Russian Arbitration Center

at Russian Institute of Modern Arbitration

ARBITRATION DIGEST DECEMBER 2021

CASE LAW DEVELOPMENTS

Sing the Award Properly, Would You?

The applicant tried to set aside an ICC award after the arbitral tribunal consisting of three arbitrators signed the award on three different pages because of the pandemic. Each of the arbitrators signed and sent to the ICC a separate page with a signature, each bearing a different date. In seeking to annul the award, the applicant argued that that cast doubts on the integrity of the arbitral proceedings.

The French court dismissed the applicant's arguments noting that French law did not require arbitrators to sign the same page of the award on the same day. This gives the ICC the right to act in such a manner as it deems appropriate given the circumstances.

Читать

ICC to Review a Dispute Resolved Eight Years Ago

The International Court of Arbitration (ICC) has decided to resume an arbitration between a state – Congo – and a company, Commisimpex based on Congo's request for revision of the award, where the state is alleging that the arbitrator had been bribed to render the award in favor of Commisimpex.

French laws allow the parties to apply for revision of arbitral awards in exceptional circumstances, including where it transpires that the award was made as a result of fraud and the applicant had been unable to raise its objections earlier. Usually, in such cases, a request is considered by the same arbitral tribunal; however, in this particular case, the ICC has decided to form a new tribunal, inviting each party to appoint an arbitrator. It is reported that Congo's representatives have also sought to demand the institution of criminal proceedings against the arbitrator who had issued the initial award in the dispute.

Читать

Freedom to Arbitrations!

The English Commercial Court has supported the broad discretion of arbitrators with regard to the conduct of arbitral proceedings in *Tenke Fungurume Mining S.A. v Katanga Contracting Services S.A.S.* [2021] EWHC 3301.

In 2018, Tenke and Katanga entered into contracts for the operation of a mine in the Democratic Republic of Congo. When in 2020 disputes erupted between the parties, Katanga initiated two (later consolidated) London-seated arbitrations worth USD 13 million and obtained an award in its favor. At the same time, only when the parties exchanged the submissions on costs (well after the oral hearing) did Katanga for the first time reveal that it received funding from a third party, in view of which it additionally requested USD 1.5

million as a compensation of the costs incurred in obtaining the said financial support. The tribunal satisfied the request, awarding USD 1 million to Katanga.

Disappointed with the award, Tenke sought to challenge it in English courts. Tenke referred to the fact that the arbitral tribunal refused to adjourn the arbitral proceedings notwithstanding several circumstances caused by the COVID-19 pandemic: thus, in order to make a counterclaim, Tenke initially moved to adjourn the proceedings due to an expert's inability to visit the site where Katanga was performing the work, and after the lead counsel for Tenke contracted COVID-19 a month before the hearing and was unable to recover in time for the hearing. In addition, Tenke asked to cross-examine Katanga on the matter of funding, but was once again denied its request.

The tribunal based its refusals on the following: first, the experts themselves had agreed that a site visit would not allow them to visually inspect the areas in question and would not be useful in terms of conducting interviews, and, thus, it would not be reasonable and fair to adjourn the case; second, 4.5 weeks passed from the time when Tenke was notified of the counsel's unavailability for the oral hearing and that time was sufficient to appoint another member from amongst a highly qualified legal team, especially one that included a senior partner with considerable experience; and, third, when evaluating the need for cross-examination on third-party funding, the tribunal considered the type and amount of funding and concluded that Katanga did not enrich itself and had barely been able to obtain other funding.

Having considered the arguments of Tenke, Mrs Justice Moulder dismissed all of them and supported the arbitral tribunal. In her view, Tenke failed to prove that the arbitral tribunal had made such a mistake in its conduct of the arbitration that "justice calls out for it to be corrected" and that the arbitrators' refusals amounted to conclusions "which no reasonable arbitrator could have arrived at" – all these being simply manifestations of the broad discretion of the arbitrators to make decisions on the conduct of arbitration.

Читать

Loftleidir Would Rather Fly, But Has to Go to Arbitration Because of Cape Verde

An Icelandic company Loftleidir Cape Verde has filed an ICC claim against Cape Verde after the Government of this African state privatized the share capital in Cabo Verde Airlines (CVA, Transportes Aéreos de Cabo Verde, SA (TACV)).

