Russian Arbitration Center

at Russian Institute of Modern Arbitration

ARBITRATION DIGEST NOVEMBER 2021

CASE LAW DEVELOPMENTS

To Vaccinate or to Go to Employment Arbitration – That Is the Question

Hardly anyone would disagree that the COVID-19 pandemic has forced humanity to change its attitude towards matters of health. That said, the methods used in the world to overcome the coronavirus infection differ from state to state and are sometimes different even within the same state. This is the situation that happened in Canada this November, where in three cases that raise the issue of mandatory vaccination employment arbitrators have come to opposite conclusions.

Mandatory COVID-19 Vaccination Policy Upheld

More than 4,000 employees of Paragon in Ontario render security services at hundreds of facilities and, at 226 of the facilities a regime of mandatory COVID-19 vaccination is in force. In September, Paragon mandated all employees to get fully vaccinated by 31 October 2021. For those employees who refused to vaccinate, the employer provided such options as changing the facility, testing for COVID-19 or taking an unpaid leave.

In response to this ultimatum, the United Food and Commercial Workers Union filed a claim asserting a violation of the Management Rights Provision contained in the collective agreement, as well as the Ontario Human Rights Code (*United Food and Commercial Workers Union (UFCW), Canada, Local 133 v Paragon Protection Ltd).*

The arbitrator in this case, while finding Paragon's policy to be reasonable, enforceable and consistent with the law, has referred to the statement made in the same month by the Ontario Human Rights Commission, which read that "mandating and requiring proof of vaccination from employees is generally permissible under the Ontario Human Rights Code." Also, the arbitrator has acknowledged the employer's obligation to take "every precaution reasonable" to protect employees and observed that a mandatory vaccination policy was not tantamount to forced medical intervention and that subjective perceptions of employees about vaccines could not override and displace available scientific considerations.

Read

Mandatory COVID-19 Vaccination Policy Upheld in Part

Another arbitrator in Ontario, in the case *Electrical Safety Authority v. Power Worker' Union*, while paying special attention to the context of the abovementioned circumstances, has found that the requirement for mandatory vaccination, which superseded the Vaccinate-or-Test Policy, was unjustified, insofar as it established that employees could be subjected to disciplinary sanctions, fired, or placed on unpaid leave, if they did not undergo full vaccination.

This case generally did not concern vulnerable population groups (the elderly and young children); the employees were able to work remotely; most of the employees were fully vaccinated; the place of work itself did not carry a risk of a COVID-19 outbreak; and, since the Vaccinate-or-Test Policy was introduced, there have been no significant changes in the situation.

For these reasons, when the Power Workers' Union made a claim against mandatory vaccination, the arbitrator, while applying the test for assessment of the policy implemented in the work place as "reasonably necessary and involving a proportionate response to a real and demonstrated risk or business need" (the so-called "KVP Test"), has supported the Union and required that the policy should be revised by the Joint Health and Safety Committee.

Read

Requirement to Provide a COVID-19 Vaccination Certificate Deemed a Justified Violation of Human Rights

Finally, in Quebec, in the case *Lachance c. Procureur général du Québec,* 2021 QCCS 4721, the arbitrator has found a compromise while acknowledging that both parties were partly right.

In autumn 2021, technical building maintenance employers decided to request information about vaccination status from their employees. This decision was triggered by the demands from several clients that wished to have certificates demonstrating that the personnel providing technical maintenance services in their buildings were duly vaccinated against COVID-19.

The employers concerned and the relevant trade union filed a claim arguing that there has been a violation of the right to privacy as envisaged in the Quebec Charter of Human Rights and Freedoms. Importantly, the parties had agreed in advance that fully vaccinated people could both contract COVID-19 and transmit it, but to a lesser extent than those who did not get vaccinated.

The arbitrator has declared the requirement to provide a COVID-19 vaccination certificate a violation of the right to privacy, yet one justified from the standpoint of public order and well-being of the Quebec citizens. An employer must consider that an employee who has not been properly vaccinated may put at risk not only his/her own health, but the health of other people as well and, therefore, must take all necessary steps to protect the health and safety of its employees. Aside from that, the arbitrator has noted that "employees' rights affected by the requirements of the employers (acting on behalf of their clients) shall not be placed above the rights of other people," which prima facie justifies interference with privacy. As to the employees who refused to get vaccinated or report their vaccination status, the arbitrator has decided that they could be assigned to provide services to other clients, who do not consider vaccination to be relevant.

Read

Attempted Removal of an Arbitrator Due to His Resignation

In the September judgments in *Laxmi Continental Construction Co. vs. State of U.P. and Ors.* MANU/SC/0664/2021, initiated back in the past century, the Supreme Court of India resolved that an arbitrator's retirement did not terminate their mandate in the arbitration proceedings.

In their agreement of 1988, underlying the subsequent controversy, the parties decided that all disputes between them were to be resolved by public officers of the rank of superintending engineer or higher and were unrelated to the works under the agreement. A sole arbitrator, who at the time worked as a chief engineer, was appointed to resolve the dispute. Nevertheless, in 1995, the arbitrator resigned, but the proceedings went on until 1998. In the award issued, the arbitrator ordered the respondents to pay a total of INR 1,097,024 with interest for the period from 1990 until 1998, which the respondents did not agree with and sought to challenge and set aside the award in various courts.

Almost 25 years after the arbitration award was made, the dispute reached the Supreme Court of India that considered whether the arbitrator was entitled to continue performing his functions after the resignation. The Court found that the qualification requirement pertained exclusively to the time of appointment of a public officer as an arbitrator, *inter alia*, since the parties had not specified in their agreement that the arbitrator's mandate was to terminate after resignation. Furthermore, the arbitrator had made the award within the time limits extended by a decision of a civil judge; hence it could not be claimed that the arbitrator had acted unlawfully.

