Российский арбитражный центр

при Российском институте современного арбитража

ARBITRATION DIGEST JUNE 2021

CASE LAW DEVELOPMENTS

Arbitrator's Disclosure Obligations á la Française

A French court has heard a case (Delta Dragon Import SA v BYD Auto Industry Co Ltd, 25 May 2021, No. 18/20625) on the setting aside of an arbitral award for the arbitrator's failure to disclose that he had been a member of the advisory board of a company whose subsidiary had close ties with the key partner of the respondent in arbitration.

The decision sets out the core principles of disclosure of conflict of interest in arbitration under French law:

- arbitrators must disclose any and all circumstances that may affect their independence and impartiality both before accepting their appointment and during the arbitration;

- the parties must also demonstrate a certain degree of caution before the arbitrator accepts his/her appointment and may not appeal to non-disclosure of publicly available facts;

- the parties are precluded from invoking non-disclosure if they do not act promptly.

The court found that the arbitrator's non-disclosure of publicly available circumstances that could be discovered by running a search online did not warrant setting aside the award, especially where the party in question failed to exercise proper care during the arbitration in a timely manner.

Read

The Russian Supreme Court against a Ban on SCC Arbitration

JSC Uraltransmash brought an appeal against the decision of lower courts denying a stay of an SCC arbitration under Art. 248.1 – 248.2 of the Russian Commercial Procedure Code that provide for exclusive jurisdiction of Russian state courts in sanctions-related disputes in case of unenforceability of an arbitration agreement.

The courts assumed that the appellant was fully exercising its right to judicial relief at the SCC by taking active steps in the arbitration for over two years. Furthermore, they found that the sanctions introduced against the appellant did not entail any limitations preventing performance of the relevant agreement, consideration of the dispute arising from it, or provision of legal services in view of such a dispute.

The Russian Supreme Court endorsed the lower courts' reasoning, refusing to refer the appeal to the Judicial Chamber on Economic Disputes for further review.

Read

Islamic Banking Not an Issue for Arbitration

NMC Healthcare is the primary participant of the UAE's healthcare services market, managing over 200 various healthcare providers. In September 2020, an Abu Dhabi court put NMC Healthcare and its related companies into administration, after its UK parent also faced a bankruptcy case over concealed debts amounting to USD 5.3 billion.

In May 2021, the administrators of NMC Healthcare applied to the court with a claim seeking to determine an Islamic bank rights over the funds received from healthcare insures and deposited in a security account to cover monthly payments from NMC and its related companies to the bank under Murabaha agreements (a form of an Islamic trade agreement, where the bank buys certain assets on behalf of the client to then sell them to him at a profit known to the parties in advance). Under those agreements, NMC Healthcare had received USD 400 million for hospitals and clinics in the UAE and Saudi Arabia.

The agreements were governed by English law and provided for the resolution of disputes at the LCIA with the bank's unilateral right to opt for any other court.

Moreover, to secure its obligations, NMC had assigned to the bank the funds paid by 12 insurance companies. The assignment agreements were governed by Islamic law and provided for the exclusive jurisdiction of the Dubai courts.

The court had to establish, which dispute resolution provision should be applicable to the claims of the administrators. The court decided that the claims, connected with the equitable assignment, fell within the scope of arbitration clause and should be considered in LCIA, as affecting the Murabaha agreements.

Read

The Abu Dhabi Court Rules that a Special Authority is Required to Conclude an Arbitration Agreement

The Abu Dhabi Court of Cassation has concluded that an arbitration agreement may be deemed invalid and unenforceable if the representative lacked special authority to conclude it.

The dispute arose from a contract made by the representative of a subcontractor, whose power of attorney vested him with full authority to act on behalf of the client, without prejudice to Article 58 of the Civil Procedure Law stipulating that arbitration of disputes is allowed only where the representative has special authority. The subcontractor later issued a new power of attorney that expressly provided for the representative's powers under Article 58 of the Civil Procedure Law.

After the subcontractor did not receive the payment under the contract, it applied to a state court. The general contractor, in turn, objected the court's jurisdiction, relying on the existence of an arbitration agreement. The courts of first and appellate instances concluded that the dispute was to be referred to arbitration. The cassation court, however, indicated that the subcontractor's representative "lacked authority to bind the subcontractor to the arbitration agreements". The fact that the representative was

vested with that power later did not affect the subcontract and covered only the subcontractor's future agreements.