In 2019, Loftleidir Cape Verde acquired 51% of shares in TACV. But after the coronavirus pandemic started and borders were closed in March 2020, the airline's operations were suspended, and the Government of Cape Verde, the airline, and Loftleidir Cape Verde entered into negotiations to restructure the company's debts. The parties reached an agreement that Cape Verde and Loftleidir would provide capital to finance TACV and that most of the airline's debts would be written off. In exchange for these benefits, however, the agreement provided for the appointment of a state administrator who was entitled to monitor and authorize any payments to suppliers in order to ensure that operations could resume.

Cape Verde claims that Loftleidir had precluded the administrator from performing these functions and that the airline denied him access to the company's accounting system, contracts, and bank accounts. As a result, Cape Verde decided to take back the 51% of shares acquired by Loftleidir in 2019. Loftleidir, in turn,

claims that it performed all obligations that it had assumed and even increased the company's revenue, earning more than EUR 61 million in 2019.

Читать

The Two Faces of the Oil Company from Saudi Arabia

In the case *Al-Qarqani v. Saudi Arabian Oil Company*, Case No. 21-20034, the U.S. Court of Appeals for the Fifth Circuit has refused to enforce an international arbitral award against Saudi Aramco, a Saudi Arabian oil company. The Court based its refusal on the conclusion that, in terms of the U.S. Foreign Sovereign Immunities Act of 1976 (Immunities Act), Saudi Aramco was a foreign state, and the claimant had failed to prove that any exemption from this Act applied in this particular case.

The dispute that arose in 2014 and the potentially sham arbitration at the International Arbitration Centre in Egypt that followed both stemmed from the fact that in 1949 the predecessors of the claimants lost oil-rich lands in Saudi Arabia, for which, following a highly controversial arbitration proceedings, the tribunal awarded the claimants USD 18 billion.

After a few unsuccessful attempts to have the arbitral award enforced by other U.S. courts, the claimants tried to plead that Saudi Aramco had waived its immunity under the Immunities Act according to the 1933 Agreement between Standard Oil of California and the Kingdom of Saudi Arabia, which contained an arbitration clause, and the 1949 Agreement between the predecessors of both parties, which, in turn, referred to the 1933 Agreement, but had no arbitration clause. The Agreement, however, was signed by the predecessors of the parties and Saudi Aramco did not exist at all at the time. For that reason, the U.S. Court of Appeals for the Fifth Circuit did not deem it possible to recognize that the arbitration agreement was concluded and formed or that the immunity had been waived.

An attempt to invoke another exemption under the Immunities Act – the one relating to commercial activity or actions of states or state-owned enterprises operating directly in the United States – failed, too, since the international arbitration in Cairo did not have "direct effects" in the United States and Saudi Aramco did not own property and did not engage in commercial activity in the United States.

Читать

Signed the Agreement, Lost the Arbitration Clause

An Ohio federal court has denied a former Axcess employee the right to arbitrate a dispute. This right was provided for in a 2020 non-compete agreement, concluded with the employee since he had access to sensitive information. A year later, however, the parties executed another non-compete agreement, where they agreed to refer disputes to a competent court of the state.

Shortly after that, the employee breached the agreement with his employer by resigning from the company and joining a competitor company. The following question arose between the parties: should they resolve

their disagreements in arbitration in accordance with the 2020 agreement or should that agreement be superseded by the 2021 agreement and should they apply to a state court?

The Ohio Court has ruled in favor of the second option, noting that the 2021 agreement was "complete" and, therefore, superseded the 2020 agreement. The Court has specified that an agreement shall be regarded as "complete" if the parties reached a consensus with respect to subject matters of their agreement and the way to enforce such subject matters. The Court has dismissed the employee's arguments to the effect that the subject matters of the agreements were different and that for the 2020 agreement to be superseded, the new agreement had to indicate that the jurisdiction of the court was exclusive. According to the Court's findings, that level of specificity was not required when choosing a means of dispute resolution, and the agreements, despite minor differences, had identical subject matters and purposes.

Читать

Center of Gravity of a Dispute: Hong Kong Court Prefers a Court to Arbitration

ZPMC sued its former CEO, one of its shareholders, and a consulting company. The Hong Kong Court of First Instance examined several interlinked agreements: an employment agreement between ZPMC and the CEO containing an exclusive jurisdiction clause in favor of the Hong Kong courts, as well as a shareholders agreement and a service agreement, both of which contained an arbitration clause in favor of the HKIAC. An issue arose when the defendants applied for a stay of further court proceedings pending their arbitration.

In its decision, the Court referred to another case of a Hong Kong Court of First Instance stating that the presumption that the parties intend for all disputes arising out of their relationship to be decided by the same tribunal (*Fiona Trust*) does not apply when there are multiple agreements dealing with different aspects of the parties' relationship.