Read

Violation of Employment or Human Rights?

In the Canadian province Manitoba, there are two regimes governing employment relations: the Manitoba Labor Relations Act (the "MLRA") and the Manitoba Human Rights Code (the "Code").

The case in question concerned dismissal caused by the refusal to sign an agreement that required abstaining from alcohol consumption. Former employee filed a complaint against discrimination with the Manitoba Human Rights Commission. The Commission appointed an adjudicator in this case according to the Code; however, the employer did not agree with the appointment, since under the collective agreement an arbitrator must be appointed even in human rights cases. Despite the employer's objections, the adjudicator found that the court had jurisdiction and proceeded to establish discrimination in the employer's conduct.

Eventually, the case reached the Supreme Court of Canada (*Northern Regional Health Authority v Horrocks*, 2021 SCC 42). The Supreme Court has resolved that the adjudicator who heard the case did not have jurisdiction over the complaint filed, since, according to the collective agreement and the MLRA, exclusive jurisdiction to resolve such disputes rests with the employment arbitrator, and the Code does not contain any provisions that would clearly stipulate otherwise. Moreover, having considered the complaint on the

merits, the Court has ruled that the complaint pertained to the issues of employer's governance and management under the collective agreement, which once again evidenced exclusive jurisdiction of an employment arbitrator.

Read

Time Limit to Challenge an LCIA Award Is Extended Due to "Special Circumstances"

The Commercial Court in London has held that, despite failing to submit an application within the applicable terms, a company for strategic development 1MDB owned by Malaysia is entitled to challenge a multibillion LCIA award in the dispute with International Petroleum Investment Company (IPIC) owned by Abu-Dhabi, which was allegedly used to cover up a major fraud.

In the reasoning, Justice Andrew Baker indicated that 1MDB was unable to file a claim for setting aside before, as up until recently the Malaysian Government was headed by Mr Najib Razak, who is suspected to have been involved in a major scandal concerning the embezzlement of 1MDB funds. These suspicions also triggered an investigation conducted by the U.S. Department of Justice.

As a result, given the circumstances of this "unusual and special case", 1MDB has been allowed to challenge the arbitral award as obtained by fraud. By the way, it was exactly during Mr Najib's time in office as Prime Minister that the parties agreed on LCIA arbitration, resulting in 1MDB paying USD 1.2 billion to IPIC.

Read

Parents Responsible for Their Children's Games

This conclusion has been reached by a court in the case Wolfire Games LLC et al v. Valve Corporation, Docket No. 2:21-cv-00563 (W.D. Wash. Apr 27, 2021). The court dismissed a class action brought by consumers, consumers' parents, and a publisher of computer games Wolfire Games against Valve, a company developing computer games and software, and redirected the consumers to arbitration.

The claimants accused Valve of anticompetitive practices adopted in the online shop Steam set up by the company. When making a purchase in Steam, consumers agreed to an arbitration clause contained in the "Steam Subscriber Agreement", according to which all disputes between a consumer and Valve had to be referred to arbitration.

That ended up in parents being bound by the arbitration clause as agents for their children in special circumstances (agency exception) because in order to pay for purchases in Steam, parents allowed their children to use their credit cards. As the author of the article believes, a similar approach was followed in

G.G. v. Valve Corp., CASE NO. C16-1941-JCC (W.D. Wash. Apr. 3, 2017), where the court relied on the equitable estoppel doctrine.

As far as the publisher of computer games is concerned, the court has ruled that it was not bound by the arbitration clause, as it was not anyhow related to consumers or the online shop under the Subscriber Agreement. Moreover, the publisher's claims about violation of the antitrust laws did not concern the Agreement but were rather linked to internal recommendations to developers who wished to distribute their games in Steam.

Read

Banker's Dispute Comes Back Home

In November, an application for recognition and enforcement of a foreign arbitral award filed by Bank Trust was registered in the Russian database of commercial (arbitrazh) cases.

As reported by the representative of Bank Trust, the award that the Bank seeks to enforce in the Russian Federation was made by the LCIA. According to him, in this award, the arbitral tribunal deemed a replacement transaction between Bank Otkritie, a majority shareholder of Bank Trust, and the structures of businessman Boris Mints, fraudulent. At the same time, the representatives of the respondents insist that the LCIA proceedings are not yet terminated, and they have not received a copy of the application for the enforcement of the award.

The deal at issue was made not long before the rehabilitation procedures at Bank Otkritie. The Bank bought bonds worth USD 500 million from Boris Mints's companies, proceeding to use the funds raised to repay the loans of the same companies, secured by pledge, to Bank Otkritie. Unlike the loan agreements, however, the bonds were not backed by any material collateral and, as the Bank's representatives say, were not liquid.

Recovery of funds is now handled by the former subsidiary of Otkritie – Bank Trust, since it was the one to receive all non-core assets after Otkritie's rehabilitation.

Read

Botswana and Nornickel Settle their Dispute

The Russian smelting company announced on its website that it has finally managed to reach an agreement with the Government of Botswana on the compensation for breach of the contract on selling mines in the country. The amount of compensation is not disclosed, but an expert agency specializing in studying smelting companies' operations has reported a figure of USD 45 million. According to the agency, exactly this amount was sought to be approved in the Parliament of Botswana as compensation to Nornickel.

The dispute between the parties had been going on since 2014, when Nornickel concluded a contract for selling shares in the mines Nkomati and Tati with BCL Group (a company controlled by the Government of Botswana). However, BCL Group did not perform its payment obligations, and in 2016 the Government of Botswana filed for the company's liquidation. Nornickel, in turn, filed a claim against BCL Group with the LCIA and a lawsuit against the Government of Botswana with the High Court of Botswana. The expert agency asserts, with a reference to a Botswanan newspaper, that the claims could have amounted to USD 277 million. The Russian company continued to support its claims even after the contract was terminated in 2018.

