Russian Arbitration Center

at Russian Institute of Modern Arbitration

ARBITRATION DIGEST JANUARY 2022

CASE LAW DEVELOPMENTS

No Arbitration – No Agreement on a Fair Contract Price for Gas

On 14 January, Gazprom Export LLC and PJSC Gazprom sent a notice of ad hoc arbitration with the seat in Stockholm to the Polish monopolist PGNiG. Russian companies have claimed a retroactive increase of the price for natural gas supplied under the 1996 Yamal Contract.

The Contract allows the parties to demand a revision of the price for gas every three years, which is exactly what Gazprom had done earlier by submitting its revision requests on 8 December 2017 and 9 November 2020. The negotiations based on Gazprom's demands, however, proved unsuccessful and resulted in the current proceedings.

The Polish company, in turn, claims that Gazprom's requests are unfounded and plans to continue its efforts to reduce the contract price. Earlier, PGNiG already secured a reduction of the contract price for gas: in 2020, the arbitral tribunal concluded that Gazprom had unreasonably evaded price revision, and ordered the Russian company to pay a compensation.

Read

Ongoing Battle for the Indian Retail Market

The Delhi High Court has stayed the arbitration between Future Retail and Amazon ruling that its continuation could cause irreparable damage to the Indian company.

The SIAC arbitration was initiated by Amazon following Future Retail's attempt to sell its assets to the main competitor of the American company in India, Reliance Retail. Amazon cited an investment agreement with Future Retail as a formal ground for blocking the deal and successfully enforced an emergency arbitrator's decision to halt the deal last August.

Last month's events, however, have turned the tables. The Competition Commission of India suspended the investment agreement between Amazon and Future Retail, which gave the latter grounds to claim that the arbitration was illegal in the Indian Court.

The outcome of this dispute is of paramount importance to all the parties involved. Amazon and Reliance Retail are in a tight battle for the Indian retail market of over one billion customers, and successful completion of the acquisition will give the latter a major advantage over the US tech giant. In turn, Future Retail has been seriously affected by the consequences of the pandemic, and without the money from the sale of its assets, the company is likely to face a default on its bonds and subsequent bankruptcy.

Read

Writ of Execution Does Not Survive the Second Cassation

The Supreme Court of the Russian Federation has ordered a retrial in a court of first instance of the case concerning a writ of execution for the ICAC award issued against Belarus.

In their decision, the ICAC arbitrators granted the claims of the DaVinci management company for the recovery of damages from Belarus resulting from the State's failure to fulfil its obligations under a guarantee. This guarantee was issued to secure the obligations under a loan agreement between CJSC Osipovichi Railway Car Building Plant and a bank. The bank had ceded some of the rights under the agreement to the management company, and when the borrower failed to fulfil its obligations, DaVinci tried to enforce the guarantee, but was refused.

The Moscow Commercial Court has issued a writ of execution for the ICAC award, which was upheld by the court of cassation as well. The Supreme Court, however, stated that not all circumstances of the case had been examined properly. Namely, it pointed at the need to review whether the rights under the arbitration agreement had been transferred to the management company, whether the guarantee provided for the obligation to pay interest and penalties, as well as whether there was any Belarusian property present in the territory of Russia that could be seized.

Read

"No" to Counterclaims in Award Enforcement Proceedings

The respondent, Bein Media Group (BMG), an entertainment media company incorporated in Qatar, operated satellite television channels in various countries and held an exclusive right to broadcast the coverage of sporting events, including the English Premier League, in the MENA region through its subsidiaries. In May 2014, BMG entered into a distribution agreement with Selevision that provided broadcasting-related services in Saudi Arabia, pursuant to which Selevision, the claimant, became a non-exclusive distributor of set-top boxes allowing the customers to watch BMG media channels. The agreement contained an arbitration clause that provided for the resolution of disputes by arbitration under the Arbitration Rules of the DIFC-LCIA Arbitration Centre with Dubai as the seat of arbitration. According to the claimant, tensions between the parties increased when BMG suspended Selevision's access to BMG's customer relationship management system, as well as wrongfully terminated the agreement. In this regard, Selevision demanded payment of the amount owed to it under the agreement, including the unpaid commission fee. BMG counterclaimed, stating that Selevision had breached the agreement, which resulted in BMG suffering losses of around USD 30 million. The disputes were referred to arbitration in June 2016, and, on 5 June 2018, the arbitral tribunal issued a final award concluding that BMG had breached the terms of the agreement and wrongfully suspended it. The tribunal further dismissed BMG's counterclaim and ordered BMG to pay to Selevision the amount exceeding USD 8 million with interest.