Instead, the court should identify the "nature of the claim" and find the agreement that has the closest connection to the "center of gravity" of the dispute. Based on these principles, the Court held that the substance of the matter was ZPMC's claims specifically against the former CEO for breaches of fiduciary duties. Therefore, the dispute has to be considered in a Hong Kong Court and not in an arbitration.

Читать

Battle Between the State and the Federal Arbitration Act: the US Supreme Court Grants Review

On 15 December, the US Supreme Court granted certiorari in the case *Viking River Cruises, Inc. v. Moriana*, which raises the question of the validity of an arbitration agreement where it provides for an employee's waiver of the right to bring claims under the California Private Attorneys General Act (PAGA).

PAGA is used to recover civil fines for violations of the California Labor Code. Respondent Angie Moriana worked as a sales representative at Viking River Cruises. In 2018, Ms. Moriana filed a suit with the state court pursuant to PAGA, invoking numerous violations of the California Labor Code by Viking River Cruises and seeking remedies on behalf of hundreds of other "aggrieved current and former employees."

As part of this case, Viking River petitioned with the California State Court that the dispute had to be arbitrated in accordance with the arbitration agreement. The court of first instance dismissed the company's motion, holding that Ms. Moriana's action under PAGA could not be taken to arbitration by virtue of an express provision of the law. The Appellate and Supreme Courts of California upheld the position of the court of first instance. As a result, Viking River petitioned for review with the US Supreme Court referring to previous decisions of the Supreme Court that confirm the argument that the Federal Arbitration Act requires enforcement of arbitration agreements in PAGA actions. In the end, the US Supreme Court granted Viking River's petition for review. The Court's reasoning will become clear by the summer of 2022, when the Court delivers its decision in this case.

Читать

India's Arbitration Act Cannot Apply Retrospectively

In its recent decision in *Ratnam Sudesh Iyer v. Jackie Kakubhai Shroff,* the Supreme Court of India has reiterated that the 2015 Arbitration and Conciliation (Amendment) Act (2015 Amendment Act) is not retrospective by nature and only applies to arbitration initiated after the 2015 Amendment Act became effective.

In this case, the appellant was a party based in Singapore and thus, the arbitration would qualify as an "international commercial arbitration" as defined under Section 2(1)(f) of the 2015 Amendment Act. At the same time, through the 2015 Amendment Act, the scope of interference by the courts became more restricted when it came to international commercial arbitration: based on Section 2A, an award issued in course of an international commercial arbitration can no longer be annulled as patently illegal, which does not apply to the domestic arbitral awards.

While considering the possibility of overturning the decision, the Court concluded that the updated version of the 2015 Amendment Act did not apply; therefore, the Court held that the prohibition for an arbitral award to be impugned as patently illegal became applicable only after the amendments entered into full force and effect.

Читать

INVESTMENT ARBITRATION NEWS

Canadian Keystone Goes to Arbitration

Six months after a notice of its intention to file a claim, the Canadian energy company TC Energy Corporation has followed through on its threat and filed a claim under the Keystone XL project against the US, demanding USD 15 billion worth of compensation for the repeatedly approved and then cancelled construction of an almost 2,000 km-long pipeline for the transportation of up to 830,000 barrels of bitumen oil per day from Canada to the US (*TC Energy Corporation and TransCanada Pipelines Limited v. United States of America,* ICSID Case No. ARB/21/63). The legacy claim was filed under Chapter 11 of the NAFTA, in accordance with the transitional provisions of Chapter 14 of the US, Mexico, and Canada Agreement (USMCA).

Keystone XL project was supposed to create around 15,000 jobs in Canada, and just last year, the Government of Alberta issued CAD 7.5 billion in the form of various financial instruments to support the project. Nevertheless, at first in 2015, the Obama Administration denied the company the relevant permits for the project based on environmental concerns. Later, after the next US President Donald Trump resumed the project in 2017 and made it one of the key points on his presidential campaign's agenda, the current US President Joe Biden annulled the previously issued permits on his very first day in office. Because of that, on 9 June 2021, TC Energy and the Government of Alberta announced that they were canceling the project for the construction of the Keystone XL pipeline.

Читать

Going Green Has a Price

A Belgian investor has initiated an arbitration against Ukraine, filing a request with the ICSID under a BIT between Ukraine, Belgium, and Luxembourg. According to the projections of Ukraine's Ministry of Justice, the claims will amount to around EUR 70 million.