As of now, after all contentious matters have been settled, Nornickel has announced that it is withdrawing its claim from the LCIA and intends to terminate the proceedings before the Botswanan court.

Read

U.S. District Court Grants Google's Motion To Compel Individual Arbitration

On 9 November, the U.S. District Court for the Northern District of California granted a motion, filed by the defendant, Google, LLC, to refer to arbitration the claims of one plaintiff in a class action.

According to the plaintiff, the defendant failed to disclose that it was monitoring and collecting Android smartphone users' confidential personal data. Moreover, the defendant was collecting users' "sensitive personal data to obtain an unfair economic advantage."

Google, however, stated that the plaintiff's claims should be arbitrated, rather than decided by a state court, since on the date of filing of the suit, as well as later, the plaintiff had been using Google smartphones that were subject to an individual arbitration agreement and class action waivers. The Court also noted that, initially, the defendant was not aware of its right to move the dispute to arbitration, since the plaintiff had consistently concealed which phones it had been using.

Read

Please, Read Your Offer Letter

Preti Flaherty Beliveau & Pachios LLP hired Bryan O'Brien as an associate in 2017 to work at its Portland office. In 2018 he was fired. O'Brien claims that the firm fired him for submitting consecutive requests for parental leave after the birth of his two daughters. His employer claims that the associate was fired for poor performance.

While considering the case, the district court discovered that the offer letter stated that all employment claims were subject to an arbitration clause. As a result, Judge Richard G. Stearns dismissed O'Brien's lawsuit, having referred his claims to an arbitration.

Interestingly, in his appeal, O'Brien highlighted that the lower court completely dismissed the lawsuit instead of staying the proceedings until the outcome of the arbitration as required under the Federal Arbitration Act.

Read

English Court and the Law Applicable to an Arbitration Agreement

In the English case *Kabab-Ji SAL (Lebanon) v Kout Food Group* (Kuwait), the Supreme Court has made three observations notable in the context of arbitration:

- whether the Court of Appeal erred in finding that the parties made an express choice of English law as applicable to the arbitration clause, and not French law;
- whether the Court of Appeal erred in terms of the 1958 New York Convention, having applied the summary procedure to the issue of refusing enforcement; and
- whether it erred in making a final determination to refuse enforcement of the arbitration award.

A Lebanese company entered into a Franchise Development Agreement with Al Homaizi Foodstood Company from Kuwait. Several years later, as part of its reorganization, the Kuwaiti company became a subsidiary of the Kout Food Group. A dispute arose between the parties that was referred to the ICC under the arbitration clause in the agreement. The arbitral tribunal faced the question of whether Kout Food Group was bound by the arbitration clause, and concluded that it was. When the claimant referred to the English court to enforce the award, the court decided that the applicable law was the English law, which provided that the respondent was not subject to the agreement's arbitration clause. Based on these circumstances, the court refused to enforce the award.

Remarkably, the Supreme Court has once again resorted to reflection on how the law applicable to an arbitration clause should be established, basing its position on the famous *Enka Insaat Ve Sanayi AS v OOO Insurance Company Chubb & Ors (Rev 1)* [2020] EWCA Civ 574 (29 April 2020). In this case, however, unlike in *Enka v. Chubb*, the issue of applicable law arose after the arbitration had concluded. The Supreme Court clarified the approach to identifying the applicable law governing the validity of an arbitration clause, having confirmed that the same principles apply both before the commencement of arbitration and at the enforcement stage. The Supreme Court ruled that the parties' choice of English law as applicable to the main agreement defines the law applicable to establishing the validity of the arbitration clause.

Read

Know and Still Double-Check Arbitration Clause

In late October 2021, the High Court of Singapore upheld the prohibition to bring lawsuits anywhere other than to the arbitration institution agreed by the parties. The circumstances of the dispute concern one of the parties filing three lawsuits in Singapore simultaneously while the charterparty contained a reference to a bill of lading with an arbitration clause on its back. The court decided that in this case the party was aware

of the potential existence of the arbitration clause but preferred not to take any steps to clarify this information. Additionally, the Court dismissed the respondent's objections to the effect that the dispute could not be arbitrated according to the law applicable to the arbitration agreement. The Court ruled that in order to establish whether a dispute could be arbitrated, the law of the arbitration forum shall be applied as having more relevance and impact on the arbitration in this case.

Read

Arbitration Clause in an Agreement between a Charity and Its Counterparty Does Not Bind the Patrons

A Canadian court ruled that a person who had not signed an arbitration clause can only be bound by it when it has a "defined" link to the agreement. A third party that is not aware of the arbitration clause is not bound by any obligations under the agreement, enjoys no benefits from the arbitration clause, and shall not be bound by the clause.

A charity and data services provider Blackbaud entered into an agreement that contained an arbitration clause. Following a cyberattack, there was an alleged leak of the data of the charity's patrons. The patrons brought a class action into a state court; however, the respondent – a database management company – insisted on referring the dispute to arbitration based on the existing arbitration clause. According to the respondent, while the claimants were not signatories to the arbitration clause, they were nevertheless bound by it. The court found no grounds for these persons to be bound by the clause.

Read

U.S. Court Allows Reading Emails. What About Attorney-Client Privilege?

A federal judge of the U.S. District Court for the Eastern District of Pennsylvania has ordered Dechert LLP to provide documents requested for the ICC arbitration against the directors of Korek Telecom Co LLC of Iraq, having established that these documents were not confidential.

Gergi B. Youssef and Mansour Farrid Succar claim that, according to English law, documents relating to their purchase of homes in the UK are protected by attorney-client privilege. The discussion centers around the communications between Dechert LLP lawyers and other persons involved in the real estate transactions. These houses were, however, allegedly used as a bribe. As part of the corruption scheme, the houses were transferred to government officials in exchange for favorable administrative decisions, which led to the investments of Iraq Telecom Ltd. being confiscated.