Consequently, Selevision petitioned the High Court of Justice in England seeking to enforce the arbitral award against BMG. In turn, in January 2021, BMG petitioned the English Court for permission to bring a counterclaim. In its application, BMG did not dispute the validity of the award, but challenged the amount awarded to Selevision in its counterclaim.

According to the Court, as a general rule, counterclaims are not allowed in applications for enforcement of the arbitral awards. For it to be considered, such a counterclaim would have to relate to a matter outside the scope of the arbitration agreement (otherwise, it should have been brought in the arbitration) or constitute a claim against third parties.

Read

Dispute Between Former Client and Law Firm over Alleged Collusion to Be Arbitrated

King & Spalding LLP represented its client in an investment arbitration against Vietnam in connection with seizure of real estate. Following the award in this case, Vietnam was ordered to pay USD 46 million. In order to institute arbitration, the client of King & Spalding LLP entered into an arbitration funding agreement with Burford Capital. Under the terms of this agreement, in case of a win, there was a USD 4.7 million cap for arbitration costs and a USD 3.7 million cap for legal expenses. According to the firm's former client, King & Spalding LLP assured him that this amount would be enough to pay for their services.

After the award was issued, however, the former client filed suit against his counsel, the law firm King & Spalding LLP and its partners, claiming that the firm had colluded with the third-party funder, Burford Capital. In his opinion, this way, the firm intended to increase its share of the proceeds. King & Spalding LLP vehemently denies all allegations.

Subsequently, the lawyers of King & Spalding LLP motioned the US District Court to dismiss the lawsuit and to compel arbitration of the dispute. The former client, in turn, was convinced that his relationship with King & Spalding LLP was not covered by the funding agreement with Burford Capital; therefore, this dispute was not governed by the arbitration clause.

The Court disagreed with this approach. It found that the arbitration clause contained in the funding agreement concluded with Burford Capital extended to, among other things, the dispute between King & Spalding LLP and its former client, even though the firm had not signed the agreement. The Court's judgment allowed the firm to commence the arbitration.

Read

Limits of Confidentiality in Arbitration and Litigation in English Court

In the case *CDE v NOP* [2021] EWCA Civ 1908, the English Court of Appeal determined whether, in court proceedings overlapping with the subject matter of an LCIA arbitration, a case management conference and other proceedings should be held in public or private.

The issue arose when the claimant commenced proceedings in the English Commercial Court accusing the defendant of fraud. Same allegations had been brought against a company related to the defendant, but as part of an LCIA arbitration. According to the claimant, which was not disputed by the defendant, the arbitrators held that the claimant's allegations were well-founded and the defendant's evidence to the contrary was inconclusive. Based on the award issued by the arbitral tribunal under the LCIA Rules, the claimant requested a summary judgment from the Court.

At the case management conference, the claimant petitioned the Court to hold all of the proceedings in public. The defendant objected, arguing that this would attract media attention and thus, in order to avoid such an outcome, the case should be considered confidentially, in private.

Initially, the Court agreed that the case management conference should be held in private, but made no further decision as to how the remaining applications by the parties should be considered. This judgment was appealed. The main argument of appeal was that the Court relied on the principle of confidentiality of arbitration, which is not applicable to these proceedings, and holding them in public would not interfere with the parties' interests.

The Court of Appeal agreed that the hearings before the English Court could be held with due regard to the confidentiality principle. The critical question, according to the Court of Appeal, was whether it was necessary to sit in private in order to ensure the proper administration of justice. This question required considering the stage that the proceedings have reached – a case management conference was less likely to involve matters of public interest or require public scrutiny of the court's conduct of the proceedings and decision-making processes than, for example, a hearing on the merits. That is why the Court of Appeal decided that holding it in public would not violate the confidentiality of arbitration applicable to the LCIA award.