The complaints of Srew N.V. are due to the adoption of a law that provides for a decrease of tariffs for solar energy by 15%, and for wind energy, by 7.5%. That said, earlier, Ukraine had guaranteed to the investors implementing renewable energy projects that the tariffs would remain unchanged until 2029.

This change of policy on renewable energy sources resulted in the refusal, by the European Bank for Reconstruction and Development, to issue a loan for the construction of the Dnipro-Buzka Wind Farm and the suspension of the project where Srew N.V. was the main participant.

Читать

I Support the Fight with CO2 Emissions, Yet I Will Go on with Arbitration

The German company Uniper owning coal power plants in the Netherlands, has asked an ICSID tribunal to grant interim relief, restricting the respondent from pursuing “anti-arbitration proceedings” before a German court.

The ICSID arbitration was commenced after the Netherlands enacted a law on the step-by-step winding up of coal power plants in order to combat climate change. While Uniper agreed that the goal was important, it believed that it was owed a compensation for closing its plants.

The company thus filed a motion seeking to stop the proceedings for declaring the arbitration inadmissible that the Netherlands had initiated under Article 1032(2) of the German Code of Civil Procedure in a Cologne court. The Netherlands’ confidence in the success in these proceedings is kindled by the recent judgment of the Federal Court of Justice of Germany that agreed with the rulings of lower courts on the inadmissibility of arbitrations conducted under a bilateral investment treaty between EU member states.

Читать

Life in the USSR Bars an Investor from Protecting Investments

An ICSID tribunal has found that it has no jurisdiction over a claim of the businessman Edmond Khudoyan and his California-based company who sought compensation from Armenia for the assets allegedly taken from them by fraud.

Edmond Khudoyan argued that high-ranking Armenian officials advised that he should invest in a joint venture with another businessman and that he followed that recommendation. Shortly after the JV was created, however, the partner siphoned off all of the money, the JV itself was declared bankrupt, and all of its property was auctioned off to the relatives of the very same officials. Moreover, national courts and the prosecutors refused to hold the ex-partner liable.

The arbitral tribunal held that it lacked jurisdiction under the ICSID Convention, since the dispute was a domestic one. The arbitrators reasoned that Edmond Khudoyan was an Armenian national, and his Californian company did not hold or manage investments on its own behalf.

That said, the conclusion of the arbitrators to the effect that Edmond Khudoyan was an Armenian national, was based on his upbringing in the USSR and the fact that after Armenia proclaimed its independence, he was to receive the citizenship of that country. The claimant’s counsel objected, arguing that Edmond Khudoyan had moved to the US back in 1989, never lived in Armenia and was seen by the government of that country as a foreign investor when doing business in Armenia.

Читать

EU Commission Demands Termination of Intra-EU BITs

The European Commission has announced that it has launched proceedings on the infringement by Austria, Sweden, Belgium, Luxembourg, Portugal, Romania, and Italy of the obligation to terminate all bilateral investment treaties in the EU. In support of this measure, the European Commission relies on the *Achmea* ruling to the effect that any intra-EU BITs are creating parallel treaty regulation inconsistent with the EU laws.

Читать

ARBITRATION NEWS

2021 RAC Arbitration Rules Enter into Force

On 13 December 2021, the 2021 Arbitration Rules of the Russian Arbitration Center entered into force, providing for:

- an even more flexible arbitration procedure, including expanded opportunities for the use of expedited proceedings;

- updated rules on interim measures and appointment of emergency arbitrators;

- appointment of the presiding arbitrator by co-arbitrators;

- provisions on third-party funding (TPF) of arbitration;

- improved rules on the conflicts of interests for the RAC bodies;

- rules on the hybrid med-arb procedure and simplified issuance of arbitral awards to confirm a mediation agreement;

- enhanced opportunities for the use of electronic means of sending the first written submissions to the respondent; and a lot more.

Importantly, all claims received before 13 December 2021 will be considered by way of arbitration as per the previous version of the RAC Rules.

Читать

Towards Transparency and Predictability

The Hong Kong International Arbitration Centre (HKIAC) has launched a new project – HKIAC Case Digest – a database with anonymized awards by arbitral panels in HKIAC-administered disputes. Access to awards and their analyses is subscription-based.

This year, the Russian Arbitration Center (RAC) has also launched a section of its website, publishing anonymized arbitral awards and orders in RAC-administered disputes. This month, another section of the RAC website went online – one with analyses of all practice on the enforcement of RAC awards by Russian commercial courts of first instance.