Since the vast majority of the communications were addressed to Youssef and Succar's agents, former clients insisted that attorney-client privilege should also apply to the communications between their agents

and Dechert LLP. The judge determined that aside from the fact that the former clients of Dechert LLP failed to prove that the documents were privileged, they also missed the 14-day term for submitting any objections.

As a result, the judge requested to provide all emails that were not addressed directly to the former clients.

Read

Kevin Spacey to Pay for the Unsuccessful Sixth Season of *House of Cards*

The Superior Court of the State of California received a petition to enforce an arbitration award demanding that Kevin Spacey and his companies pay USD 30 million.

The arbitration, which resulted in the abovementioned award, was initiated by Media Rights Capital studio. The claimant insisted that the internal investigations uncovered numerous episodes of harassment by Spacey towards the actors in all five seasons of the show. For this reason, the studio had to fire Spacey, shorten and rewrite the entire final season, which led to significant financial losses. The claimant considers Spacey's behavior, which brought about the above events, to be a material breach of his contract that required him to act in a professional manner according to the studio's practices and policies.

The actor's lawyers disagree with the award and argue that his actions were not a substantial factor in the studio's financial losses.

Read

Russia Asks the UN Secretary-General to Initiate Arbitration

Sergei Leonidchenko, Russia's representative in the Sixth Committee of the UN General Assembly, has stated that Russia is planning to ask the Secretary-General to initiate an arbitration pursuant to Section 21 of the Agreement regarding the Headquarters of the United Nations between the United Nations and the United State of America. According to that provision, "any dispute between the UN and the US concerning the [...] application of this Agreement [...] shall be referred for final decision to a tribunal of three arbitrators, one to be named by the Secretary General, one to be named by the Secretary of State of the US, and the third to be chosen by the two, or if they fail to agree upon a third, then by the President of the International Court of Justice."

Russia's representative has explained resort to this procedure by the refusal of the US to issue visas to the Russian members of the UN Secretariat and diplomatic missions of Russia in the US. Another reason for initiating the arbitration mentioned by the representative was the confiscation of Russian diplomatic property and introducing restrictions on the movement of Russian diplomats.

Read

Russia Hopes to Continue with Consultations

During the meeting of the WTO Dispute Settlement Body, Russia blocked the request from the European Union to create an arbitration panel to decide on the dispute concerning Russia's violations of the WTO's rules on campaigning for import substitution. In the July 2021 Digest, we had examined in detail the provisions of the law that the EU was so unhappy about.

Russia explained its reasoning for blocking the request for arbitration by its desire to continue discussing the issues in question through consultations with the EU. According to media agencies citing the relevant source, Russia believes its participation in consultations to be constructive and emphasizes that it has supplied detailed explanations of its law and rules concerning state procurement.

Nevertheless, if the EU requests an arbitration panel for the second time at the next meeting, according to the WTO rules, such a request cannot be blocked and the arbitration panel will be formed.

Read

INVESTMENT ARBITRATION NEWS

The YUKOS Saga: Annulment

The Supreme Court of the Netherlands has overturned the decision of the Hague Court of Appeal and referred the case for a new hearing to the Amsterdam Court of Appeal. The reason for this was the fact that the lower court had erroneously dismissed Russia's argument regarding the fraud committed by the YUKOS shareholders during the arbitral proceedings.

As part of its argument, Russia's representatives stated that, during the proceedings, YUKOS shareholders were making false statements and concealing documents relevant to the case. The Hague Court of Appeal dismissed Russia's arguments, indicating that one can only rely on such arguments when seeking to annul an arbitral award pursuant to Art. 1068 of the Code of Civil Procedure of the Netherlands (the Dutch CCP), while the proceedings in question were conducted under Art. 1065 of the Dutch CCP.

The highest court of the country disagreed with these conclusions, having noted that the discovery of the circumstances listed in Art. 1068 of the Dutch CCP could indicate a violation of public policy in adopting the arbitral award. The Supreme Court determined that, to that extent, the Court of Appeal had unreasonably limited Russia's remedies. Meanwhile, other arguments of Russia's appeal were dismissed and the decision of the Hague Court of Appeal was left unchanged.

Therefore, the case is to be remanded to the Amsterdam Court of Appeal for it to consider the merits of the argument concerning the fraud during the proceedings. An official representative of the Amsterdam Court of Appeal stated that the Russian side should be the one to initiate the proceedings.

Shortly after the decision of the Supreme Court of the Netherlands, the YUKOS shareholders submitted a petition to terminate the enforcement of the decision in the US. Earlier, a US court suspended the arbitration enforcement proceedings on the territory of the country pending the decision of the Supreme Court of the Netherlands. The YUKOS shareholders disagreed with the decision on suspension and made an attempt to challenge it; however, after the Supreme Court of the Netherlands accepted their claim, they recalled their appeal. The U.S. Court of Appeals for the District of Columbia granted the petition.

Read

Speaking of Stati

A decade-long confrontation between the Stati family and the Kazakhstan Republic continues. In 2013, an SCC arbitral tribunal decided that Kazakhstan was in breach of the Energy Charter Treaty and awarded USD 543 million to the Stati family (*Anatolie Stati, Gabriel Stati, Ascom Group SA and Terra Raf Trans Traiding Ltd v. Kazakhstan*, SCC Case № V 116/2010). Later, in September 2017, the Amsterdam District Court attached Kazakhstan's share in the Dutch KMG Kashagan BV worth USD 5.2 billion, as well as Kazakhstan's property in the territory of the Netherlands. However, in July 2020, it was announced that the Stockholm Court of Appeal concluded that the assets in possession of a central bank enjoyed sovereign immunity according to the UN Convention on Jurisdictional Immunities of States and Their Property. The Court set aside the previous orders concerning the attachment of the monetary funds located in the National Bank of Kazakhstan.