Read

Sanctions for Non-Compliance with the Arbitration Schedule: Are They Acceptable?

An interesting matter was resolved by the High Court of Singapore in connection with an order issued in arbitral proceedings where an arbitrator barred the respondent from advancing any objections, including in a form of a counterclaim, if it failed to serve procedural documents by the specified date and hour.

The Singapore Court had to decide whether such a peremptory order by the arbitrator breached the principle of natural justice. Given that the seat of arbitration was Singapore, the arbitrator had to consider the UNCITRAL Model Law when determining whether he had the powers to make such peremptory orders.

The Court held that the arbitrator had to consult with both parties before determining the period of time for submitting the objections in the absence of an agreement between the parties to that effect. If for any reason an arbitrator does not consult both parties and simply fixes the period of time, he must be open to reconsidering it.

In cases when the objections are not filed within the prescribed time, an arbitrator should give a reasonable opportunity to both parties to explain their failure to serve the documents. All this allowed the Court to

conclude that the principle of natural justice had been breached, since the arbitrator had not considered the reasons for failure to serve the submissions within the stipulated period of time.

Read

Using State Insignia Does Not Make a Court out of an Arbitration Center

In 2004, Nagaraj, the borrower, entered into a loan agreement with Rajendran and pledged a land plot owned by another person, Jagannathan, as security. In 2014, a dispute arose between the two parties and they appointed attorney K. Rajaram as the arbitrator. The dispute, however, was heard in a peculiar arbitration center established in the Dharmapuri District that used the State Emblem of India, and even had personal gunmen and a bailiff as its staff.

The heirs of Jagannathan petitioned the Madras High Court seeking to overturn the arbitral award. The Court sided with the heirs and did not permit enforcement of the sale and purchase agreement with respect to Jagannathan's real estate in favor of Rajendran. The Court noted that this case presented quite an extraordinary situation where an arbitration center was established with the intention of misleading ordinary people and impersonating a state court.

Read

U.S. Court Upholds an Arbitration Agreement between PayPal and Its User

Tingyu Cheng sued PayPal after the latter confiscated the funds in his account. PayPal, not wishing to litigate in U.S. courts, invoked the arbitration agreement made between the parties.

The plaintiff objected against arbitrating the dispute, arguing that an arbitration clause was part of a user agreement – a 54-page multi-section document. That argument did not persuade the court, which has observed that Cheng acceded to the arbitration clause by clicking "yes" twice and thereby consenting to the user agreement and the setting up of an account. At the same time, the court stressed that it did not matter whether Cheng actually read the user agreement.

The arbitration clause also contained a provision allowing a user to opt out arbitration. In order to do that, within 30 days of agreeing to the user agreement, the user should have mailed a written notice to PayPal. Cheng argued that it was difficult for him as an international resident to do so. The court dismissed this argument and observed that the mere existence of the possibility to opt out ruled out a lack of a meaningful choice for the user.

Read

Ukraine International Airlines Intends to Defend Its Interests in Arbitration

The CEO of Ukraine International Airlines has stated that the company is considering the possibility of initiating an arbitration against Iran in order to obtain a compensation for the passenger aircraft shot down in 2020. However, he did not clarify which agreement allowed the company to bring the claims in arbitration.

According to the CEO, at the moment experts are assessing the damages that the company has incurred due to the incident; at the same time, Iran has already settled the dispute with the aircraft owner.

The incident occurred in January 2020, when the Iranian air defense corps shot down a Ukrainian passenger plane. According to Iran's version, bearing in mind particularly tense relations between the U.S. and Iran, the military mistook the plane for an enemy craft.

Read

Family Crisis Is Overcome through Mediation

A family conflict triggered by children's uncontrolled use of the Internet has been resolved thanks to mediators specializing in in-family problems.

A single mother raising a 19-year-old son and a 12-year-old daughter was happy to share the results of the negotiations conducted with the help of the Negotiation Mediators Association, ARABULDER. The mediators have managed to bring the disputing parties to the negotiating table and convince them to sign an agreement whereby the children agreed to use mobile phones for only 45 minutes on weekdays and an hour and half on weekends.

As Feridun Balcı, the head of ARABULDER, notes, "While negotiating, we do not criticize, judge, blame anyone. Being neutral gives confidence to the parties."

