Russian Arbitration Center

at Russian Institute of Modern Arbitration

ARBITRATION DIGEST APRIL 2022

CASE LAW DEVELOPMENTS

After Uber Deliveries Comes the Arbitration Fee

After the death of the African American man George Floyd, Uber came forward with an initiative announcing that it would not charge Uber Eats deliveries from certain restaurants owned by dark-skinned people. Later, over 31,000 Uber clients who had paid for deliveries from restaurants not owned by dark-skinned people filed arbitration claims, arguing that the fees constituted unlawful reverse racial discrimination. The claimants' strategy in such a group action is fairly simple – thus, they are seeking to settle on favorable terms, burying the company in millions of fees related to mandatory costs for filing documents, handling their cases and arbitrators' fees, since such costs and fees must be paid long before any dispute moves to the merits stage.

Uber's Terms and Conditions contain a clause providing for arbitration to be administered by the American Arbitration Association (AAA) under the AAA Consumer Arbitration Rules. These Rules stipulate that Uber, as a corporate respondent, must pay a USD 500 filing fee, a USD 1,400 case management fee, and a USD 1,500 arbitrator fee — for each individual case. In the end, for 31,000 cases, even after AAA gave it a "discount", Uber was invoiced over USD 91 million in arbitration fees.

Uber tried to challenge the bills and sought an injunction on any further invoices from AAA (*Uber Techs., Inc. v. Am. Arb. Ass'n, Inc*., No. 15732, 2022 WL 1110550 (N.Y. App. Div. April 14, 2022)).

Nevertheless, the Appellate Division of the New York Supreme Court unanimously supported the decision of the first instance court to dismiss Uber's motion for a preliminary injunction. According to the judges, Uber failed to demonstrate a prospect of success on the merits of its claims, since 1) the aggregator failed to prove that by charging it reasonable fees the AAA had breached any agreed terms; 2) the AAA was fully within its rights to charge the fees under the Consumer Arbitration Rules; 3) Uber could not demonstrate any unlawful or unfair conduct on the part of the AAA, as enforcement of the AAA fee schedule did not violate public policy and was not immoral or unethical; and 4) Uber could not seek a declaratory judgment when it was actually seeking a monetary judgment.

Read

Arbitrator Joins a Party-Related Law Firm before the Award: Is a Disclosure Necessary?

The Federal Supreme Court of Switzerland has dealt with the issue of whether an arbitrator's joining a law firm that has one of the parties as a key client triggers a conflict of interests. The proceedings at the state court were opened in view of an award delivered in a dispute administered under the Swiss Rules of International Arbitration of the Swiss Arbitration Centre. The tribunal was constituted in 2018: on 27 February, the parties appointed the co-arbitrators, and on 23 May, the latter elected a presiding arbitrator. Neither party challenged the panel. In a few years, on 15 July 2021, the tribunal issued its award. Then, on 1 September, it appeared that the presiding arbitrator had become a partner of the law firm for which the respondent was a key client.

On 14 September, the company that was the claimant in the arbitration applied to the Federal Supreme Court of Switzerland seeking to set the arbitral award aside on the ground that at the time it was issued, the presiding arbitrator had a conflict of interests with the respondent that won the case. The party argued in support of its position that the arbitrator's transfer to the law firm had been planned and approved prior to the date of the award.

It followed from the explanations of the arbitrators submitted to the Court that the arbitral panel had reached its conclusions on the merits back on 5 February 2021. The presiding arbitrator's submission suggested that the first round of negotiations on his potential joining the law firm as a partner took place only three weeks after that, while the agreement on the transfer was made on 28 April 2021.

The Swiss Court did not accept the applicant's arguments. According to the Court, when assessing an arbitrator's impartiality and interest in the outcome of the case, a court must assume that a conclusion on the lack of impartiality may only be made where clear or systemic errors were made that indicate a possible intention to put one of the parties to the arbitration in a manifestly unfavorable position as compared to its opponent. The Court made a suggestion that the president of the tribunal did not believe it was necessary to disclose his transfer to the law firm as the discussions and reaching an agreement on that transfer took place well after the arbitrators had deliberated on the key conclusions on the merits of the dispute. The fact that the full reasoning for the award was not yet produced in its final form was irrelevant.

Read

Two Plus Two Makes Four: Why Do Arbitrators Need to Know Their Maths?

An English court has set aside an award issued by a tribunal in an ad hoc arbitration under the Rules of the London Maritime Arbitrators Association (LMAA), reasoning that the tribunal had failed on its duty of fairness. The court's judgment brings clarity to the issue of whether a party may challenge an award suffering from a clear computational error that the tribunal is refusing to correct. English law was the applicable law of the proceedings.