Now, in November 2021, the Supreme Court of Sweden overturned the decision of the Stockholm Court of Appeal and interpreted the Convention differently. According to the Court, sovereign immunity is not absolute and depends on how the foreign state is using its property. Since the property at issue was linked to the investment strategy targeted at quoted shares associated with considerably higher than usual acceptable risks ensuring a higher profit, which did not seem like an instrument of the monetary policy of the Kazakhstan Central Bank, the Supreme Court of Sweden established the existence of a commercial element in holding the property and returned the case for reconsideration to the Stockholm Court of Appeal.

At the same time, also in November, a Belgian Court ruled against the enforcement of the same award, finding that Anatolie and Gabriel Stati had obtained it through fraud. Kazakhstan insisted that, during the arbitration, the company belonging to the Stati brothers was asking for the recovery of fictional expenses for building a liquified petroleum gas plant. The Belgian court established that the Stati company provided false financial information to KPMG and relied on the audit reports received in order to legitimize these financial documents in the arbitration. Then, in 2019, KPMG recalled the audit reports that it had provided for the Stati companies for using in the arbitration.

The Brussels Court of Appeal determined that the arbitrators were relying on the evidence that, as it turned out, was significantly corrupted, which affected the process of evaluation and the final amount of the awarded damages. It also established that Kazakhstan was deprived of the right to be heard on these matters.

Read

ECJ Enjoins Attachment of Sanctioned Assets

In the case of the Iranian Bank Sepah, two US creditors sought to enforce a USD 4 million French judgment. Bank Sepah objected to an attachment of its assets, arguing that the Iranian financial institutions (the Bank being one of them) were subjected to international sanctions introduced in order to curtail Iran's nuclear program. The French courts then referred the issue to the ECJ.

The ECJ has held that absent a prior authorization from the competent national authority, the EU law prohibits attachment of assets frozen as a result of international sanctions. This ruling of the ECJ is especially interesting when read in conjunction with the *Al Kharafi* case, also pending enforcement in the territory of France.

The arbitral award in the case of the Kuwaiti company Al-Kharafi & Sons. Co. concerns an agreement with Libya to turn the suburb of Tripoli into a tourist hub. During the implementation of the project, problems arose when Al-Kharafi faced claims challenging the company's title to land. Libya terminated the agreement in 2010, while Al-Kharafi filed an arbitral claim the next year. An arbitral tribunal in Cairo ruled in favor of Al-Kharafi.

In the meantime, Al-Kharafi filed an application to enforce the award in France in 2013 and tried to attach the assets controlled by the Libyan Investment Agency (LIA). The LIA's main defense boiled down to arguing that the LIA's assets could not be attached in any event, since they remained frozen under the EU and UN sanctions.

Read

Chinese Investors Deliver on Their Promise to Initiate Arbitration

Beijing Skyrizon Aviation Industry Investment Co. Ltd has initiated an arbitration against Ukraine under the China-Ukraine BIT. The proceedings will be conducted at the PCA in The Hague.

The investor is accusing Ukraine of taking unlawful measures that had been causing it to incur losses for five years now; namely, Ukraine's measures with respect to Motor Sich, a company where the Chinese investor had acquired a share, as we reported almost a year ago. Previously, a Ukrainian court attached the company's shares, and it was later nationalized under a resolution of the National Security and Defense Council of Ukraine. Moreover, sanctions were introduced against the investor, and its Ukrainian assets were frozen.

Read

ICSID Refuses to Expand an Arbitration Clause under MFN

An ICSID tribunal has concluded that it lacks jurisdiction over an investment dispute initiated by three subsidiaries of the Kimberly-Clark Group from Belgium, the Netherlands, and Spain, against Venezuela under the Belgium-Venezuela, the Netherlands-Venezuela, and Spain-Venezuela BITs.

The dispute arose over a Venezuela-based factory for the production of personal care products. In 2016, after the oil prices dropped, demand soared for basic necessities, causing a crisis in the market for such products. The investor claimed that Venezuela had introduced unfair and discriminatory control over the price for personal care products, accompanied with foreign exchange control, as well as refused to ensure timely reimbursement of the sales tax. Moreover, according to the investor, right after announcing that the factory was to stop functioning, Venezuela expropriated it.

The arbitral tribunal found no grounds to assume jurisdiction over the dispute for several reasons.

The first reason cited was the absence of the state's consent to arbitration pursuant to the ICSID Additional Facility Rules. In interpreting the versions of the treaties in different languages, the tribunal concluded that under the BITs, Venezuela's proposal of arbitration under the Additional Facility Rules was confined to the period preceding Venezuela's adherence to the ICSID Convention and did not cover the disputes arising after Venezuela ceased to be an ICSID Contracting State. In other words, having ratified the ICSID Convention, Venezuela thus consented to arbitration, which excludes its earlier consent with respect to investor-state disputes under the BITs.

Second, the tribunal decided that using a dispute resolution clause from other investment treaties for the purposes of its jurisdiction under the MFN regime was impossible. According to the tribunal, that regime could not affect the competence of the arbitrators.

The tribunal deemed these reasons to be sufficient to make a finding that it had no jurisdiction and not to rule on the objections of Venezuela that, for instance, argued, that the investor had made no investment within the meaning of the treaty.

Read

Argentina Runs out of Luck

An ICSID tribunal has ordered Argentina to pay a compensation to an Austrian investor for revoking a licence for operating a gaming and gambling business.

Two out of three arbitrators ruled that Argentina had committed an unlawful expropriation in view of the decision of one of the local regulatory authorities to revoke a license for its gaming business and to hand its business over to another company. One of the three arbitrators, however, issued a dissent opinion, disagreeing with the finding of Argentina's breach of its BIT with Austria. According to him, the local regulatory authority acted in compliance with both Argentina's domestic law, and international law.