New Secretary General at the VIAC

The Vienna International Arbitration Centre (VIAC) has announced that Niamh Leinwather is to become its new Secretary General, replacing Alice Fremuth-Wolf who has served as the head of the VIAC for almost a decade.

Niamh Leinwather will be the first foreign female Secretary General of the VIAC. Moreover, she is the first Ireland-born practitioner to qualify in Austria.

As we reported previously, numerous leading arbitral institutions are women-led, which is undoubtedly having a favorable effect on promoting gender diversity in arbitration.

Читать

17th ICC International Commercial Mediation Competition

From 7 through 15 February 2022, the ICC will host the 17th International Commercial Mediation Competition Online. The 2022 Competition will gather more than 350 students and coaches, as well as over 150 mediators and academics from across the world, all interested in mediation as one of the key alternative means of resolution of business disputes. During the Competition, 48 student teams, guided by professional mediators, will resolve a business dispute by mediation under the ICC Mediation Rules. The performance of the teams will be evaluated by the world's leading specialists in dispute resolution. The preliminary rounds are scheduled to take place on 8 February 2022. The language of the Competition is English.

Читать

SPIBA Business Meeting on Arbitration

On 15 December 2021, the St. Petersburg International Business Association (SPIBA) hosted a business meeting on the problems of arbitral proceedings. The representatives of legal and business community discussed the topical issues of arbitration and arbitral proceedings. The key topics were the state and prospects of development of arbitration in Russia, the landmark cases of 2021, the professional conduct rules in arbitration and their practical relevance, and the peculiarities of international commercial arbitration for price revision in long-term contracts for the supply of natural gas.

Yulia Mullina, Executive Administrator at the RAC, has spoken of the advantages of arbitration in Russia and shared practical recommendations for the parties.

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13th International Conference by ICC Russia “Russia as a Place for Dispute Resolution: New Era of International Arbitration”

On 2 December 2021, the Russian National Committee of the International Chamber of Commerce (ICC Russia), together with the ICC International Arbitration Court, held the 13th edition of its International Conference “Russia as a Place for Dispute Resolution: New Era of International Arbitration.” The core topic for discussion was an analysis of the implications of the pandemic for international commercial arbitration. World-class experts shared their experience of working during the COVID-19 pandemic, discussed new rules, new approaches, and new digital products in international arbitration. The keynote speech at the Conference was delivered for the first time by the new ICC Court President Claudia T. Salomon, who assumed office on 1 July 2021, as well as the Secretary General of the ICC Court Alexander Fessas.

The Conference featured several sessions, including “ICC International Court of Arbitration Level-Up: All the Good News of 2021!”, “Megadisputes: What is Special about the Resolution of Disputes Arising from Large Infrastructure Projects?”, “Jurisdictional Clashes: How to Deal with the New Trend Towards Extraterritoriality”, “Cross-Border Insolvency: Do We Face the Primacy of International Arbitration over Bankruptcy Legislation?”, “Oral Advocacy and New Techniques in Cross-Examination of Experts and Witnesses.”

Читать

Mozolin Readings

The 3rd International Congress on Civil Comparative Studies the “Mozolin Readings” took place on 9-11 December at the Kutafin Moscow State Law University (MSAL).

The Congress featured, on 10 December, a panel discussion “Arbitration of Disputes Arising from Public Procurement: A New Dialogue”. The discussion will be moderated by Olga Belyaeva and Yulia Mullina. The panelists are Gleb Sevastyanov, Viktor Eremin, Natalia Gaidaenko Schaer, Valeria Romanova, as well as Anton Benov as a participant of the discussion.

The discussion covered the issues of:

- arbitrability of disputes from corporate and public procurement;

- validity and enforceability of arbitration clauses for this category of disputes;

- risks of arbitration being challenged by public authorities;

- defining the infrastructure for the arbitration of such disputes, including the requirements to an acting arbitration institution or institutions to administer disputes arising from public procurement, as well as the structure and principles of arbitration rules to be adopted, etc.

The broadcast of the session is available at YouTube channel of the Russian Arbitration Center.

Читать

International Conference “New Horizons of Private Law”

The Department of Civil and Arbitration Procedural Law at the International Law Faculty of the MGIMO University held the International Conference “New Horizons of Private Law” on 8-10 December in hybrid format. The issues at the Conference included, in particular, settlement of commercial disputes, the transformation of private-public relations in the era of digitalization, as well as the problems of development of private law through the prism of time.

The livestream of the sessions is also available on YouTube.

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