The dispute arose from a time charter (a contract to hire a vessel for a specific time) under a claim filed by the shipowners against the charterer. The shipowners were claiming USD 37,831 in freight payments under the agreement. The charterer of the vessel conceded that the award amounted to USD 28,277.91, yet also filed a counterclaim for USD 15,070. The tribunal concluded that the claimant was entitled to USD 28,277.9 and dismissed the counterclaim. In the award it stated, however, that the total claims granted amounted to USD 53,692.66, having added the amount of the charterer's counterclaim to the shipowners' claims. As a result, it awarded around 33% more to the shipowners than they were entitled to claim. The charterer approached the arbitrator twice with a request to correct the error in calculations, but the arbitrator refused to do so.

The English court was to get to the bottom of whether there were grounds to set that award aside. The court held that the arbitrator's having added to the shipowners' claims the USD 15,070 in counterclaims by mistake was common ground between the parties. According to the charterer, that computational error was tantamount to a serious irregularity that constituted a ground for annulment under Section 68(2)(a) of the Arbitration Act 1996. The shipowners, in turn, were convinced that the Section only covered matters of undue legal procedure, rather than any errors that the arbitrators might have made on the merits of the dispute. The court ruled that the egregious and manifest computational error violated the duty to ensure fair

resolution of the dispute. In the court's opinion, the parties agreed on what the rules of arithmetic were and a derogation from such mathematical rules could well be deemed a violation of arbitral procedure.

Read

Interpretation of an Arbitration Clause Paves the Way to China

The issue of interpretation of an arbitration clause found in an insurance contract came before the US courts. The contract contained a clause referring any claims arising in connection with its performance to arbitration before the Shanghai arbitration committee or to litigation before a "people's court". The claimant brought its claim before a US state court, arguing that a "people's court" meant a court of any legal order, including the US, and that the court was to construe that clause against the party that suggested the wording, that is, against the insurer. The defendant submitted, on the contrary, that the term "people's court" could only refer to a court in China both from the standpoint of its English translation and from the standpoint of the other contract terms. Thus, for instance, that the arbitration clause provided for arbitration of disputes administered by the Shanghai arbitration committee supported the interpretation in favor of the jurisdiction of Chinese courts over the dispute. The US court agreed that the clause was to be interpreted as establishing the jurisdiction of courts in China.

Read

Decision on Admissibility Cannot Be Reviewed by Courts

A Hong Kong court (*T v B (Arbitration)* [2022] 1 HKLRD 279) has concluded that an arbitral tribunal's decision on the admissibility of a dispute in arbitration cannot be subject to review by state courts.

The agreement between the parties contained an arbitration clause that provided that the arbitration could be initiated only after the execution of a works completion certificate. One of the parties to the dispute initiated an arbitration, to which the other party objected, arguing that at the time the parties had not issued the completion certificate. Both the parties and the tribunal considered those objections as aimed against the arbitral tribunal's jurisdiction over the dispute. The tribunal issued an interim award to the effect that it was incompetent to hear the dispute between the parties on the merits as the arbitration was premature.

Disagreeing with the award, the claimant seized a court with a setting aside application, arguing, first, that the arbitrator could not interpret the arbitration clause, and, second, that the clause was invalid since it excluded the party's right to approach a court within the limitation period prescribed. The court, in turn, underscored that the issue of referring the dispute to arbitration was one of admissibility, rather than of the tribunal's jurisdiction over the dispute. The court noted that an arbitral tribunal may itself define the procedural rules as done, for instance, by state courts. Accordingly, an arbitral tribunal's decision on whether the parties complied or failed to comply with pre-arbitration procedures is final and cannot be reviewed by a state court.

Read

You Can't Have Your Cake and Eat It: Refusal to Pay Fees Brought Parties to Court

The French Supreme Court has confirmed that a respondent cannot sabotage the arbitration by refusing to pay its share of the advance on costs, as that violates the duty of procedural loyalty (*loyauté procédurale*) of the parties and cannot be invoked to challenge jurisdiction (*Cour de cassation*, n° 21-11.253). The Court achieved that conclusion after considering the facts of a dispute between Taglia'Apau and Pastificio.

In 2011, two companies entered into a franchise agreement; after a few years, however, Taglia'Apau demanded that its revision and claimed a compensation of the losses it suffered due to low margin. In 2016, Taglia'Apau went bankrupt, having succeeded, nevertheless, to file an ICC claim under the 2012 Rules. Pastificio refused to pay the arbitration fee, while Taglia'Apau had no money to cover the respondent's share, so the ICC terminated the proceedings under Article 36.6 of the 2012 Rules.