Interestingly, in Russia, the prevailing case law allows a representative who has general powers to enter into a civil-law agreement, to conclude an arbitration agreement on behalf and in the interests of the principal.

Read

Tribunal Allows EssilorLuxottica to Exit a Merger Deal

An ICC tribunal held that the Franco-Italian eyewear group EssilorLuxottica could back out of a multi-billion takeover of its Dutch competitor GrandVision.

The EUR 5.5 billion deal was made in 2019 between EssilorLuxottica, the investment company HAL Optical Investments, and GrandVision. HAL Optical Investments undertook to transfer its 77% shareholding in GrandVision, while GrandVision was to assist in fulfilling certain conditions before the completion of the acquisition.

However, COVID-19 interfered with the deal's success: EssilorLuxottica started voicing concerns about GrandVision's attempts to mitigate the consequences of pandemic. In particular, the latter began changing the terms of settlements with suppliers, delaying lease payments, and raising loans.

In response, HAL Optical Investments and GrandVision initiated an arbitration, asking the tribunal to recognize that GrandVision was not breaching any of the material provisions of the agreement. EssilorLuxottica filed a counterclaim, demanding permission to exit the deal. Throughout the dispute, EssilorLuxottica also applied to a Dutch court with a claim for the disclosure of evidence related to GrandVision's attempts to mitigate the consequences of the pandemic, but was turned down.

Eventually, the arbitral tribunal sided with EssilorLuxottica, allowing it to exit the deal without compensating damages that, according to mass media reports, could amount to EUR 400 million.

Read

Beijing Everyway Traffic Continues Filing Claims against Ghana

The Chinese company Beijing Everyway Traffic and Lighting Tech Co has filed an LCIA claim under an arbitration clause contained in a terminated contract.

In 2012, Everyway entered into a contract with Ghana's Ministry of Roads and Highways to design and create a smart traffic management system in the country's capital, Accra. The project that provided for the

installation of SSTV surveillance and automated number recognition to detect traffic offences, was funded by the China Development Bank. In 2020, however, the African state rescinded the contract and selected other Chinese contractors for the work, forcing the company to first file an ICSID claim under the China-Ghana BIT, and then to initiate a related proceeding before the LCIA trivunal.

Read

Joining the Opposing Party's Law Firm as a Ground for Annulment of Award

A Spanish company is challenging an ICC award for violation of public policy, claiming that two members of its external counsel's team breached ethical rules by joining the opponent's law firm before the case was over.

The ICC dispute concerned a multi-million project for the construction of an oil refinery in Talara, Peru. The Peruvian subsidiary of the Spanish Técnicas Reunidas (TRT) entered into a sub-contract with SSK for mechanical and electrical works. The contract contained an arbitration clause in favor of an ICC tribunal with a seat in Miami and Spanish substantive law as the governing law.

SSK instituted an arbitration against TRT in 2018; the award was delivered in March 2021. The tribunal awarded SSK USD 38 million, as well as held that TRT was to return certain assets. During the arbitration, SSK was represented by a team from the law firm Cuatrecasas, Madrid, while TRT was represented by PPU.

In the setting-aside proceedings, TRT claims that one of the PPU lawyers, who had been in charge of preparations for the last hearing that took place in March 2020, had access to its "confidential information and arbitration strategy", as well as played a key role in the cross-examination of witnesses, announced that he was quitting PPU in April 2020 and, together with his associate who had also previously represented TRT, joined Cuatrecasas.

According to TRT, the lawyers violated the rules of professional conduct by failing to obtain an express consent to their transfer and to explain to TRT, how the confidential information that became known during the arbitration would be protected from disclosure to SSK and other Cuatrecasas lawyers representing SSK.

Read

No Enforcement in Favor of a Non-Existent Company

A Singapore court has blocked the Norwegian Hydralift from enforcing an award, finding that it was rendered in favor of a legal entity whose legal existence had ceased before the arbitration even started.

Keppel made a contract with Hydralift in 1996, governed by the laws of Singapore and containing an arbitration clause. In 2007, Keppel initiated an arbitration against Hydralift, claiming SGD 5.5 million.