Read

INVESTMENT ARBITRATION NEWS

ICSID Dismisses a USD 300 Million Claim against Switzerland Due to Failure to Make an Advance Payment to Arbitrators

Human Rights Defenders Inc. representing Italian investors filed an ICSID claim against Switzerland in 2019. The claimant contended that Switzerland breached the terms of the bilateral investment treaty when it passed a law retroactively prohibiting the sale of real estate for 5 years from the time of its acquisition. As a result of the Swiss legislators' actions, the investors have incurred losses from real estate investments in the amount of USD 300 million.

The ICSID had to dismiss the case due to the violation of Article 14(3)(d) of the ICSID Administrative and Financial Regulations, namely due to the fact that the claimant did not pay the advance owed to arbitrators. The investors' counsel notes that the dismissal of this case does not rule out that the same claims will be brought before the ICSID or another arbitral institution in the future.

Read

Spanish Court Decides Not to Argue with Arbitrators

The Madrid High Court has refused to set aside the arbitral award in the case of Sergei Pugachev against the Russian Federation. The judgment of the Spanish court states that it cannot be appealed; however, in the comment to the Russian news agency, Sergei Pugachev himself has said that he intends to file an appeal.

The arbitral award that the businessman seeks to set aside was issued back in 2020. The businessman demanded the recovery of losses in the amount of USD 14.5 billion caused by the alleged expropriation of assets, arguing that he could resort to arbitration because he was a French investor, as he acquired French citizenship in 2009.

Having considered the arguments of the parties, the arbitrators decided that they lacked the jurisdiction to consider the dispute under the French-Soviet Bilateral Investment Treaty.

Read

Claimant's Winding Up as a Method to Oppose Arbitration

The Indian Government has announced that it intends to demand the setting aside of an arbitral award of USD 1.3 billion favoring Devas Multimedia over India's violation of the principle of fair and equitable treatment.

This dispute dates back to the early 2000s, when Antrix, a subsidiary of India's space agency, signed a contract with Devas Multimedia, undertaking to build two satellites for the company and provide S-band digital multimedia services for 20 years.

After 6 years, however, it transpired that the payment for services was inappropriately low, and the state needed the S-band spectrum for national security purposes. According to the findings of the commission conducting the inquiry, this situation was caused by a procedural mistake. On that basis, the Indian Government decided to terminate the contract, forcing Devas Multimedia to file an ICC claim.

In 2015, the arbitral tribunal rendered an award in favor of Devas Multimedia, ordering India to pay compensation. On the basis of that award, Devas Multimedia attached multiple Indian assets around the world, including a luxurious Paris apartment of the Deputy Chief of India's Mission.

Nonetheless, in 2021, India made a countermove by filing, on behalf of Antrix, a petition for winding up Devas Multimedia on the ground that the company had been set up to perpetrate fraud. In mid-January this year, the Indian Supreme Court upheld the decision to wind the company up, at the same time declaring the contract in dispute and the arbitration clause invalid, as that these deals were a product of fraud.

Read

ARBITRATION NEWS

Translation of Jan Paulsson's Book "The Idea of Arbitration"

The Russian Institute of Modern Arbitration is happy to announce that it has become the publisher of a Russian translation of "The Idea of Arbitration" by Jan Paulsson.

Monograph authored by Professor Jan Paulsson, one of the most famous academics and practitioners in the field of alternative dispute resolution, discusses the essence and nature of arbitration from the regulatory and philosophical standpoints. The book's author explores different challenges that arbitration as a means of dispute resolution has had to and still has to face both in the context of national legal orders and globally.

The book is intended for judges, arbitrators, practicing lawyers, academics, teachers, PhD students, and law school undergraduates, as well as anyone interested in international commercial arbitration.

The presentation of Jan Paulsson's book "The Idea of Arbitration" will be held during the Russian Arbitration Week. The date and time of the event will be announced shortly. To order a book please email info@centerarbitr.ru or follow the link.