Then, after the agreement was terminated and Taglia'Apau went into liquidation in 2018, its administrator brought proceedings against Pastificio before the commercial court of Pau, France.

Pastificio challenged the court's jurisdiction due to the existence of an arbitration agreement and relied on the excessiveness of the opposing party's claims that had ultimately resulted to a large advance payment. Taglia'Apau's argument to the effect that Pastificio had refused to pay its share of the advance on costs, thus actively impeding the arbitral proceedings, was not heard – thus, the court found that it had no jurisdiction because of the arbitration agreement and concluded that Taglia'Apau could initiate a new arbitration to have its claims satisfied.

After that, Taglia'Apau went to the court of appeal, arguing that Pastificio had breached its obligation not to contradict itself (a French variety of procedural estoppel) and that terminating the proceedings would amount to denial of justice, since Taglia'Apau no longer had enough funds to commence a new arbitration. The court of appeal, however, dismissed the estoppel argument, stating that the obligation not to contradict oneself applied only to claims in the same arbitration, and holding that it had no jurisdiction to hear the dispute.

Subsequently, the French Supreme Court set the court of appeal's judgment aside and referred the case to a court of appeal in Bordeaux. According to the Court, a party could not derail arbitration proceedings by refusing to pay its share of the advance on costs and later rely on the arbitration agreement to challenge the jurisdiction of domestic courts. Furthermore, Pastificio clearly had a duty to pay its share of the advance on costs in line with Article 36 of the ICC Arbitration Rules. Having failed to do so, Pastificio violated the ICC rules that it had agreed to apply when executing the agreement that contained an arbitration clause.

Interestingly, similar circumstances (a respondent's failing to pay an advance under the ICC Rules and a claimant that, albeit being solvent this time, was forced to give a bank guarantee covering the respondent's costs) led to a markedly different result on the other side of the la Manche (*BDMS Ltd v Rafael Advanced Defence Systems* (2014) EWHC 451 (Comm)). The English High Court in that situation decided that the claimant had workarounds that it could use. In particular, the claimant could challenge the application of Article 36.6 of the ICC Arbitration Rules, or the tribunal could demand a bank guarantee from the respondent before applying Article 36.6, and, therefore, for the English Court, the respondent's failure to pay an advance on arbitration costs was not a breach of the arbitration agreement.

Read

Arbitration at the Non-Existent "China International Arbitration Center"

A dispute arose between the Chinese company Shanghai Xinan and the Singapore company Great Wall over two contracts for works that contained identically-worded arbitration clauses. During an arbitration at the China International Economic and Trade Arbitration Commission (CIETAC), Xinan obtained an award in its favor, and, later, an enforcement order from a Singapore court. Great Wall did not participate in the arbitration and eventually filed an application to set aside the award (*Shanghai Xinan Screenwall Building & Decoration Co, Ltd* [2022] SGHC 58). According to the company, the arbitration clauses were invalid under the Chinese laws – namely, they stipulated that disputes were to be referred to a "China International Arbitration Center", an institution that did not exist.

The Singapore High Court, however, used another approach. According to the Court, the core of the issue was whether by referring to a "China International Arbitration Center" the parties intended to choose the CIETAC as the arbitration institution for their disputes. The Court noted that the first two words in the names of the two institutions were identical ("China International") and that both names contained the word "Arbitration". It then looked at the list of five main arbitration institutions in China, supplied by the Chinese legal counsel of Great Wall. Out of four major arbitration institutions, three were named after cities rather than the country. The last one contained the word "Maritime" in its name, which left only the CIETAC as the closest match.

Based on that interpretation, the Court upheld the CIETAC tribunal's award and ruled that where the parties objectively intended to apply to one and the same arbitration institution, the validity of the arbitration agreement would not be affected.

Read

A Fly in the Chocolate

Between 2016-2020, Husky Food Importers (a Canadian distributor) and JH Whittaker & Sons Limited (a New Zealand chocolate manufacturer) tried to negotiate an official distribution agreement on the import of Whittaker chocolates to Canada and their promotion in the local market. Yet, by July 2020, the relations between the two companies soured and Husky sued Whittaker for breach of agreement and the duty of honest performance.

Whittaker opposed a litigation, since one of the schedules to the distribution contract, based on the principle "unless otherwise agreed" in the distribution contract itself, contained an arbitration clause providing that any disputes or controversies with customers located outside of New Zealand were to be heard by the New Zealand International Arbitration Centre in an arbitration with the seat in Wellington, New Zealand. Additionally, Section 8.7 of the distribution contract stipulated that "the parties attorn to the non-exclusive jurisdiction of the New Zealand courts to hear and determine all disputes arising from or related to the Alleged Distribution Agreement or transactions contemplated therein".