In 2019, the arbitral tribunal dismissed Keppel's claim and ordered the company to pay SGD 0.7 million to Hydralift to compensate the latter's losses, and another 3.1 million of costs. By then, however, Hydralift had already been struck from the register of Norwegian companies, having merged into the NOV Norway Group. In the arbitration, NOV Norway acted on behalf of Hydralift.

After NOV Norway tried to enforce the award, Keppel objected that Hydralift no longer existed.

In his ruling, the judge concluded that NOV Norway was not the respondent in the case and, consequently, did not become a creditor under the arbitral award.

Read

Judge Allows Arbitration in a Major US Insolvency Case

Numerous complaints and criminal charges filed against the pharmaceutical company Purdue Pharma that allegedly incited doctors to prescribe opium-containing painkillers without a legitimate medical purpose, pushed the company to start reorganization under Chapter 11 of the US Code in 2019.

In January 2021, Purdue Pharma brought a lawsuit against several insurance companies, asking the court to establish that Purdue Pharma was entitled to USD 3.3 billion worth of coverage for claims for the damage allegedly caused by the company. The insurance companies, in turn, invoked the existing arbitration agreement.

The court sided with the insurers, holding that Purdue Pharma's access to insurance coverage in any event would not affect the implementation of its reorganization plans.

Read

INVESTMENT ARBITRATION NEWS

Yukos Shareholders Disagree with the US Court's Judgment

The former Yukos shareholders demand a reversal of the judgment of the US District Court for the District of Columbia on the stay of enforcement of the arbitral award until November 2022 or until completion of the proceedings before the Supreme Court of the Netherlands under Russia's cassation appeal. They reason that the Court had misinterpreted the 1958 New York Convention and the US Foreign Sovereign Immunities Act.

In their complaint, the Yukos shareholders are also asking for an order that Russia provide USD 7 billion worth

Read

The Ukrainian Energoatom Demands Compensation for Lost Assets

The company has announced on its website that it has sent a notice of dispute to the competent authorities of the Russian Federation under Article 9(1) of the 1999 Agreement between the Cabinet of Ministers of Ukraine and the Government of the Russian Federation No. 1302 on Promotion and Mutual Protection of Investments.

Under the Agreement, any disputes arising between the Parties are, if possible, to be resolved by negotiations. Should they fail to reach a result within six months from the date of the notice, the dispute is to be submitted to:

1. a competent court or arbitral tribunal of the Contracting Party in whose territory the investments were made;

2. the Arbitration Institute of the Stockholm Chamber of Commerce;

3. an ad hoc arbitration under the UNCITRAL Arbitration Rules.

The dispute arose from the company's claim for a compensation for its lost assets, in particular, the Donuzlavska Wind Power Plant. Energoatom is represented by Shearman & Sterling LLP.

Read

No Taste of Paradise: The Developer of a Five-Star Hotel Resort Takes Grenada to ICSID

The island state in the south-east Caribbean – Grenada – will become a party to investment arbitration under a claim filed by a US investor.

The dispute arose from a project originally intended as an initiative to reconstruct a hotel, but later, upon Grenada government's approval, changed scale: foreign buyers could contribute funds to create a condominium to receive Grenadian nationality in exchange. The investor claims that the ambitious idea fell through due to Grenada's actions aimed at cutting down the funding and eventually at curtailing the project.

The claim was brought under the US-Grenada BIT.

Read

Ecuador Fails to Challenge an Arbitral Award

The Hague District Court has dismissed Ecuador's appeal against a UNCITRAL award rendered under the US-Ecuador BIT.

The dispute concerned a frustrated deal for the sale of a USD 1.5 million plant to an Ecuadoran firm. The American company and its Ecuadoran counterparty failed to reach an agreement and the plant was sold to a third party, following which the Ecuadoran company demanded a compensation of its damages. The court of first instance ordered that the American company pay USD 200 million, which is more than 100 times more than the plant's value. The decision was revised by the National Court of Justice of Ecuador due to the disproportionate amount of damages awarded, but the country's Constitutional Court remanded the case for a new trial.

