(5) of the DCCP, under which if the arbitral tribunal has no jurisdiction due to the lack of a valid arbitration agreement, the dispute should be referred to a state court.

Read

Claim against Albania Over the Port Concession

The German company EMS Shipping and Trading (EMS) sued Albania in ICSID for unilateral breach of the concession agreement for the operation of the terminal in the port of Durres (Albania) (*EMS Shipping & Trading GmbH v. Republic of Albania,* ICSID Case No. ARB/23/9).

Since 2013, EMS has owned the right to operate the East Terminal of the port of Durres for loading and unloading ships. However, according to the current plans for port's development, the company should move to a new port in Porto Romano that is not built yet.

According to EMS, the port's territory will be transferred to the Arab company within this year. It will automatically terminate operations at the port and, therefore, terminate the concession, although there are 25 years left of the 35-year concession agreement.

Read

ARBITRATION NEWS

SIAC Checklist for Drafting Awards

The Singapore International Arbitration Centre (SIAC) has made a checklist to assist arbitrators in drafting awards in SIAC-administered arbitrations and subsequently to facilitate the approval of the award by the SIAC Registrar. Since 31 March 2023, arbitrators shall provide the completed checklist to the Secretariat when submitting the draft award for scrutiny.

Read

DIAC Launched Virtual Reality Space for Dispute Resolution in the Metaverse

The Dubai International Arbitration Centre (DIAC) announced the launch of its Metaverse for dispute resolution, a close-to-reality space where parties can participate in proceedings from anywhere in the world. It is said that this will reduce the cost of attending hearings in person, ensure that arbitration is environmentally friendly, and allow parties to participate in hearings online in a close-to-reality (albeit virtual) environment.

Read

SCC Published a Paper with Analysis of Its Decisions on *Prima Facie* Jurisdiction to Administer the Disputes

The Arbitration Institute of the Stockholm Chamber of Commerce (SCC) has published a paper that analyzes case law where the SCC was required to make a preliminary determination of whether it had jurisdiction to administer a dispute. The paper (i) analyzes how the 2023 Rules address the SCC's power to determine its jurisdiction to administer a dispute, (ii) discusses the standard employed by the SCC to address this issue, (iii) includes examples of decision dedicated to *prima facie* competence, and (iv) contains conclusions .

Read

A Study on Third-Party Funding in China

Researchers from the University of Hong Kong have studied third-party funding of arbitration in China. They found that Chinese law does not regulate such funding and, therefore, does not prohibit it, which makes its legitimacy depend entirely on the court’s discretion.

Two approaches have currently emerged in the case law: conservative and liberal.

The conservative approach is common to state courts that take a cautious stance and do not support third-party funding in litigation. For example, in 2021, the Shanghai Second Intermediate Court rendered an important decision denying validity of a third-party funding agreement in litigation (*(2021) Hu 02 Min Zhong 10224 Hao*). According to the Court, in determining the validity of the funding agreement, it was necessary to consider whether the content of the agreement seriously affected the integrity of the litigation. The court found that one company excessively controlled the conduct of the other in the proceedings through the funding and thereby interfered with the other company's freedom of litigation.

However, Chinese courts have recently demonstrated the possibility of following a more liberal approach by confirming the legality of third-party funding in CIETAC arbitration in *Ruili Airlines Co. Ltd. and Yunnan Jingcheng Group Limited v. CLC Aircraft Leasing (Tianjin) Co., Ltd*. ((2022) Su 02 Zhi Yi 13 Hao; (2022) Jing 04 Min Te 368 Hao). Due to the third-party funding, the respondent objected to the enforcement of the award and sought to set it aside. However, the state courts disagreed and held that the third party's financial support of the disputing party did not violate China's arbitration law or affect the impartiality of the arbitrator. Therefore, there was no basis for the arbitrator's recusal. Importantly, the party informed the tribunal in advance of third-party funding, and the tribunal heard the parties' positions on the legality of such funding during the hearings. The courts also noted that involvement of third party funding, including sharing confidential information with a limited number of funders, did not necessarily violate the confidentiality of the arbitration.

Read

The Parade of the Reforms Continues: Amendments to the German Arbitration Law

As we reported earlier in February and March 2023, several European countries have begun reforming their arbitration laws. Now Italy, Greece and Luxembourg are joined by Germany – in mid-April, the Ministry of Justice published a paper with the key issues of the upcoming reform that will modify chapter 10 of the German Code of Civil Procedure, which governs arbitration.

The Ministry of Justice's paper outlines twelve cornerstones, including conclusion of arbitration agreements without form requirements, interim judicial review of awards on lack of jurisdiction, virtual hearings, creation of a legal basis for the publication of awards if the parties agree, allowing awards and key documents to be presented to the courts in English in annulment and enforcement proceedings, etc.