In view of that, the Justice of the Superior Court of Justice of Ontario had to analyze the above circumstances and establish whether they met the legal principles set out in *Haas v. Gunasekaram*, 2016 ONCA 744, 62 B.L.R. (5th) 1, as well as answer the following questions:

1. Is there an arbitration agreement?

2. What is the subject matter of the dispute?

3. What is the scope of the arbitration agreement?

4. Does the dispute arguably fall within the scope of the arbitration agreement?

5. Are there grounds on which the court should refuse to stay the action?

The principal dispute revolved around the first and fifth elements of that test. On the first question, the Justice decided that the threshold for establishing the existence of an arbitration agreement was low and that Husky was well aware of the existence of the arbitration clause, since even after reviewing and amending the distribution contract at issue it left the arbitration clause unchanged. Moreover, the Justice also dismissed Husky's argument to the effect that the non-exclusive jurisdiction clause took priority over the arbitration clause, since the arbitration clause in that case was more specific and detailed.

The Justice eventually stayed the legal proceedings and referred the dispute to arbitration in Wellington, New Zealand (*Husky Food Importers & Distributors Ltd. v. JH Whittaker & Sons Limited*, 2022 ONSC 1679).

Read

A Paris Court Disagrees with the ICC on Assessing the Evidence of Corruption

A Paris court has overturned a USD 180 million ICC award against Gabon after discovering sufficient proof that public works contracts that lay at the heart of the dispute had been procured through corruption.

A group of companies owned by businessman Santullo, filed an ICC claim against Gabon in 2015, seeking recovery of payment for the works performed under 11 public infrastructure development contracts. Gabon asserted that the contracts had been executed irregularly, namely, without a tender and by way of corruption. An ICC tribunal, however, disagreed (see the second part of the award here) with the evidence submitted due to lack of trust in Gabon's judiciary and the commonly known torture of a high-ranked Gabon official Ngambia who had allegedly confessed to accepting a bribe.

The Paris Court of Appeal confirmed that a confession of guilt, made after torture while in detention, could not be admitted. The Court, however, turned its attention to other evidence: namely, that Ngambia had himself signed all contracts at overstated prices in circumvention of tender procedures and had undeclared income. Moreover, in 2011, Ngambia's family visited Mr Santullo's hotel in Italy at the latter's invitation. In the end, the Paris Court concluded that there was enough evidence to recognise that the public works contracts were based on corruption and reversed the award for violation of international public policy.

Read

Is Everyone to Blame, Even the CIArb?

The claimant – Mr Sangamneheri — filed a series of claims for GBP 33 quadrillion in seeking to recover damages incurred in an arbitration before the Chartered Institute of Arbitrators (CIArb). In 2015, he commenced an arbitration against his business partner, invoking a breach of a contract to exchange land plots for a certain amount of pure gold.

Disagreeing with the award, Mr Sangamneheri started literally persecuting everyone who had anything to do with that case. In his last claim, filed last year, he named the CIArb (the president and three CIArb staff) and the arbitrator seized with the case, as respondents.

Mr Sangamneheri argued that the respondents had ex post facto changed the date of receipt of his notice of arbitration, that Bellamy's (the arbitrator's) powers were terminated without lawful grounds to do so, and that all respondents had breached the agreement on arbitration services.

The High Court in London dismissed that "obviously absurd" claim against the CIArb and referred a request to the Attorney General of the UK to consider giving an indefinite civil proceedings injunction against the claimant.

Read

LCIA to Hear a US Company's Claim on the Theft of COVID-19 Vaccine Development Technology

A Seattle company HDT Bio Corp developed an innovative COVID-19 vaccine, as well as the LION platform for delivering it that allows storing the vaccine even at high temperatures, which makes it especially attractive to developing countries.

In 2020, the US company entered into a contract with an Indian company Gennova Biopharmaceuticals (an Emcure Pharmaceuticals subsidiary), whereby Gennova received a license for the use of the innovative technology for the development and sale of the COVID-19 vaccine in India in exchange for licence payments and the right to use Gennova data to develop and sell the vaccine in other countries.

In late 2021, Emcure announced that it had manufactured its own vaccine – as it turned out, using manufacturing and storage technologies that matched those of HDT. That pushed HDT to terminate the licence agreement. The company now intends to file an LCIA claim pursuant to the applicable arbitration clause.