Read

Welcome Online Hearings for Commercial and General Jurisdiction Courts

On 1 January 2022, Federal Law No. 440-FZ dated 30 December 2021 "On Amendments to Certain Legislative Acts of the Russian Federation" entered into force, introducing a series of long-awaited provisions into three procedural codes at once, namely the Russian Civil Procedure Code, Commercial Procedure Code, and Administrative Procedure Code, concerning, among other things, the participation in online court hearings or, as the legislator has put it, participation "through the use of the web-conferencing system." Now the parties to a case and other participants of legal proceedings may take part in a court hearing via the web-conferencing system provided that they make a motion to this effect and the court is technical able to host a web conference. Aside from that, the procedural laws have limited the court's discretion to resolve whether an online court hearing must be held in cases where the relevant motion is filed by an interested party. Only technical impossibility or in camera proceedings may serve as the ground for the court's refusal to grant such a motion.

Read

Commentary to Section VI of the Russian Civil Code

The published edition is an article-by-article scientific and practical commentary to Section VI "Private International Law" of the Civil Code of the Russian Federation, edited by I.S. Zykin, A.V. Asoskov, and A.N. Zhiltsov. The authors analyzed in depth and covered international acts, foreign laws, Russian and foreign

doctrinal authorities. The commentary is intended for anyone interested in studying and correctly applying the effective laws in the field of private international law.

Read

Disputes of the Independent Film and Television Alliance (IFTA) Will Be Heard by ICDR under the IFTA Rules

IFTA is a global commercial association of independent film and television production, financing, distribution, and sales companies. The Alliance also organizes a major annual cinema event, the American Film Market, whose participants make deals worth more than USD 1 billion.

Since 1984, the IFTA Tribunal has resolved disputes in the industry between film and television production, distribution, financing, and sales companies globally. As part of the partnership between IFTA and AAA-ICDR, since January 2022, an ICDR specialized arbitrator panel for IFTA arbitrations will begin its work; the panel will bring together lawyers with significant experience in the field of intellectual property, copyright, and entertainment law. Disputes will be resolved in accordance with the new IFTA Rules designed in cooperation with ICDR.

Read

ADR EVENTS

FIAMC Conference

Time is nearing for the winter moot courts season and the traditional FIAMC Moscow Pre-Moot Conference that will be held online on 4 February 2022.

The issues relating to the 2022 FIAMC case-study will be discussed at the Conference in the following sessions:

Session 1. “Yours badfaithfully” – How to Detect the Sabotage in the Process.

Session 2. Bond. State Bond: No Time to Define Investments.

Timothy Nelson (Skadden, Arps, Slate, Meagher & Flom LLP), Philippe Pinsolle (Quinn Emanuel Urquhart & Sullivan LLP), Josefa Sicard-Mirabal (independent arbitrator, Fordham University School of Law in New York City), Greg Lourie (Cleary Gottlieb Steen & Hamilton LLP), and Dmitry Evseev (Arnold & Porter) will be among the speakers.

Anna Korshunova (LALIVE) and Crina Baltag (Stockholm University) will moderate the sessions.

Participation is free and English is the working language of the event. If you do not want to miss the Conference, you can register now here.

Read

Moscow Pre-Moot of the Willem C. Vis International Commercial Arbitration Moot

This year, a record number of 89 applications were received, among which the Organizing Committee has chosen 40 best teams from all around the globe to participate in the Moscow Pre-Moot!

Now, the geographical coverage of the Pre-Moot has extended even further: apart from Russian teams, there are participants from the United Kingdom, North Macedonia, Poland, Japan, Latvia, Switzerland, Austria, South Korea, Spain, Armenia, Slovenia, Portugal, Greece, Brazil, Serbia, China, Germany, India, Guatemala, the Czech Republic, the Netherlands, the US, Uzbekistan, Turkey, and Argentina.

In 2022 the winner of the Moscow Pre-Moot will also receive a monetary prize of USD 1,000!

We also remind you that the registration of arbitrators for the Moscow Pre-Moot is ongoing.

If you want to participate or cooperate, please email moscowpremoot@gmail.com.

Read

Winter Legal Week

On 10-12 February, the legal event that has already become traditional – Winter Legal Week 2022 – will be hosted by Pravo.ru in Sochi. As part of the business program, the speakers will discuss the legal risks for businesses at two sessions that will cover a great number of issues across a variety of legal areas. The participants can also look forward to an active informal program.

Read

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