The dispute has been ongoing since 2002, a period during which the National Court of Justice of Ecuador has delivered three judgments, and the Constitutional Court has sent its judgments for re-trial twice.

As a result, the American company resorted to arbitration, the tribunal declaring such conduct of the courts denial of justice and awarding the American company EUR 44 million worth of damages.

Ecuador tried to annul the award, arguing that the tribunal lacked jurisdiction and noting that tribunal has acted as means of last resort of the Ecuadorean judicial system.

The Dutch court dismissed Ecuador's arguments, finding that the arbitral tribunal merely reviewed the judgments of the domestic courts to see whether the proceedings in the case were so manifestly unjust as to constitute denial of justice.

Regarding the argument on jurisdiction, the court held that the dispute could be deemed an investment dispute since it could not be separated from the origin, being the plant's sale.

Read

Ecuador Re-Signs the ICSID Convention

On 21 June 2021, Ecuador has for the second time signed the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention).

Ecuador initially signed the ICSID Convention in 1986, announcing denunciation in 2009. Ecuador has thus become the 164th signatory of the ICSID Convention.

Read

US Court Denies Stay of Enforcement of the Tatneft Award to Ukraine

After Ukraine's unsuccessful attempt at preventing the enforcement of the arbitral award in favor of Tatneft (PAO Tatneft v Ukraine) based on the alleged doubts as to the impartiality of one of the arbitrators, Ukraine tried to secure a stay of enforcement from the US Court of Appeals for the District of Columbia.

The state's counsel submitted that confidential information could become known in view of Tatneft's claim in a related case pending before a New York District Court concerning disclosure of information on the Ukraine's attachable assets, that could cause significant losses for Ukraine.

The Court found these arguments unproven and denied a stay of enforcement of the award.

Read

A Kuwaiti Investor Is Set on Annulling an ICSID Award in a Dispute over the Expropriation of a Mobile Phone Operator

The dispute arose over Agility's investment into Korek Telecom, a mobile operator based in Kurdistan, *via* a joint venture – Iraq Telecom – created with the French group Orange. In 2014, the Iraqi regulator ordered that Korek Telecom reverse the transfer of shares to investors, since Korek had not met the necessary conditions for change of control.

Agility argued that the joint venture's shares had been restituted to Korek Telecom without a compensation of the investments made. Agility and Orange therefore filed two ICSID claims against Iraq.

In Agility's case, the tribunal dismissed the investor's claims, since it failed to prove that the Iraqi government incorrectly fulfilled the regulator's order and that the investor itself was denied judicial protection. Moreover, the tribunal held that Agility was to compensate Iraq's arbitration costs.

Agility now believes that the tribunal failed to assess the substance of the regulator's instructions and to take account of the evidence of corruption and bribery in the Iraqi government.

Notably, an ICC tribunal is now considering a USD 700 million claim by Iraq Telecom against Korek Telecom.

Read

ARBITRATION NEWS

RAC Arbitration Rules 2021: Public Consultations

The Russian Arbitration Center has announced the launch of public consultations on the draft of the new Arbitration Rules 2021, aimed at collecting feedback from legal practitioners and the business community.

In is the first major revision of the RAC Rules since 2017. The amendments are intended to ensure even more flexibility for the proceedings, while preserving the key guarantees of fair and due process, and will affect expedited proceedings, emergency arbitrators, astreinte for failure to comply with interim measures, and many other issues.

Anyone willing may email their commentaries to the draft Arbitration Rules 2021 until 11 July 2021 to rules@centerarbitr.ru. All commentaries and suggestions received will remain confidential.

Read

The First Study on Third-Party Funding of Arbitration in Russia-Related Disputes

Although the relevance of third-party funding (TPF) of arbitration can hardly be questioned today, the institute of TPF is yet insufficiently represented in the Russian market of litigation and arbitration – neither special legislation, nor consistent and established case law on the matter exists at this time.

It is for this reason that the RIMA has initiated a study of TPF in arbitrations related to Russia. The working group on the matter created by the institution includes the leading Russian and foreign specialists in TPF and will address issues including the relevant legal framework in Russia relating to arbitration and TPF, the use of TPF in Russia-related disputes, and advantages and disadvantages of TPF. The working group will produce a final report that will set out recommendations on the use of TPF.