Read

LCIA Dismisses a Claim against Telegram Group

In 2018, Igor Chuprin — the founder of a mobile app developer Zotobi Management Limited — invested USD 1 million into Pavel Durov's blockchain platform TON. In a year, however, the US District Court for the

Southern District of New York, ruling on a claim filed by the US Securities and Exchange Commission, recognized the cryptocurrency issued by the blockchain platform a security and imposed an injunction on its issuance.

After the US court's judgment, Pavel Durov put forward two options for the investors: to retrieve either 72% of their invested funds in 2020 or 110% in 2021. Chuprin got back USD 720 thousand, but he intended to return the full amount, so he brought an LCIA claim for the recovery of the rest of his investments (USD 280 thousand).

An LCIA tribunal dismissed Zotobi founder's claim, holding that the investor had been made aware of all possible risks and should have waited a year to return 110% of his investments. In the end, Igor Chuprin not only failed to return the rest of his investments but will also have to pay Telegram Group almost USD 700 thousand in legal costs.

Read

Arbitration and Mandatory Vaccination: Canadian Practice

Yet another arbitration has ended in Canada that concerned the mandatory COVID-19 vaccination policy. This time, the claim was filed by the employees of British Columbia's largest electricity supplier BC Hydro.

It should be noted that BC Hydro's mandatory vaccination policy was rather strict. A deadline was set for the employees to vaccinate, and where they failed to meet it or refused to confirm vaccination, they could face disciplinary punishment as severe as dismissal.

Unlike the labor disputes during the first COVID-19 wave, this time, the trade union did not object to mandatory employee testing, believing that measure to be a reasonable alternative to mandatory vaccination. Yet, the employer's policy did not offer that option.

After hearing the dispute, the arbitrator concluded that the company's mandatory COVID-19 vaccination policy was reasonable and sound. He noted that working at BC Hydro excluded the opportunity of work from home and often involved employees working in teams, where they were unable to comply with the social distancing requirements. Furthermore, mandatory testing, the arbitrator held, was an unreliable means of combatting the spread of the disease.

The arbitrator also highlighted the employer's public significance as a criterion of permissibility of mandatory vaccination. He indicated that a large number of people depended on BC Hydro's electricity supplies, hence the company had a high responsibility to keep healthy its employees who must perform their socially essential function.

Nevertheless, the award endorsed the already existing practice where an employee cannot be fired for refusing to vaccinate. The arbitrator found BC Hydro's policy invalid to the extent that it entitled the employer to impose that disciplinary sanction on an employee who refused to vaccinate. According to the arbitrator, it sufficed to place the employee on an unpaid leave of absence instead.

Read

LCIA Arbitrators Fail to Persuade the English Court

A Justice of the Hight Court of Justice (England and Wales) in a fraud case did not deem it possible to stop the defendants from challenging the findings of an LCIA tribunal.

Previously, an LCIA tribunal issued a partial award ruling that Boris Mints's sons, acting in concert with the ex-head of the Otkritie Bank, caused that bank to suffer damages. The case concerned a dispute on the bank's acquisition of O1 Group bonds for the total of around USD 500 million. The Group used the money from the sale of bonds to repay its loans to the very same bank; and, as the current representatives of Otkritie claimed, unlike the loans, the bonds were entirely unsecured and effectively unmarketable.

After financial rehabilitation, Otkritie Bank sought to challenge the transactions for the acquisition of bonds before Russian courts, while the O1 Group approached the LCIA with an opposite claim, asking it to deem the transactions valid. In the LCIA arbitration, Otkritie advanced a counterclaim that was eventually granted.

Nevertheless, in parallel with the pending fraud case, the Justice refused to treat the alleged involvement of any of Boris Mints's family in the O1 Group's conduct as res judicata. He noted instead that the Group itself, rather than Boris Mints's family, was a party to the LCIA arbitration. He ruled that in the fraud case, Otkritie failed to prove that Boris Mints's family had controlled and funded the O1 Group in the arbitration.

Read

INVESTMENT ARBITRATION NEWS

Australian Company Files a Claim against Greenland and Denmark over the Downfall of Its Flagship Project

As early as the year 2007, an Australian mining company Greenland Minerals obtained a license allowing it to develop the Kvanefjeld mine, known for its large deposits of rare elements, including zinc and uranium, used to manufacture electric cars, as well as in nuclear and military industries. As part of its exploration of the mine, Greenland Minerals undertook research showing that the subsequent extraction of rare elements would not have an adverse impact on nature or the local population.