The dispute arose from the revocation of the investor's licence, issued for 30 years and allowing it to operate gaming facilities and run lotteries. The revocation, Argentina argued, was due to the investor's breach of the anti-money laundering rules. Immediately after the revocation of the license, the investor's business, including all of its employees, was handed over to other Argentinian companies.

The arbitral tribunal found that in doing so, Argentina committed an indirect expropriation.

Read

SCC Does Not Approve Low Tariffs for Electricity

The arbitrators awarded the Russian energy company Inter RAO USD 80.5 million worth of damages in view of the Georgian Government's refusal to raise tariffs to electric power. Inter RAO, an owner of two HPPs in Georgia, explained the need to raise the tariffs by the devaluation of Georgian national currency in 2014.

Georgia's Ministry of Justice has announced that it does not agree with the award and is planning to challenge it at the Stockholm Court. In turn, the Ministry of Economy reported that it had no plans to raise the tariffs, irrespective of the outcome of the arbitration.

Read

A Housing Project Ends in Investment Arbitration for the Czech Republic

An ICSID tribunal has found the Czech Republic liable for actions taken by the mayor of one of the Czech villages at the outskirts of Prague over a thwarted construction of a housing complex, refusing, nevertheless, to award any amount as compensation. The tribunal deemed the mayor's actions to have breached fair and equitable treatment.

The dispute arose between a housing developer and the Czech Republic over the Sever investment project, commenced in 2007. Construction required zoning and increasing the development density; the investor asserted that while obtaining the relevant permits, the mayor demanded that it pay him money. According to the investor, the mayor's actions constituted bribery. The tribunal found that despite the violations committed, the mayor's actions resulted in no losses for the investor, since his actions were thoroughly examined by the Czech courts.

Read

ARBITRATION NEWS

RAC Releases Code of Ethics for Parties

Over the past few months, the RAC team has been working on a new code of ethical rules designed to regulate the conduct of the parties and their counsel during arbitral proceedings. Compliance with the rules of ethics by arbitrators, parties, and their counsels in the proceedings is a guarantee of effective and fair arbitration. The Code is a detailed guide, reflecting widely recognized standards of proper conduct of the parties and their counsels, as well as taking account of the best practices of administration of disputes at the RAC. To ensure the widest possible application of the Code, RAC strived to consider the specifics of various legal systems and elaborated general provisions that should work equally well for all parties and counsels.

The Code comprises general Principles of Ethics for the Parties (declaratory rules that form the basis of due process) and the Rules of Conduct of the Parties (more detailed provisions, accompanied by a commentary that reveals the essence of the rule discussed). The Code will apply in full or in part to all parties and their counsels in an arbitration under an agreement between the parties or at the initiative of the arbitral tribunal after consultations with the parties.

Read

Modern Arbitration: LLM & Careers – A Series of Interviews with the Graduates of Top LLM Programs

Young IMA, together with the Russian Institute of Modern Arbitration, has launched a new project – Modern Arbitration: LLM & Careers — a series of interviews, where Mikhail Kalinin (Associate at Kings & Spalding LLP) and Nikita Kondrashov (Counsel at Axioma, Attorney at Yurlov & Partners Office) will ask the graduates of top LLM programs at foreign universities to share their experience of applying, studying, and living abroad, as well as discuss their professional journeys and life after graduation.

In the first issue, Mikhail and Nikita have had a chat with Ksenia Koroteeva (Associate at Lévy Kaufmann-Kohler) and Anna Korshunova (Associate at LALIVE). Ksenia and Anna took LLMs in Switzerland at the MIDS, seen as one of the most prestigious arbitration programs in the world.

How do you get a scholarship that will cover the entire fees and the costs of living in Geneva? Is it hard to secure an internship at a Swiss law firm, arbitral institution or even an international organization? Lectures by Zachary Douglas and barbecues by Marcelo Kohen? A trip to the ICC Conference in Paris and a hike into the Swiss mountains between classes? Find answers to these questions and a lot more from those who have been there, with unique footage from Geneva, in two-hour-long video, available at YouTube.

Read

England Updates Its Arbitration Regulations

The UK is expected to update arbitration-related regulations in several spheres at once. Revisions will be made to the Arbitration Act 1996 and will involve introducing mandatory arbitration for commercial leases of premises.

Analysis and elaboration of recommendations on improving the Arbitration Act 1996 that has been the key statute regulating arbitration of disputes in England, Wales, and Northern Ireland for 25 years, will fall to the Law Commission of England and Wales. It is noted that the principal goal of the reform is to ensure maximum efficiency of the provisions of the statute that is to remain the "gold standard" in international arbitration, and, ultimately, to maintain the appeal of England and Wales as places for dispute resolution, as well as the predominance of English law as the preferred choice of applicable law. In light of the proposals submitted to the Commission, potential amendments will affect matters of confidentiality and privacy in arbitration; electronic service of documents; electronic awards and virtual hearings; and the possibility of challenging arbitral awards based on the grounds stipulated in the Act.

The UK Government has also produced a bill (the Commercial Rent (Coronavirus) Bill) introducing arbitration as the mandatory form of resolution of disputes on the recovery of overdue rent between landlords and tenants in the commercial sphere. The revised procedure will apply where overdue commercial rent arose from 21 March through 18 July 2021 for England (and 7 August for Wales). These amendments are addressed to lessees of commercial premises who faced financial difficulties during the pandemic. The procedure for the appointment of arbitrators will consist of several steps. The Secretary of State may approve one or more arbitral institutions that will appoint a sole arbitrator to resolve the dispute or constitute an arbitral tribunal to resolve disputes between tenants and landlords. One of the special features of arbitration has to do with the terms for applying for a remedy: a party's right to resort to arbitration will be limited by six months from the adoption of the Act. A mandatory pre-condition of arbitration is complying with a sort of complaint procedure. Thus, the claimant must notify the respondent of its intention to go to arbitration and the dispute can be referred to arbitration only after 14 days from the receipt of a reply from the other party or 28 days from the service of the notice if no reply was received. The arbitral award is binding on the parties.