It should be noted that, given the key global trends, the RAC in its new draft Arbitration Rules 2021 suggests amendments on payment of the arbitration fee and the advance payment made by third parties (Rules, Art. 14). Here, the Rules will distinguish between: 1) cases where expenses are borne by a third party not interested in the outcome of the case; and 2) cases where expenses are borne by a third party under a third-party funding agreement, whereby a party that is not a party to the dispute provides financial support in exchange for a fee (compensation) depending on the outcome of the case.

Read

The Swiss Arbitration Association's New Online Platform

The Swiss Arbitration Association (ASA) has launched a new unique online project – the ASA Arbitration Toolbox – an electronic platform offering practical advice on various stages of arbitral proceedings.

Arbitration Toolbox (both the mobile and PC versions) provides useful information on the progress of arbitration to users, arbitrators, and scholars. Its user-friendly structure allows beginners to learn the basics of the proceedings. The platform will also be of use to experienced practitioners: it will offer advice in complex cases and time-tested templates for any situations they may face in course of arbitration.

Read

Express Dispute Resolution at the SCC

The Arbitration Institute of the Stockholm Chamber of Commerce (SCC) has introduced a new dispute resolution tool that consists in the quick legal assessment of the dispute by an independent expert appointed by the arbitral institution (SCC Express). The procedure is quick (taking 3 weeks) and is based on a fixed fee (EUR 29,000).

Such an express dispute settlement procedure may appeal to those parties that need to resolve their controversy as quickly as possible and wish to try out methods alternative to a full-fledged arbitration or litigation.

Read

New Configuration of the ICC International Court of Arbitration

Together with the election of a new ICC Court President – Claudia Salomon, who became the first woman that will lead the Court in its almost 100-year-long history, the Court welcomed 68 new members and 12 new Vice-Presidents. The new configuration of the ICC Court makes it the most gender and geographically diverse composition in the ICC Court's history.

Julia Zagonek (Partner, White & Case) and Dmitry Dyakin (Partner, Rybalkin, Gortsunyan & Partners) were appointed as members of the Court from the Russian Federation.

Читать

New Seminal Work on Private International Law

A collective of authors with Vadim Plekhanov, PhD, as the Editor-in-Chief, has published the book “Private International Law: Collected National Codifications 2021.”

The collection comprises Russian translations of the national codifications of private international law of over 100 jurisdictions, including European, African, Latin American, and Asian countries.

The book will be of interest to arbitrators, private international law experts and practitioners, students, researchers, and academics.

Email your order to: private.international.law@ gmail.com

EVENTS ON ALTERNATIVE DISPUTE RESOLUTION

Registration for the V Corporate Arbitration Moot Court is Now Open

On 1 June 2021, the registration of teams and arbitrators for the National Corporate Arbitration Moot Court named after Professor V.P. Mozolin has started. Each year this moot court unites hundreds of students from different Russian regions, making the competition one of the largest and most prestigious in Russia.

The Problem of the moot this year is dedicated to the issues of responsibility of shareholders, extension of the arbitration agreement on the inheritance fund, arbitrability of disputes arising from inheritance relations.

This year the organisers have decided to hold 6 pre-moots in different Russian regions in order to provide the teams with an opportunity to practice before the competition. The winners of the pre-moots will be awarded five additional points to the scores received during the eliminations rounds.

To register and get acquainted with the Problem and Rules of the moot court, please, follow the link.

Read

RIMA Summer Academy “Basics of Arbitration”

The Russian Institute of Modern Arbitration invites to attend the Summer Academy “Basics of Arbitration”, designed for those who are beginning their path in arbitration.

During their studies at the Summer Academy, attendees will gain valuable knowledge about arbitration: the conclusion of arbitration agreements, the appointment of arbitrators and their challenge, the enforcement and setting aside of arbitral awards and many more topics. After the theoretical part of the course the attendees of the Summer Academy will be able to apply their knowledge and skills within the framework of the moot court.

The Academy will be held offline in Russian language. Maximum number of attendees – 20 people. The application deadline – 16 July 2021.

The application for the Academy shall include general information about the prospective attendee, CV and a motivation letter, which should state, how the participation in Academy will benefit the future career.

Read

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