After the snap election last year in Greenland, a new Green government has been formed that heavily criticized mining in the area and therefore has passed a law prohibiting exploitation of natural resources containing more than 0.01% of uranium. Even though the new law does not apply retroactively and covers only the issuance of subsequent licenses, the Greenland's Department of Environment and Mineral Resources nevertheless revoked Greenland Minerals' license.

Now, the Australian company is seeking to recover damages for the expropriation of its flagship project in an arbitration, claiming that the license has been revoked due to the new law. The claimant has named Denmark as a co-respondent, as the Danish Government participated in the granting of the license for the development of the Kvanefjeld deposit. Three arbitrators will hear the dispute in Copenhagen as the seat of arbitration.

Read

Business in Danger: City Authority Is Hogging Ugandan Market

A Yemeni businessman has seized the ICSID with a notice of claim against Uganda for the amount of nearly USD 860 million. The claims pertain to the alleged expropriation of the businessman's investments into the project for the reconstruction of one of Africa's largest open markets.

The dispute concerns the project for the reconstruction of a market in the Ugandan capital, Kampala. Under the agreement with the Market Stalls Owners Association, the companies owned by the Yemeni businessman have undertaken to build new shopping areas for market stalls owners and then embark on the reconstruction of the old market.

In 2020, the Kampala Capital City Authority issued the necessary project permits. Later, however, the Capital Authority informed the investors that it was going to run the market itself. Even though the Supreme Court of Uganda has found the de facto expropriation to be unlawful, the investors claim that the City Authority still runs the market notwithstanding the decision of the court.

Read

If Not Possible to Delay, Proceed: US Court Puts a Comma in the Yukos Case

The US District Court for the District of Columbia has denied the Russian Federation's motion to extend the stay in the enforcement proceedings commenced by the former majority shareholders of Yukos Oil Company. While Russia's application to set the arbitral awards aside is still being considered by Dutch courts at the seat of arbitration, the US Court has ruled that "the protracted nature" of the set-aside litigation and "concerns about asset liquidation" in the wake of the Russian Federation's special military operation in Ukraine serve as compelling reasons against granting a further stay.

As a result, the Court has ruled that the proceedings for the recovery of USD 57 billion from Russia in the Yukos case must be resumed after a six-year suspension.

Read

Kyrgyzstan Settles the Dispute and Does Not Want It to Repeat

The Ministry of Justice of the Kyrgyz Republic proposes to exclude from the legislation a provision on the state's automatic consent to arbitration in all investment disputes. In the opinion of the Ministry's representatives, that change will have no impact on the investment climate in the Republic, as Kyrgyzstan is bound by a large number of bilateral and multilateral treaties in the field of investment protection.

The statement has been made against the backdrop of settlement of a dispute over the largest gold deposit in Central Asia. The arbitral proceedings were initiated due to the alleged expropriation of investments of a Canadian gold mining company, and the case was further complicated by the fact that the investor's main shareholder was Kyrgyzstan itself.

Nevertheless, the parties have been able to settle the dispute on the condition that the stake in the investor company owned by Kyrgyzstan should be transferred in exchange for the gold deposit. It is noted that in the next decade the income that will be generated by the mine, which has now been returned to the Kyrgyz Republic, will amount to approximately USD 5 billion, while the price of the stake in the investor company transferred is estimated at USD 778 million.

Read

Award Annulment Does Not Mean Review on the Merits

The dispute involved the Kyrgyz Manas Bank, which had been acquired by a Latvian businessman Valeri Belokon in 2007. Three years later, the bank was placed under special administration and declared insolvent in 2015. A criminal case was opened against the businessman on the suspicion of his having laundered money through Manas Bank.

In 2011, Belokon filed an arbitration claim under the UNCITRAL Rules and on the basis of the bilateral investment treaty between Latvia and Kyrgyzstan. In 2015, the tribunal rendered an award in favor of the claimant and stated that the actions of the Kyrgyz Government had amounted to an indirect expropriation. Also, the tribunal found that the allegation of money laundering raised by the respondent was not sufficiently substantiated.

Kyrgyzstan approached French courts with a motion for setting aside the award. The Paris Court of Appeal annulled the arbitral award, noting that, in the case, there were "serious, reliable, and consistent" indications that the Latvian businessman had laundered money through Manas Bank.

The French Cassation Court has upheld the decision of the lower court, observing that the setting aside did not mean re-examination of the case on the merits. According to the Cassation Court, the Court of Appeal of Paris did not study the case files anew and merely "assessed the facts differently" in terms of compliance of the award with international public policy, as set out in the UN Convention against Corruption.

Read

Lawyer Disqualification Story Continued: NAFTA Tribunal Does Not Agree with Canada's Federal Court

In the RAC Digest for November 2020, we covered an unsuccessful attempt to remove a lawyer representing Canada in a NAFTA arbitration, due to the change of her workplace.