Read

China to Establish an Arbitration Center in Hong Kong, to Focus on the Asia-Pacific Region

Together with the Asian-African Legal Consultative Organization (Aalco), China plans to establish a regional Arbitration Center in Hong Kong to create conditions for more efficient resolution of disputes by arbitration for the Asia-Pacific countries. Zhang Jun, China's permanent representative to the UN, and Kennedy Godfrey Gastorn, Secretary General of Aalco, have met in New York and signed an agreement to create a regional arbitration center in Hong Kong. Pursuant to the agreement, the arbitration center will cooperate with existing arbitral institutions in Hong Kong and assist in enforcing arbitral awards.

Read

Delos Dispute Resolution Updates Its Arbitration Rules

Arbitral institution Delos Dispute Resolution has made the first substantive updates to its Rules of Arbitration since its inception. According to the revised Rules, the beneficiaries of arbitral awards will be able to submit applications to publish a “compliance failure notice” at the Delos Dispute Resolution website, if their awards remain unpaid after the expiry of all time limits for challenging them. It is noted that the amendments will eliminate the gaps in the previous Rules, take account of the latest global trends, as well as develop some of the existing provisions of the Delos Rules.

The amendments entered into force on 1 November 2021 and include new provisions on arbitration agreements and the law applicable to arbitration agreements, prima facie termination of proceedings, consolidation of proceedings, joinder, the possibility of using lists of potential arbitrators in nominating candidates, as well as on legal representation and third-party funding in arbitration.

Read

Conditional Fee in Commercial Arbitration: the Singapore Way

The Singapore Ministry of Law has presented a bill proposing amendments to the Legal Profession Act concerning the regulation of conditional fee agreements between counsel and clients in international and domestic commercial arbitrations.

In particular, the bill suggests defining the key distinctive characteristics of such agreements, providing for guarantees for both counsel and their clients, for instance, by way of introducing the obligation for the counsel to disclose a certain scope of information to their client.

Read

Russia Signs the Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters

The Hague Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (the Hague Judgments Convention*)* was adopted back on 2 July 2019, but is yet to enter into force. Russia has become the fifth country to sign it.

The Hague Convention is aimed at simplifying the procedure for the recognition of judgments adopted in some categories of civil and commercial disputes in the territory of foreign states, as well as to create an efficient mechanism for the cross-border enforcement of judgments.

Apart from the Convention, Russia is also a member of the Hague Conference on Private International Law and a party to six more Hague Conventions. Today, Russia's procedural laws assume, as a general rule for the execution of judgments, that a foreign judgment will only be given effect in the Russian territory after it has been recognized by a state court.

Read

What Is a "Foreign" Award in the Context of the New York Convention?

The authors of the article have performed a thought-provoking analysis of which arbitral awards can be enforced based on the 1958 New York Convention (the Convention).

It follows from Article I(a) of the Convention that it applies to foreign awards and the awards that are not deemed domestic in the state where their recognition and enforcement is sought (non-domestic awards). A question therefore arises as to whether a domestic award, entered in a domestic arbitration between the parties of the same nationality, can be enforced in another jurisdiction as a foreign award under the Convention.

According to the interpretation cited by the authors of the article and Gary Born, the answer to this question is affirmative: the nationality of the parties does not matter for qualifying an award as a foreign one; what matters is the territorial element. Accordingly, it suffices for an arbitral award to have been issued in a state other than the state enforcing it.

The authors are therefore drawing a distinction between domestic and international arbitration from the standpoint of nationality of the parties, and between domestic and foreign awards from the standpoint of the seat of arbitration. For this reason, where an arbitral award is enforced in a country other than the one where it was delivered, such an award will be viewed as a foreign award, enforceable under the Convention. If, however, the award is being enforced in the same country where it was delivered, it will be a domestic award that should be enforced in line with the domestic arbitration laws of the country in question.

In support of this conclusion, the authors are referring to the decisions of the High Court of England and Wales in *IPCO v. Nigeria* (NNPC), Case No: 2004 1031, [2005] EWHC 726 (Comm) and of the US District Court for the District of Columbia in *Continental Transfert Technique Limited (Nigeria) v. Federal Government of Nigeria*, Civil Action No. 08-2026 (PLF), where the courts affirmed that identical nationality of the parties and application of the law of the country of the nationality of the parties (Nigeria) was irrelevant for the purposes of enforcing an award under the Convention; that it was sufficient that enforcement was sought in another state, rather than in Nigeria, although it was clear that the Convention was intended for other purposes.

Read

“Little Words, Big Problems” or Bad Faith Mediation Practices

Lawyers at the Singapore office of Withers LLP have prepared an article focusing on the fundamental issues of challenging enforcement of international settlement agreements reached as a result of mediation on the basis of the Singapore Convention on Mediation (formerly known as the UN Convention on International Settlement Agreements Resulting from Mediation) that entered into force on 12 September 2020.

One of the key issues is the problem of bad faith practices, where a party that does not want to perform a settlement agreement relies on the grounds for refusing to grant relief (Art. 5 of the Convention) without any reasons to do so. A stark example is an argument on the mediator’s breach of the standards applicable to mediation. The problem is that today, the standards in question remain unclear; moreover, review of the mediator’s conduct by the competent authority of a state entails a violation of confidentiality of arbitration.

The authors see a potential solution to that problem in taking care to formulate mediation agreements more clearly. Such an agreement may be drafted to provide, for instance, an express waiver by a party of its right to call the mediator as a witness or a waiver of the right to challenge the enforcement of the settlement agreement based on the grounds stipulated in the Singapore Convention and related to the mediator’s conduct, etc.