Moreover, the paper anticipates a broad public debate on a number of issues, such as the need for legislative provisions on emergency arbitrators and the admissibility of dissenting opinions in German arbitration law.

Following the expected debate among German arbitration experts on the proposals of the Ministry of Justice, the next step will be the preparation of a draft bill consolidating the ideas set out in the key issues paper.

Read

New Edition of the UCIA Citation Manual for Lawyers

The second edition of the Universal Citation Manual in International Arbitration (UCIA) has been published on the GAR website. The manual was drawn up by the leaders of international arbitration to provide a unified approach to citation.

This edition has been revised to reflect a number of changes, as well as an increase in the number of jurisdictions for which citation rules are available.

The UCIA is intended for use in all documents related to international arbitration, from legal briefs to arbitral awards and scholarly articles. Although the UCIA is drafted in English, it can be used in litigation in other languages. For ease of use, the UCIA is filled with examples demonstrating how relevant rules apply in practice.

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ArbitralWomen Celebrates its 30th Anniversary by Announcing a Competition for New Exciting Initiatives to Support Women in Arbitration

The ArbitralWomen Educational Funding Committee consisting of Mary Thomson, Louise Barrington, and Sally El Sawah announced a call for nominations for the New Initiative Award.

The award provides one-time support (or seed-money) to initiatives that further contribute to the organization's goals of education and promotion of women in arbitration and other forms of ADR. Applications (in detailed form and along with two cover letters) must be submitted by 31 July 2023 and sent to awards@arbitralwomen.com with "ArbitralWomen's New Initiative Award 2023" in the subject line). Moreover, the application must be supported by two ArbitralWomen members actively participating in the organization for at least two years.

The initiative is not limited to women-only activities or programs but shall in all cases benefit them and be consistent with ArbitralWomen's goals. Funding terms are flexible and vary depending on the initiative.

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ADR EVENTS

Webinar “Appointment and Choice of Arbitrators: Procedure and Peculiarities”

On 25 April, Andrey Panov (Allen & Overy), Anna Kozmenko (Schellenberg Wittmer), Timofey Nosov (BGP Litigation) Ekaterina Petrenko (RAC), Konstantin Kroll (Dentons) spoke at a webinar moderated by Anna Grishchenkova (KIAP).

The speakers discussed the procedure for appointing arbitrators and the requirements for candidates, shared their experience in choosing arbitrators for parties in disputes of different types and complexity, and talked where and how to search for candidates, including in the light of sanctions. The speakers also touched upon how to build a career as an arbitrator, including for in-house lawyers, interact with co-arbitrators in a three-member tribunal, and choose the presiding arbitrator.

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St. Petersburg Legal Summit

St. Petersburg Legal Summit will take place on 1-2 June in Saint Petersburg and comprise of more than 50 sessions on arbitration, legal risks, standards of forensics, tax disputes, bankruptcy, daily tasks of in-house lawyers, practices on corporate and contract disputes.

The Summit welcomes more than 120 speakers from heads of legal departments, partners of law firms, judges as well as editors-in-chief of expert media.

1 June will feature a session on the recognition and enforcement of foreign arbitral awards with Anton Garmoza (Partner, Head of International Arbitration at Delcredere), Yuri Babichev (Partner at ALUMNI Partners), Yulia Popelysheva (Chief Legal Officer at Yandex), Olesya Petrol (Partner at Petrol Chilikov) and Dmitry Donov (Vice-president of Legal Affairs and Risk Management, NLMK Group). The speakers will discuss enforcement of awards in foreign jurisdictions, asset tracing problems and share their experience in this area.

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Cyprus Arbitration Day

On 22 May, the first ever Cyprus Arbitration Day will take place, focusing on the resolution of disputes in the Middle East at a time of dynamic geopolitical change. The conference includes four sessions on the current development of arbitration in the MENA region, the applicable law, and the seat of arbitration for disputes arising in MENA countries, interim measures, and enforcement of awards, as well as the distinct features of dispute resolution in the region.

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Litigation Club: Forward Legal vs. LANIT

On 21 April, the Russian Arbitration Center hosted the XII moot court of the Litigation Club, the first moot court for practicing lawyers set up by the Forward Legal team.

Teams of Forward Legal (Timur Tazhirov, Oleg Sheiki) and the legal department of LANIT Group (Ekaterina Seregina, Artem Heilo) exchanged memorandums in advance that were presented to three judges – Elmira Kondratieva (Forward Legal), Regina Enikeeva (RAC) and Svyatoslav Bushin (Hals-Development).

The moot problem was dedicated to the company's refusal to perform the contract due to sanctions. The hearing itself took more than an hour and a half, at the end of which the audience shared feedback with the counsels.

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