The motion for removal was based on the fact that one of Canada's counsel in the Theodore Einarsson, Paul Einarsson and Russel Einarsson and Geophysical Service Inc v. Canada case, Ms. Alexandra Dosman, at the time of the filing of the claim, was employed by Vannin Capital – a company that provided funding for the claimant's claim. At that time, Alexandra had already received an offer from the Trade Law Bureau of Canada that represents Canada in all investor-state disputes, and completed her transfer there in July of the same year.

Back then, the Federal Court of Canada resolved that it lacked jurisdiction to deal with the issue of the lawyer's removal, yet also pointed out that, in its view, there was no conflict of interest in the case.

The NAFTA tribunal has come to the opposite conclusion, once it considered the motion for removal. The arbitrators have found that, at the time, Vannin Capital did not know about its employee's move to the Trade Law Bureau of Canada and for that reason failed to ensure complete confidentiality of the files that had been received from the claimant. At the same time, the arbitrators could not ascertain precisely how much Alexandra was involved in the case during work briefings at Vannin Capital.

Although the tribunal has not questioned the integrity of the lawyer, nevertheless, the arbitrators have decided that there is a risk that Alexandra may recall some important details essential for the resolution of the case.

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ARBITRATION NEWS

RAC and RIMA Annual Report

This month, the RAC and the RIMA have published another report on their activities, now covering the year of 2021. The report provides statistics on cases administered by the RAC, as well as the information on the most significant projects and events organised by the RAC and the RIMA.

In 2021, 338 claims were submitted to the RAC, and, if account is taken of the cases continuing from 2020, 490 cases were under consideration with the total amount of claims exceeding RUB 5 billion. The disputes have most often arisen in such areas as construction and manufacturing, as well as professional, scientific, and technical industries. According to the statistics, oral hearings by videoconference were held in more than 300 cases, which testifies to the expansion of online arbitration proceedings and the active use of modern technologies in administering disputes.

Read the report and follow all our news in our Telegram channel.

Read

Courts and Arbitration in 2021

Pravo.ru has published a comprehensive review of the Russian court practice on the recognition, enforcement, and challenging of arbitral awards in 2021. The review addresses such topics as the validity and enforceability of arbitration agreements, as well as public policy and arbitrability.

Thus, the review provides examples of cases where courts considered the issue of validity of an arbitration agreement in view of the claimant's bankruptcy. Moreover, the review refers to cases where the parties acceded to a so-called "pathological" arbitration clause and discussed the reasons why such clauses were deemed unenforceable.

As far as public policy is concerned, the author notes that courts were not consistent in considering objections against excessive penalties awarded by arbitral tribunals. It is observed that some courts treat the issue of proportionality of the penalty as an issue of fact and, therefore, do not examine it, while other courts perceive it as an element of public policy.

Nor does the review ignore the issue of sanctions: thus, it sets out the first examples of cases where judges considered whether they could apply new rules on exclusive jurisdiction over cases against sanctioned persons and entities.

Read

Arbitrator Intelligence Survey: Expectations vs. Reality

In January 2022, Arbitrator Intelligence launched a survey, in which arbitrators were asked about the criteria they applied in their decision-making, as now there is no formal framework or mechanism that the parties and counsel could use to clearly understand who they want to appoint as an arbitrator. It is worth noting that, whereas arbitrators' answers are available for review, they cannot be used for the purpose of challenging an arbitrator.

In March, Arbitrator Intelligence went even further and conducted a joint study with Kluwer Arbitration Blog, where the blog readers were shown the questions that the arbitrators answered and were invited to guess what the replies were. Interestingly, in some case, the arbitrators' replies were very different from what the readers anticipated. In particular, the researchers reached the following conclusions:

– Both the arbitrators participating in the survey and the readers said that a key factor in the co-arbitrators' choice of the president of the arbitral panel was his/her reputation of a person willing to cooperate and/or able to resolve conflicts within the tribunal;

– The blog readers expected that no more than 25% of the arbitrators participating in the survey would think that it was not appropriate to delegate the drafting of the factual background section of the award to an arbitral tribunal's secretary. In reality, 41% of the arbitrators deemed such a practice unacceptable, with 31% of the arbitrators, who took that view, coming from continental law jurisdictions; and 55%, from common law jurisdictions. Only 13% of the arbitrators participating in the survey saw such assistance as acceptable at all times;