Read

ADR EVENTS

Registration Is Open for Courses on International Arbitration by CIArb and RIMA

The Russian Institute of Modern Arbitration invites participants to register for the Introductory and Advanced Online Courses on International Arbitration, hosted together with the European Branch and the Russian Chapter of the European Branch of the CIArb.

If you are new to arbitration and wish to learn about it and its benefits for users, its key principles and its connection with other means of ADR, then the Introduction to International Arbitration course is for you.

To look further into the legal principles, practice, and procedure in international arbitration, you are welcome to join Module 1. Law Practice and Procedure of International Arbitration course. This course will be perfect for anyone wishing to practice as counsel or an international arbitrator.

Successful completion of the course and passing an exam will give you an opportunity to qualify as a Member of CIArb (MCIArb).

The director and chief lecturer is Andrey Panov, FCIArb, Counsel with Allen & Overy.

The courses start on 13 January 2022.

Registration is open until 25 December 2021.

Read

The Fifth Mozolin Moot Court: Results

On 4-5 December, the RIMA hosted the offline rounds of the Fifth National Moot Court on Arbitration of Corporate Disputes named after Professor V.P. Mozolin. The Moot Court brought together 26 teams and more than a hundred arbitrators. This year, the students worked on a case involving such issues as whether a hereditary foundation can be held liable as a shareholder; whether it falls under an arbitration clause; whether a beneficiary may resort to arbitration if they are named in the terms of management of the foundation.

This year's winners of the Mozolin Moot Court are:

1st place: Team 220 (HSE, HSE Nizhny Novgorod),

2nd place: Team 943 (MSU, HSE),

3rd place: Team 355 (HSE).

4th place: Team 291 (HSE).

The Best Written Documents award went to Team 510 (HSE, MSU). The Best Oralist title was awarded Elena Bogodukhova (Team 220), and the Best Arbitrators – to Daria Mayorova, Konstantin Antonyuk, and Dmitry Ilyin.

Watch the recorded livestream of the Final Round of the Moot Court at the RAC YouTube channel.

Also on 3 December 2021, on the eve of the offline rounds top Russian professionals spoke at the Fifth Conference, elaborating on the issues of the Moot Court's Case. The Conference opened with a mini-lecture by Dmitry Zaikin, PhD, on "Hereditary Foundations in Russia: Evolution and Legal Nature", that was followed by two separate sessions. The first session, "Mortis Causa: Arbitration and Hereditary Foundations" was organized by the Petrol Chilikov law firm, and the speakers were Egor Chilikov (Partner at Petrol Chilikov) and Alexander Yagelnitskiy (Counsel at Petrol Chilikov, Associate Professor at the Civil Law Department of the Faculty of Law of the Lomonosov Moscow State University, PhD), with Yulia Mullina (Executive Administrator at the RAC) moderating. During the second session "IPO: Legal Regulation and Practical Advice", the speakers were the leading IPO specialists Arthur Iliev (Partner at Clifford Chance), Sergey Volkov (Counsel at LECAP), Alexandra Karachurina (Partner at BALAYAN I GROUP), with Marina Akchurina (FCIArb, private practitioner) as the moderator.

Watch the recorded livestream at the RAC YouTube channel.

Read

Registration Is Open for the VI Moscow FIAMC Pre-Moot 2022

On 4-6 February 2022, the RAC will hold the online VI Moscow Pre-Moot rounds of the Frankfurt Investment Arbitration Moot Court (FIAMC). During the Pre-Moot, teams will be able to practice presenting their cases ahead of the international rounds. On 4 February 2022 the conference will be held on the most topical and interesting issues on the global investment arbitration agenda.

The participants of the conference will discuss issues related to the 2022 FIAMC Case at 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.

Register now not to miss the conference.

Team can register until 16 January 2022 here (please note that registration can be closed early if the number of registered teams reaches the limit).

Register as an arbitrator here.

Working language: English. For all questions, please contact us at fiamc@mootcourt.ru.

Read

Registration Is Open for the Moscow Pre-Moot of the Willem C. Vis Moot

From 11 through 13 March 2022, the RIMA will hold one of its largest pre-moots: the 13th Moscow Pre-Moot for the 29th Willem C. Vis International Commercial Arbitration Moot.

This year, the Pre-Moot will once again be held online.

The organisers of the Pre-Moot are the Russian Institute of Modern Arbitration, the Lomonosov Moscow State University, and the Young IMA.

Teams and arbitrators can register until 21 January 2022.

Should you have any questions on participation and cooperation, please email moscowpremoot@gmail.com.

Read

FDI Mediation Moot 2022

The International Student Moot Court Competition on Mediation of Investment Disputes (FDI Mediation Moot 2022) is organized by the Center for International Legal Studies (Salzburg, Austria) and will take place online from 25 through 27 March 2022. 24 teams will represent an investor or a state in the settlement of a dispute. Twelve student mediators (together with professional mediators) will help teams resolve a moot investment dispute. The students who have ever acted as mediators or legal counsel, however, will not be able to participate. Given that the result of mediation is traditionally not the "win or lose" outcome of the dispute, but rather a compromise, the winning students will also be given the opportunity to take part in the FDI Mediation Moot Mentoring Program. The purpose of the FDI Mediation Moot is to facilitate development of mediation as a means of alternative dispute resolution for investment disputes and explore its potential.

Team registration closes on 15 January 2022.

Read

Conference "Faces of Diversity: CIS Best Practices"

On 30 November, the Russian Arbitration Center and Arbitrator Intelligence held a joint conference Faces of Diversity: CIS Best Practices. Top experts from the CIS countries spoke over the course of three sessions of the importance of various types of diversity in arbitration, including in the appointment of arbitrators, as well as discussed different approaches to the appointment of co-arbitrators.

Watch the recorded livestream of the Conference here.

Read

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