– The blog readers assumed that arbitrators from continental law jurisdictions would favor peaceful settlement of disputes more often. In fact, there was no significant difference in the positions of arbitrators coming from different law systems: 10% of the respondents believed that it was not appropriate to encourage peaceful settlement of disputes, 30% of the arbitrators were in favor, and 40% said that it was appropriate only if there was an agreement between the parties to that effect;

– The blog readers indicated that limiting the number or scope of the parties' positions and early resolution of certain questions in an expedited procedure were the most popular methods of ensuring the efficiency of arbitral proceedings. The arbitrators, in turn, indicated holding preliminary and online oral hearings, as well as setting and observing strict timetables as such methods;

– According to the majority of the blog readers, less than 20% of the arbitrators would order online hearings where one of the parties objects to doing so. On the contrary, 37% of the arbitrators participating in the survey found such a practice acceptable.

Read

A New Process Facilitators Tool to Further Increase the Efficiency of Proceedings

The College of Commercial Arbitrators invites parties to hire Process Facilitators – PFs, who can "help the parties prepare for an efficient arbitration". The service implies that a mediator participates in arbitration proceedings as an intermediary interested in the reconciliation of the parties. Unlike the Med-Arb hybrid

procedure, where the same person can act as both a mediator and an arbitrator, PFs are hired independently, and may talk to the parties to the arbitration confidentially. The PFs' purpose is to help parties make arbitration proceedings more efficient through discovery, motions, and scheduling. It is observed that PFs in arbitration may further help the parties to understand what prospects the arbitration has and whether such prospects align with the parties' interests. Agreements between the parties to hire PFs may be executed, in particular, through signing an addendum to the arbitration clause, if the parties have already agreed to arbitrate the dispute.

Read

DIAC and LCIA Agree on the Procedure for Administering Cases Under the DIFC-LCIA Rules

The Dubai International Arbitration Centre (DIAC), which recently started to work independently, and the London Court of International Arbitration (LCIA) have reached an agreement on the procedure for administering disputes. It is reported that, in the transitional period, many arbitrators were not paid any fees.

The arbitration centers have jointly decided that the LCIA will hear all existing DIFC-LCIA cases initiated before 20 March 2022 in London under the DIFC-LCIA Rules. In turn, all cases initiated after 21 March 2022 will be administered by the DIAC in accordance with its new rules.

Read

Facilitating Sustainable Change: "Green Protocols" Translated in Russian

The "Campaign for Greener Arbitrations" has published "green protocols" in six languages, including Russian. The protocols describe measures that will allow reducing the negative impact of arbitrations on the environment. Such measures may be implemented by the parties, arbitrators, and arbitral institutions in the course of arbitrations.

In addition, the first edition of the information bulletin has been published. It contains recommendations and updates about measures that the arbitration community is already taking, as well as those that may be taken to protect the environment in the future. For instance, switching off one's camera on video calls may reduce the carbon footprint by 96%.

The RAC is one of the institutional partners of the "Campaign for Greener Arbitrations" movement and promotes the environmentally conscious approach to dispute resolution.

Read

ADR EVENTS

Paris Arbitration Week 2022

The traditional annual Paris Arbitration Week took place between 28 March and 1 April. The event was meant to bring the representatives of the global arbitration community together to discuss the most topical issues of international arbitration. A whole series of online and offline events was arranged during the Paris Arbitration Week 2022 with a special focus on events and discussion panels concerning the metaverse. Thus, the participants of the 6th ICC European Conference have given their panel the metaphorical title "Debate on Metaverse: Will Arbitration Be the Arena of Web 3.0 Conflict? A Dispute Resolution Minefield Coming from the Future". The issues put forward for discussion were those of determining the applicable law in metaverse-related disputes and the virtual world, issues of jurisdiction, in particular, in IP disputes involving NFTs and cybersecurity breaches. A projection was made that in the future we may see an increase in the number of small-scale transnational disputes. The topic of resolution of metaverse-related disputes continued with the First-Ever Virtual Reality Arbitration Conference organised by MetaverseLegal.

Read

IX Moscow Legal Forum Roundtable: Improvement of Arbitration Legislation

On 21 April 2022, a roundtable on the "Topical Issues of Improvement of Arbitration Laws" took place in the Academic Council Hall of the Kutafin Moscow State Law University (MSLU).

Speakers discussed the most urgent issues of improvement of the laws on arbitration, influence of sanctions on arbitration, and regulation of *ad hoc* arbitrations. Yulia Mullina, the Executive Administrator of the RAC, became one of the panelists. She stressed that participation in the disputes of foreign counsel or arbitrators should not prevent or impede impartial dispute resolution and enforcement of the resulting arbitral awards, irrespective of whether such awards were issued in Russia or abroad.

Read

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